

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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PEOPLE OF THE STATE OF NEW YORK,  
by ELIOT SPITZER, ATTORNEY GENERAL  
OF THE STATE OF NEW YORK,

Plaintiff,

01-CIV-0364 (CM)

-against-

THE TOWN OF WALLKILL,

Defendant.

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### **THIRD REPORT OF THE MONITOR**

#### **Introduction**

This is the Third Report of Dean Esserman (the Monitor) and the Police Assessment Resource Center (PARC) on implementation of the Consent Decree agreed to by the Town of Wallkill and the New York State Attorney General concerning the functioning of the Town of Wallkill Police Department. United States District Judge Colleen McMahon, of the Southern District of New York, approved and entered the Consent Decree on April 5, 2001. The Court subsequently selected Police Chief Dean Esserman<sup>1</sup> to audit compliance with the Consent Decree and appointed PARC<sup>2</sup> to assist Chief Esserman.

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<sup>1</sup> At the time of his selection, the Monitor was the Chief of the Stamford (CT) Police Department. He is currently the Chief of the Providence (RI) Police Department.

<sup>2</sup> PARC is a national non-profit organization whose mission is as follows: PARC, in cooperation with monitors, law enforcement executives, civic and government officials, and other interested constituencies, aims to strengthen police oversight so as to advance effective, respectful, and publicly accountable policing.

The Monitor's First Report covered the period from June 2001 through January 2002. The first two sections of the First Report recounted the events that led to the Attorney General's suit, summarized the pertinent provisions of the Consent Decree, and reported on the adoption of the Best Practices Guidelines, which have become the Department's policies and procedures manual.<sup>3</sup> The Monitor's Second Report covered the period from February through July 2002. The present report deals with the period from August 2002 through February 2004.

Our report draws, among other things, on our at-least weekly contact with the Department's Chief; regular contact with Town Supervisor John Ward; monthly or bimonthly visits to Wallkill where we regularly meet with the Supervisor, the Chief, the available sergeants, the union president or vice president or both;<sup>4</sup> ride-alongs with Wallkill police officers; meetings and other contacts with Orange County law enforcement officials, members of the former Wallkill Police Commission, and members of the community; the review of hundreds of documents and many hours of videotape; and reading relevant articles from the local newspaper.

During the past 18 months the Wallkill Police Department has made significant, but not uniform, progress. The abuses of the past that caused the Attorney General to intervene have long since ceased. There is no evidence of any systemic abuses of authority or unconstitutional practices. And now, when citizen complaints of misconduct are made, they are appropriately accepted, investigated, and resolved.

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<sup>3</sup> Portions of the current report assume familiarity with the historical portions of the First Report. Those who have not read it may want to refer to Sections I and II of that report. Both prior reports of the Monitor are available under "publications" at [www.parc.info](http://www.parc.info).

<sup>4</sup> We also met with the Deputy Chief for the period he was appointed.

Compliance with the requirements of the Consent Decree has generally been reasonably good, but should be improved in various respects that we discuss below. The most significant problem has been the recurring one of delayed completion of complaint investigations. Once completed, the investigations are thorough, well-documented, and reach fair, justifiable conclusions. Nevertheless, most investigations are not timely completed and too many are significantly delayed for no good reason. For the second time since monitoring began in 2001, the Monitor in April 2003 formally cited the Town for noncompliance because of the number of untimely complaint investigations and the length of the delays in resolving cases. We examine the handling of the complaints received in 2002 and 2003 in considerable detail in Part III of this report.

We also discuss in the body of the report, among other things, staffing and hiring, the continued need for a new physical facility, vehicle and pedestrian stops, use of force reports, training, implementation of an early warning system, evaluations, and the need for the Department to start handling more felonies in preparation for the possible termination of the Consent Decree on June 30, 2005.

## **I. Staffing**

**Chief.** Chief Hertman is the skilled, hard-working, consummately professional Chief the community and the Police Department need. His tenure was cast in doubt when, five months after his original selection in early 2002, the Town was advised that he had failed the civil service test for the position. In July 2002, the Town Board was able, however, to provisionally appoint Chief Hertman to the position pending the results of another test. Chief Hertman passed the second exam and was permanently appointed to

his position in June 2003. Throughout the periods of uncertainty about his status Chief Hertman, to his credit, did not allow those issues to distract him from appropriately fulfilling his job responsibilities.

Much of the Chief's focus has been upon building the Department's professionalism and changing the negative departmental culture that had pervaded the Department under its last permanent Chief. Personnel problems with several long-time officers who are frequently the subject of civilian complaints and discipline occupy a disproportionate amount of time. Even though he imposes significant amounts of discipline, only recently for the first time since Chief Hertman arrived has an officer sought arbitration of discipline he imposed. The Chief reduces the likelihood of arbitration by being even-handed and by imposing discipline commensurate with the offense. On the more positive side of personnel matters, Chief Hertman and the sergeant responsible for recruitment succeeded in hiring nine new police officers in 2003, most of them lateral transfers from other departments. The Chief encouraged people to take the police officer test and placed public service announcements in the media to encourage applications. He worked hard to expand the racial, ethnic, and gender diversity of the force, and succeeded in including African-American, Latino, and female officers among the new hires.

Chief Hertman has focused considerable efforts on upgrading the supervisory and internal investigative skills of the sergeants. He has continued the biweekly supervisors' meetings he instituted and has increasingly used them as a vehicle to improve performance. He is appropriately demanding with the sergeants and commands respect by leading by example. A significant setback on the supervisory front, however, was the

fact that the person selected for Deputy Chief was not the right fit for the job and left after six months.

Chief Hertman understands that he works for the community so he regularly reaches out to civic groups and interested citizens of the Town, attending meetings and interacting with concerned residents. Among his initiatives to meet the community's needs are the following:

- Assigned an experienced officer to full-time duty as the Town's youth and DARE program officer;
- In response to complaints of increased crime from a neighborhood's residents, installed on a test basis a video camera system that allows personnel in the police station to monitor a neighborhood park for criminal activity;
- Has routinely required patrols, when the officers are not responding to calls for service, of specifically designated portions of assigned sectors where problems have occurred;
- Targeted areas with many complaints of crime for zero tolerance quality of life enforcement; and
- Organized underage-drinking sting operations at commercial establishments.

Chief Hertman has taken the following additional steps to improve the policing of Wallkill:

- Acquired two Taser Stun Devices that are designed to be used, when appropriate to protect officers or others, in lieu of firing a gun;<sup>5</sup>
- To facilitate tracking and analyzing uses of force by the Department, the Chief created a report that must be filled out whenever force is used—which report is sent to him for review;
- Created an Emergency Response Team that is trained to deal with life-threatening situations until the better-equipped State Police are able to respond to the emergency; and
- To document interactions with the public, installed a new telephone recording system that tapes calls to and from all but several designated confidential telephone lines in the police station.

Chief Hertman's achievements are detracted from, however, by the untimeliness of completion of many essential functions, such as resolving personnel complaints and evaluating staff.

**Deputy Chief.** One of the serious setbacks of the past year was that George Tyndall, an experienced law enforcement officer chosen as Deputy Chief, was not a good fit for the position and resigned in November 2003 after six months on the job. Chief Hertman, and the temporary acting chief before him, had early in their tenures both concluded that there simply is too much work for a Chief to accomplish by himself. Between the internal supervision of the Department, the personal conducting of many complaint investigations, the external relations with the community and other law

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<sup>5</sup> A month after the deployment of the first Taser, it was successfully used to subdue an intoxicated man who was threatening to kill himself with a knife he was holding to his throat and who was warning officers to stay away from him. A Taser is effective at a distance of up to 21 feet.

enforcement officials, and the considerable demands the Monitor makes upon the Chief, no one person can get everything done that should be done, no matter how hard he works. We supported Chief Hertman's conclusion that he needed a Deputy Chief. After some hesitation, the Town Board authorized the position—a decision for which we compliment them.

The setback from the resignation of the Deputy Chief was greater than the disappointment of losing a key member of the Department. Because the Chief has an overwhelming workload, he transferred a number of what had been his responsibilities to the Deputy Chief soon after his appointment. When the Deputy Chief left the Department, most of the tasks he had been assigned were left unfinished. In the short term, then, the Chief ended up with a greater workload. The timeliness of many required activities suffered—with all the consequences that stem from not getting necessary things done in a timely fashion.

Chief Hertman is currently engaged in a search to fill the Deputy Chief's spot. Nothing has changed our minds that filling the Deputy Chief's position is essential to the health and effective functioning of the Wallkill Police Department.

**Sergeants.** One of the more important reforms incorporated into the Best Practices Guidelines was the requirement that a sergeant be assigned to every shift. In the two years since Chief Hertman assumed his position, a sergeant (or higher-level supervisor) has covered every shift. Fulfilling that mandate has come at a significant price to the sergeants. While five sergeants are needed to cover all the shifts without overtime, there have been significant periods over the past year where only four sergeants have been available because of an injury to one sergeant, who has been on sick leave

(except for the briefest of interludes) since March 2003. From August 2003 through January 2004 Officer Antonino Spano was acting sergeant. Despite performing well in his temporary post, civil service regulations prevented his continuing as acting sergeant.

There are some encouraging signs that the sergeants collectively are beginning to perceive enough common interests as supervisors to work together in a collaborative manner. One indication of this more constructive working relationship is that on their own initiative the sergeants have begun meeting together biweekly, without the Chief, to discuss items of mutual concern. In the past, the relations between the sergeants—all of whom have been with the Department for at least 13 years—have often been more characterized by litigation and animosity than by any sense of common purpose.

Reaching this point of tentative cooperation stems mainly from the strong leadership of Chief Hertman who has consistently pushed the sergeants to act and think like supervisors and who, having come into the Department from the outside, is not involved in the factionalism and antagonisms that divide so many of the long-term members. For some of the sergeants, Chief Hertman's permanent appointment to his position last June was a turning point. At that point they knew he was going to be Chief for the foreseeable future. Hoping for a less demanding Chief at that point clearly became wishful thinking. Another very significant positive development for the sergeants, as well as the rest of the Department as a whole, was the hiring of nine additional officers.

There continues to be significant variations in the degree of supervision provided by some sergeants as compared to others. Two sergeants in particular are less likely than their colleagues to hold officers to high standards in their day-to-day performance. Chief

Hertman has made clear both by what he says and what he does that he expects excellence, not mediocrity, so it behooves the sergeants who resist the increased professionalism in the department to join with the Chief and their colleagues who have embraced the Department's improvements over the past two years.

**Officers.** As a result of tremendous extra efforts by Sergeant Ari Moskowitz and Chief Hertman, the Department reached its current authorized strength of 23 full-time officers in October 2003—the first time the Department has had a full complement of officers in more than four years.<sup>6</sup> This achievement has had significant positive effects. Mandatory overtime that had been employed at least several times a week for many months in 2003 has virtually ceased. Quite understandably, morale has risen now that officers know that when they come to work for eight hours, they are not going to be forced to work for 16 hours. Sergeants, who had to enforce the mandatory overtime, are delighted to not have to perform that distasteful task. Officers are fresher and more alert when they are on patrol since they have not been worn down by working too many hours.<sup>7</sup>

As important as the positive effects on mandatory overtime and morale have been, and they are truly important, the most significant positive change comes from the critical mass of new blood in what was a severely troubled department. Now 43 percent (10 of 23) of the full-time officers in the Department were hired in 2002 and 2003. None of them was in any way associated with the past abuses of authority and none of them are

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<sup>6</sup> The Department also currently employs three part-time officers. By way of comparison, at the time of our First Report in January 2002, the Department had 14 full-time officers. In July 2002, when our Second Report was issued, the number had increased to 18.

<sup>7</sup> One measure the Department took, with mixed results, in the summer of 2003 to try to deal with the lack of officers was to switch from eight to 12-hour tours of duty.

involved in the intense factionalism that came close to destroying the Department. Most of the new officers have only limited knowledge of the past problems. To them joining the Wallkill PD is a welcome opportunity to work at a job they are proud of. Around the stationhouse one can feel the increased energy and considerably more positive attitudes that the new officers bring. The new officers are both the reality and the symbol of the Department's renaissance.

That the new officers are a large group and have such a positive esprit will hopefully increase the likelihood that all or most of the new officers will remain at the Department for years to come. One of the disappointments of the recent transition period for the Department was that the only officer hired in 2001 and two of the three officers hired in 2002 are no longer with the Department. While the reasons each of the three officers left (two resigned and one was terminated while on probation) were idiosyncratic, the absence until 2003 of a significant peer group of new officers was less supportive than the current situation.

Seven of the nine new officers transferred from other departments and thus were already certified as police officers. This was a significant benefit to the Town in a number of ways: the already-certified officers were ready for field training immediately upon being sworn in and were able to start patrolling on their own a minimum of six months earlier than a recruit required to attend the police academy; the certified officers brought a wealth of experience and knowledge from their prior jurisdictions; and the Town did not have to pay the costs of six months of training. The two new officers who were hired without a prior certification are currently attending the Rockland County Police Academy.

Pursuant to the Consent Decree (¶15) and the Best Practices Guidelines (Rule 6.2.h), the Wallkill PD is required to test candidates' psychological fitness for duty. Chief Hertman identified a local firm, with considerable expertise in testing law enforcement professionals, which provides the necessary psychological screening. One psychologist or psychiatrist administers a psychological test and two questionnaires, while another professional conducts a subsequent one-hour personal interview. Over the last two years the psychologists have expressed reservations about a significant portion of the otherwise-qualified candidates for the Department. Chief Hertman, as a matter of prudent policy, will not recommend that any candidate about whom the psychologists express reservations be hired.<sup>8</sup>

Despite the requirements of the Consent Decree and the obvious good sense that a prospective police officer be psychologically fit for the position, the Orange County Department of Personnel, which administers the civil service process for the County, initially refused to accept Wallkill's disqualification of candidates for psychological reasons because New York civil service law does not require psychological screening. As a result the Orange County Attorney appeared at a September 2002 status conference before Judge McMahon. The County Attorney indicated that the County would accept the higher standards required by the Consent Decree if directed to do so by the Federal Court; without such an order, the County would decline to disqualify any candidate for the Wallkill PD who met the civil service requirements but who did not pass the psychological test. At the request of the both the Attorney General and the Town, Judge McMahon directed Orange County to process applicants for the Department in

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<sup>8</sup> Some of the sergeants and officers have questioned Chief Hertman's policy on psychological screening, but he has appropriately stood his ground.

accordance with the higher requirements of the Consent Decree.<sup>9</sup> With the direction from the Court, the County readily agreed to do so. The County's civil service announcements now alert candidates that the Consent Decree and the direction of Judge McMahon provide for requirements beyond those required for all the other jurisdictions in the County.

## **II. Facility, Contract, and Budget**

**Facility.** From its founding in 1989 until the fall of 2002, the Wallkill police station was crammed into four small and uninviting rooms in the back of Town Hall. The stationhouse, which occupied only 600 square feet, was a serious embarrassment to the Town and its police force. In the fall of 2002 the Town moved some other departments to two trailers outside Town Hall and quadrupled the Department's space. The Chief's office, which had been half the building away, relocated to across the hall from the sergeants and the officers. The Chief, the sergeants, the officers, and the dispatchers all received more and improved space. The vestibule, however, where the public comes to make inquiries or to wait to see someone from the Department, remained as cramped and dingy as it had been.

The expanded space for the Department in the current Town Hall is intended to be a temporary measure while the Town pursues plans for either a new Town Hall including a police station or a new freestanding police station (which might also include the Town courts). In August 2002 the Town Board voted to acquire a never-used supermarket

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<sup>9</sup> In addition to the requirement for psychological fitness, Wallkill police officers must be at least 21 years old, while civil service law requires that police officers be at least 20 years old. The County now applies Wallkill's higher age requirement also.

building and to convert it into a new Town Hall and police station. The Board approved a resolution authorizing borrowing of up to \$9.5 million. Residents who objected to the plan obtained enough signatures to require a referendum on the plan. In December 2002 the voters overwhelmingly rejected the plan, with only 14 percent voting for approval.

Within days of the referendum a six-person committee, including John King, the only Council member who opposed the former plan, was appointed to find a solution to the Town's, and particularly the Police Department's, need for new space. The committee has considered a number of options over the past 14 months, but for a variety of reasons, none has yet come to fruition. While two possible sites are currently being considered, it is uncertain when a proposal will be recommended to the Town Board, which must approve any plan before it moves forward.

While the present police facility is an improvement over the prior disgraceful quarters the Department occupied for so long, it is seriously inadequate for the Department's needs. The area that the public uses to make inquiries or to wait to see a member of the Department remains dingy, cramped, and uninviting. A police department should welcome members of the community it serves. The present space sends exactly the opposite message to the public—which is negative for both the residents of Wallkill and the Department. The officers, whose number has increased as planned, all work out of one multi-purpose room. Roll calls take place there. The officers do all their paperwork there. Complainants or other witnesses are interviewed there, without the privacy that the complainants and witnesses would often prefer. The Department is so cramped for space that it has started to place file cabinets in the public hallway. The officers' locker room in the basement—which was never adequate in either size or

amenities—is more cramped than ever, now that the Department is up to its authorized strength.

The 25,000 residents of Wallkill deserve a professional police station where they can transact their business feeling respected. Likewise, the members of the Department deserve a police station that facilitates their performing their duties as supervisors, as officers, and as dispatchers. The Town, as it should, wants the Department's employees to always act in a professional manner. That goal will be facilitated if the members of the Department are provided with a professional work space, which will show respect for the service the Department provides the community. The failure to provide an adequate work space sends the opposite message—a message veteran members of the Department articulate frequently—that they are neither appreciated nor respected.

We consider the need for a new police station to be an urgent priority for the Town. We urge the Town to devise a workable plan for a professional stationhouse before the end of the spring of 2004 and to ensure that the plan is actually and promptly implemented.

**Contract.** The sergeants' and officers' union contract expired on December 31, 2003. That five-year contract, agreed to in April 2002, after nearly three and one-half years without a contract, was a watershed event. The Town for the first time agreed to pay salaries that were competitive for Orange County. The officers and sergeants went from the lowest paid in the county to the mid-range for the county. Negotiations for the upcoming contract thus began at a much better place than the prior negotiations, when the Town had to change its fundamental outlook on what officers would be paid if it wanted an effective police force.

Negotiations are being conducted regularly at present. The reports we hear are that the parties are making progress in resolving their differences. We are hopeful that the progress that the Department has been made over the past two years will not be impeded by the intransigence of either party.

**Budget.** The 2004 budget for the Department is approximately \$2 million, the same as the 2002 and 2003 budgets, but 25 percent higher than the 2001 budget, which preceded the current Town Board's commitment to a professional police force. In 2002 the Department spent \$250,000 under the \$2-million budget, and last year the Department exceeded its budget by \$230,000, mainly due to heavy expenses relating to overtime and to recruitment of new officers. The important point is that the Town since 2002 has been adequately funding the Department. Members are generally paid competitive wages, cars are replaced at reasonable intervals, and equipment needs are being met. The Town Boards that were elected in 2001 and 2003<sup>10</sup> are to be complimented for this important contribution to the improvement of the Department which had for so long starved for adequate resources.

### **III. Personnel Complaints**

#### **A. Introduction**

One of the more effective ways to gain insights into the health of a police department is to examine how it deals with personnel complaints—most of which normally come from the public—and the subject matter of those complaints. From the beginning of our monitoring of the Wallkill Police Department, we have closely

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<sup>10</sup> In 2003 four of the five members of the Board were re-elected, while in 2001, following a series of debacles related to the Police Department, only one member of the prior Board was re-elected.

scrutinized all aspects of its handling of personnel complaints. In this report we discuss in detail how the 105 complaints received in 2002 and 2003 have been handled. We have reviewed the allegations made in all 105 cases and have thoroughly read 79 of the 84 completed 2002-03 personnel complaint files.<sup>11</sup>

The Wallkill Police Department's overall handling of personnel complaints has been good, but it is far more instructive to characterize the different aspects of that performance. The Department has been exemplary in the following respects: accepting all complaints made to it; publicizing its willingness to take complaints; labeling information that comes to its attention as complaints even when the communication is not intended as a complaint; thoroughly, rigorously, and fairly investigating the relevant facts and circumstances of each case; being willing to conclude that members of the Department—at both staff and supervisory levels—have engaged in misconduct when it has been proven; and classifying the dispositions of complaints accurately. The Department also deserves a positive rating for the fact that neither the substantiated findings nor the allegations as a whole suggest systemic problems of misconduct or incompetence in the Department.

Our analysis shows problems, however, in three areas: certain members—who often have a significant history of misconduct and poor performance—receive a disproportionate percentage of the complaints; certain officers and sergeants have apparently abused the complaint process to try to settle personal scores; and the

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<sup>11</sup> Four of the complaint files we have not yet read were closed in February 2004 and the fifth was not readily available on the last occasion that we were perusing these files. We intend to read those five files and all future completed investigations for the remainder of our monitoring.

processing of investigations has been almost universally slower than required by the Best Practices Guidelines—more often than not without good cause.

This overall picture is significant improvement from the findings in our First Report (see pages 24-27) concerning the handling of complaints before the arrival of Chief Hertman. In that report we identified the following problems: failure to classify a complaint as a complaint (and serious resistance to the Monitor’s admonitions to consider the matter as a complaint); failure to send required notifications to complainants and the Town Board; failure to create appropriate documentation; failure of the Chief to make initial determinations of complaints; less-than-desirable objectivity in the consideration of complaints; and serious delays in investigating complaints. All these problems, except the timeliness of completing investigations, were cured by Chief Hertman.

B. Background

A significant part of the Attorney General’s federal court complaint against the Town—which led to the Consent Decree and the monitoring of the Department—resulted from the absence of adequate procedures for receiving, processing, and reviewing complaints against Department members. The Attorney General’s complaint stated in pertinent part (pages 25-26, ¶¶84, 86, 90):

The Wallkill Police Department’s lack of a complaint review mechanism prevents Defendant [the Town of Wallkill] from assessing officer performance and gauging whether there are problems with respect to any of the officers.

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In the Town of Wallkill, should a citizen decide to make a complaint about the conduct of Wallkill police officers, there is not now, and has never been, an established mechanism to allow a citizen to do so.

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Defendant’s failure to institute an adequate system to receive, investigate and resolve complaints against police officers demonstrates a

policy of deliberate indifference to the need for police supervision and to the constitutional rights of citizens.

The Town's failure on numerous occasions to investigate or take any other corrective action concerning misconduct of which it had been notified led the Attorney General to charge that the Town "tacitly encouraged" "illegal behavior." The complaint further stated that the Town's "deliberate indifference ... sent a clear message to Wallkill police officers that improper, even illegal, conduct could go unpunished, thereby giving a license to Wallkill officers to continue engaging in such misconduct." (Complaint, pages 18, 20, ¶¶57, 63.)

### C. Current Procedures

The Consent Decree and the Best Practices Guidelines, which are the rules and regulations of the Department, deal extensively with the receipt and processing of complaints. Complaints are defined in the Best Practices Guidelines as "any allegation of misconduct against any member(s)" of the Department from any source, including civil lawsuits or criminal prosecutions. Rule 9.1.

The Guidelines provide for the initiation of complaints by any form of communication, in written or oral form, by any person, including one who wants to remain anonymous. Members of the Department are prohibited from refusing or discouraging a complaint. The Department is obligated to acknowledge receipt of complaints in writing within three days. Rule 9.2.

When the Chief receives a complaint, he first must determine, while assuming the allegations to be true, whether they "make out a colorable claim of misconduct or incompetence." If the allegations fail to state a colorable claim, the Chief makes such a finding in writing and no investigation need be conducted. On the other hand, if the

allegations, if proven, would support a finding of misconduct, a full investigation must be conducted by the Chief or other supervisor designated by him. Rule 9.5. Over the past two years Chief Hertman has assigned approximately one quarter of the investigations to himself—cases which involve allegations against supervisors in the Department and particularly serious or sensitive allegations. The balance have mainly been assigned to the sergeants, with a few assigned to the Deputy Chief during his brief tenure.

Upon conclusion of the investigations the Chief is required to make an initial determination of the complaints, deciding “whether it is more likely than not that the allegation is true.” The dispositions provided for in the Guidelines (Rule 9.6) are the following:

Substantiated: the complainant allegations are true and constitute misconduct, in part or in whole.

Unsubstantiated: the Chief cannot reasonably determine the truth or falsity of the complainant’s allegation.

Exonerated: the complaint’s allegations are true but the conduct was legal and proper.

Unfounded: the complaint’s allegations are false.

The Chief must prepare a full written report on the case and, if substantiated, recommend discipline to the Town Board. Initial determinations are supposed to be made within 60 days of the filing of the complaint unless there is a valid reason for an extension. Rule 9.6.

The Town Supervisor makes the final determination concerning the disposition of complaints and the discipline to be imposed. Rule 9.7. All the various stages of the process need to be fully documented in writing. Rule 9.9.

#### D. Receiving Complaints

The Department has done an excellent job in fulfilling the Consent Decree's and the Best Practices Guidelines' mandates to accept all personnel complaints. We reported in detail in our Second Report (see pages 20-24) on the many steps that the Department had taken, and continues to take, to publicize its willingness to accept complaints. In March 2002 and March 2003, the Department made a presentation about how to file a complaint at a locally televised Town Board meeting. The Department established 24-hour hotline telephone and fax numbers for the receipt of complaints. Information about how to file a complaint is prominently displayed by the information window in the police station and is included in the Reference Guide to the Town of Wallkill. In connection with the March 2003 meeting publicizing the complaint process, Chief Hertman was successful in getting two local cable television channels to report on the process, and the complaint hotline number is permanently posted on one channel's community bulletin board.

The changes instituted have had a dramatic effect on the number of complaints received by the Department. Before 2001, as indicated in the Attorney General's lawsuit, complaints were discouraged, sometimes investigated, sometimes ignored, and never tracked or documented, so there is no way of knowing how many complaints were in fact made to the Department. In the transition year of 2001, only half of which was subject to the procedures of the Consent Decree, 12 complaints were processed. In 2002 the number rose to 52, and in 2003, 53 complaints were received. As we discussed more fully in our Second Report, the increase in complaints processed is a clear success of the Consent Decree. There is no indication of an increase in misconduct. To the contrary,

isolated misconduct seems to have significantly decreased, and systemic lawless and unconstitutional behavior certainly has ceased. The key difference in the number of complaints is that the Department now accepts and documents the complaints. One of the indicators of that change in the Department's practices is that seven complaints received in 2002 involved incidents from prior years (as long as ten years earlier) and two complaints received in 2003 likewise involved incidents in 1997 and 2001.

Several examples show how the Department's culture has changed in response to the requirements of the Consent Decree and the leadership of Chief Hertman. Vividly demonstrating the positive steps the Wallkill PD has taken under the Consent Decree, a member of the Department brought to the Chief's attention a videotape from a police car that showed a sergeant shoving a complainant in a dispute. The sergeant apparently lost his temper when the complainant failed to heed his directions to keep quiet. Even though the complainant refused to cooperate when contacted, the investigation was completed and the complaint of unnecessary force was substantiated.

In another instance, a store employee in casual conversation during a business transaction with a member of the Department mentioned that she did not trust a particular officer because of a serious criminal incident, which she then described, that had occurred more than ten years earlier. Even though the store employee did not intend the conversation to be a complaint and even though she largely refused to cooperate with the investigation, the case was investigated as thoroughly as circumstances permitted.

A third example involves a sergeant who initiated a complaint based upon a citizen's inquiry about obtaining an accident report. During the conversation about the accident report the sergeant astutely recognized that the citizen was dissatisfied that the

officer involved had failed to take other appropriate action relating to the incident. Even though it appears that the citizen had not come to the police station to make a complaint, one was filed based upon the facts she presented. The complaint for failure to take appropriate action was subsequently substantiated.

Another indication of how the Department now aggressively seeks to investigate any misconduct brought to its attention is that in the course of investigating four complaints that resulted in unsubstantiated findings, the Chief and the sergeants discovered instances of misconduct that were not included in the complaint. Five allegations of misconduct were substantiated as a result of these investigations, even though the citizen complainants never mentioned that wrongdoing.

As is shown in Table 1, 68 percent of the 105 complaints received in 2002 and 2003 were based upon information received from citizens—whether the citizen

Citizens	71	68%
Officers/Dispatchers*	14	13%
Sergeants/Chief	14	13%
Town officials (not PD)	6	6%
Total	105	100%

\*One of these complaints was made by a relative of an officer in connection with an ongoing dispute that officer was having with a second officer.

intended the communication to be a complaint, or not. Six percent of the complaints were initiated by Town of Wallkill officials from outside the Police Department. Thirteen percent of the complaints were brought by officers or dispatchers (or in one instance by the relative of an officer acting on behalf of his relative), and another 13 percent were brought by sergeants or the Chief.

The most frequent allegations involve, in order of frequency: abuse of authority, failure to take appropriate action, rudeness or profanity, unnecessary force,

unprofessional conduct, and criminal conduct. Less frequent allegations involve sexual harassment,<sup>12</sup> falsifying records, and violation of departmental rules. Table 2 shows a breakdown of the types of misconduct allegations received in the two years in question. The two categories with significant percentage increases in 2003 are unnecessary force and sexual harassment. In light of the fact that the investigations are pending on all of the sexual harassment and six of the unnecessary force allegations, it would be premature to analyze these trends in allegations. In Section III.F, below, and particularly in Table 4, we consider the number of allegations that were substantiated, dividing those allegations into the same categories used in Table 2.

	2002	2003	Total
Abuse of authority	16	15	31
Criminal conduct	5	4	9
Failure to take appropriate action	14	10	24
Falsifying records	2	1	3
No colorable claim of misconduct	3	2	5
Rudeness/profanity	10	12	22
Sexual harassment	0	4	4
Unnecessary force†	4	10	14
Unprofessional conduct	7	3	10
Violation of departmental rules	1	2	3
<b>Totals</b>	<b>62</b>	<b>63</b>	<b>125</b>

\*This table includes the subject matter of all allegations. The totals exceed the 105 complaints made, as some complaints make allegations of more than one type of misconduct. Also included are five allegations of misconduct that were developed during the course of the investigations, although not alleged in the original complaints.

†Includes unnecessary pointing of weapons.

<sup>12</sup> None of the four sexual harassment allegations involves members of the public. This is not to in any way diminish the seriousness of the allegations—all of which are currently under investigation—but to draw a distinction from the misconduct found by the Attorney General’s investigations: persistent use of traffic stops and tickets to harass women.

The Best Practices Guidelines appropriately provide for the initiation of complaints by employees of the Department as well as citizens. ¶Rules 9.1.b, 9.3. Just as citizens bring bad-faith, false, and frivolous complaints, so in the Wallkill Police Department do a small number of sergeants and officers. In our view, two of the nine complaints initiated by sergeants in 2002 and 2003 appear to have been brought in bad faith, motivated by longstanding personal antagonisms that particularly plagued the Department in the several years before the Consent Decree was imposed. Of the 13 complaints initiated by officers (or a relative of an officer), eight appear to have been brought to try to settle personal scores or out of the misguided belief that the best defense is a good offense. All six of the officer-initiated complaints brought since August 2002 that appear to us to be in bad faith were brought by two officers, each of whom is currently facing very serious discipline.

The facts that Chief Hertman has not in any way become involved in the petty, vindictive squabbles that have divided the Department for years, and that almost half the full-time officers currently in the Department have been hired in the last two years provide hope that the bad-faith use of the complaint process by sergeants and officers is simply one of the last gasps of the bad old days in Wallkill. We encourage sergeants and officers in the future to talk to the Chief about their concerns about colleagues they dislike before writing a letter of complaint.

We also wish to emphasize that our concern about these ten apparently bad-faith complaints should in no way discourage members of the Department from fulfilling their obligations to bring instances of real misconduct to the Department's attention. In that connection, it should be noted that a significant majority, 18 of 28, of the complaints

initiated over the past two years by members of the Department were made in apparent good faith. Officers and supervisors willing to call their colleagues on misconduct are in the best traditions of fair and equitable law enforcement.

E. Investigations

The quality of the complaint investigations and of the documentation supporting them is excellent. This is a testament to the insistence of Chief Hertman that investigations be competent and thorough before he will close a file. It is also a testament to the ability of the sergeants to learn and apply new skills. Because the Department's procedures on internal investigations were nonexistent before the Consent Decree, even the three sergeants who have held that position for many years had very little experience investigating personnel complaints. Chief Hertman, with his background as an integrity officer and internal affairs supervisor, had the necessary knowledge and experience to teach both the long-time and newly promoted sergeants the techniques they should follow.

Most significantly, Chief Hertman has insisted that a case be thoroughly and fairly investigated before he will make his initial determination of the case. He often returns files assigned to the sergeants with directions for further interviews and/or pursuit of additional facts. Reopening investigations in such circumstances certainly causes delay in closing cases (a problem we discuss below), but it is the right decision. As important as it is for complaints to be promptly investigated, it is considerably more important that they be thoroughly investigated.

A particular strength in the investigative files is the closing memo Chief Hertman writes in every case that summarizes the evidence and supports his initial determination

of the relevant allegations. His memos are clear, well-reasoned, and most importantly, fairly decided. If there are flaws in the reasoning of the prime investigator—and in a small percentage of the cases there are—the Chief’s memo corrects those errors and reaches a just and defensible result.<sup>13</sup> In addition to the Chief’s closing memo, the facts developed by the investigators are well-documented and the files are consistently organized and complete.

As mentioned above, one of the hallmarks of the thoroughness of the Department’s complaint investigations is that when instances of substantiated misconduct beyond the allegations made by the citizen complainant are discovered, the Department investigates them. This, among other things, is evidence of the cultural change in the Department concerning complaints. Going from refusing to accept complaints to finding misconduct that was not even alleged in a complaint is a long way to travel in two years.

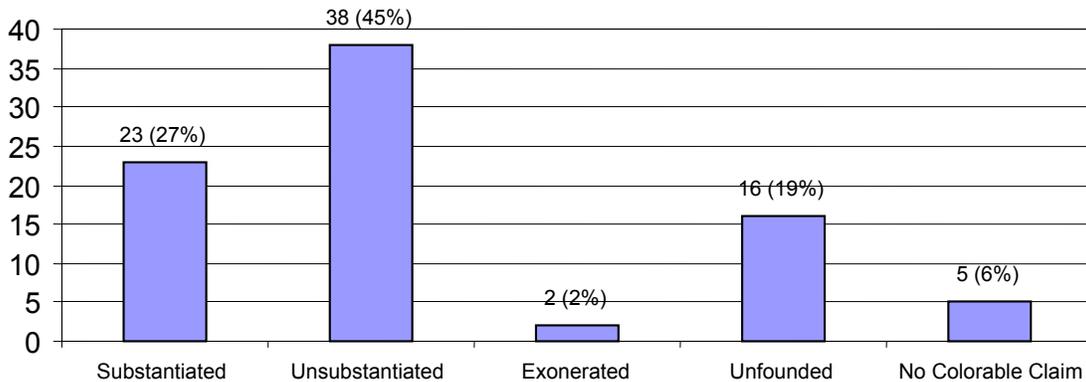
#### F. Dispositions

Possibly the most powerful indicator of whether a law enforcement agency can police itself is the degree to which its investigations result in substantiated allegations. As is shown in Table 3, 27 percent of the 84 complaint cases from 2002 and 2003 that have been closed resulted in at least one substantiated allegation. Forty-five percent of the complaints were found to be unsubstantiated, 19 percent unfounded, and in two percent of complaints the officer was exonerated. Six percent of the complaints presented no colorable claim of misconduct.

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<sup>13</sup> We do not wish to imply that we would have resolved every case identically to the determinations made by Chief Hertman. We see our role in monitoring the Department as determining whether complaints are resolved in a fair and credible way, not in determining whether the Chief resolved the cases exactly as we would have.

**Table 3**  
**Dispositions of Personnel Complaints 2002-03\***  
**By Case**



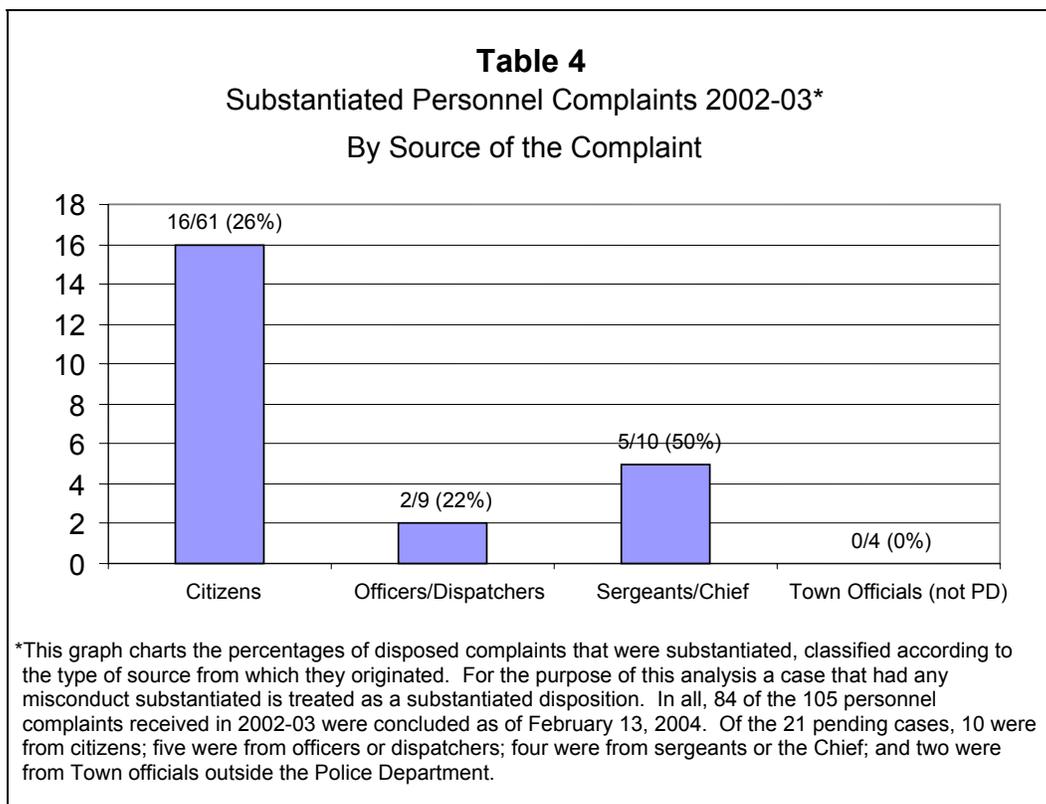
\*This graph charts the dispositions of the 84 2002-03 personnel complaints that were concluded as of February 13, 2004. Twenty-one cases were pending as of that date. For the purpose of this analysis a case that had any misconduct substantiated is treated as a substantiated disposition. Although the Department's records show three exonerated cases and four cases with no colorable claim, we believe that one case classified by the Department as exonerated should have been classified as not a colorable claim. The percentages do not add up to 100 percent because of rounding.

At least three of the complaints that were determined to be unfounded were proven to be false by video or audio tape recordings, again proving, as many Wallkill officers now recognize, that not only do officers and dispatchers who do their jobs appropriately have nothing to fear from taping their interactions with the public, but that tapes can be their strongest defense against accusations of wrongdoing.

We have observed that Chief Hertman is rigorous in classifying only those cases that undeniably make false allegations as unfounded. If there is doubt about the falsity of an allegation, the case is classified as unsubstantiated. Likewise, a case with both an unfounded and an unsubstantiated allegation is classified as unsubstantiated.

Particularly noteworthy is the fact that 27 percent of complaints end with substantiated findings—a significantly higher rate than in many departments. For instance, the Chicago Police Department reached sustained findings in ten percent of its

investigations of misconduct in 2002, and over the five-year period 1998-2002, the New York City Civilian Complaint Review Board substantiated at least one allegation of complaints in 11 percent of fully investigated cases.<sup>14</sup> One might suspect that that substantiated rate was skewed upward by the fact that 32 percent of the Wallkill complaints came from Police Department or other Town officials. Table 4, however, shows that complaints from citizens were substantiated at virtually the same rate (26%) as complaints overall (27%). Complaints from superior officers were substantiated at twice the average rate (50%), while complaints from departmental line staff and Town officials were substantiated at lower rates (22% and 0%, respectively).



<sup>14</sup> Chicago Police Department, 2002 Annual Report, pages 42-43; New York City Civilian Complaint Review Board, Status Report, January-December 2002, page 95. It should be noted that the New York CCRB figures are based on cases on which the agency conducted full investigations. Taking into account all complaints (which is more comparable to the Wallkill PD statistics), the New York CCRB substantiation rate is five percent.

Looking at the types of allegations that are found to be substantiated, Table 5 shows that failure to take appropriate action is substantiated much more frequently than any other type of action. One reason such allegations are substantiated at a higher rate is that credibility is less of a factor in such allegations. If the member should have taken a particular action, more often than not some document or other record should show that that action occurred. Once it has been determined that a certain action should have been taken, the absence of a record documenting the occurrence of such an action may well be conclusive.

**Table 5**  
Dispositions of Personnel Complaints 2002-03\*  
By Nature of Allegations

	Substantiated	Unsubstantiated	Exonerated	Unfounded	Pending
Abuse of authority (n=31)	3	18	0	5	5
Criminal conduct (n=9)	1	4	0	0	4
Failure to take appropriate action (n=24)	11	7	0	4	2
Falsifying records (n=3)	0	2	0	1	0
Rudeness/profanity (n=22)	5	9	1	4	3
Sexual harassment (n=4)	0	0	0	0	4
Unnecessary force (n=14) <sup>†</sup>	2	3	0	3	6
Unprofessional conduct (n=10)	2	5	0	1	2
Violation of departmental rules (n=3)	1	0	1	0	1
<b>Totals (n=120)</b>	<b>25</b>	<b>48</b>	<b>2</b>	<b>18</b>	<b>27</b>

\*Dispositions (plus pending allegations) as of February 13, 2004. This table tracks allegations, of which there may be more than one in a particular complaint. This table does not include the five allegations which did not raise a colorable claim of misconduct, but it does include the five instances of substantiated misconduct (four of failures to take action and one of unprofessional conduct) which were established during the investigation of allegations that were found to be unsubstantiated.

<sup>†</sup>Includes unnecessary pointing of weapons.

Because of the seriousness of substantiated instances of criminal conduct and uses of unnecessary force, a brief examination of the facts of the three such matters that were substantiated seems warranted. The criminal conduct involved the intentional destruction

of Town property by an officer who has been a perennial discipline problem and who is currently facing multiple disciplinary charges and serious disciplinary penalties for this and other incidents. One incident of the use of unnecessary force involved, as we discussed above, a sergeant who apparently lost his temper with and shoved a complainant who would not stop talking when told to—an incident caught on videotape. The second substantiated incident of use of unnecessary force also involved a sergeant. In this incident a sergeant displayed (but did not discharge) a Taser when a prisoner refused to be fingerprinted. Since the prisoner was locked in a cell and posed no threat to anyone, there was no justification for even the display of the weapon.

In addition to the three disturbing incidents discussed in the preceding paragraph, one use of unnecessary force that was found to be unsubstantiated is particularly disturbing—both because it is a case of gratuitous and serious violence and also because it appears to be a case of the “blue wall of silence.” A prisoner in the Department’s holding cell told a sergeant that an officer whom he had known for several years and who was not the arresting officer had entered the holding cell and choked him while two or three other officers were in the room surrounding the cell. While the accused officer admitted entering the cell, he denied choking the prisoner. All the officers in the station house at the time denied seeing any assault. The Chief reluctantly concluded that the available evidence was not sufficient to substantiate the charge. The accused officer is currently facing serious discipline based upon an unrelated incident. In response to this incident, the Chief installed a video camera that films the holding cell and issued a new departmental procedure that forbids members from opening the cell door except if directed by a supervisor, requested by the arresting officer, or in exigent circumstances.

While the number of complaints a member of a police department receives is subject to many external variables—degree of activity by the officer, assignments, etc.<sup>15</sup>—the number of complaints received often does correlate to members whose conduct is problematic. Considering the information in Table 6, there clearly is significant, if not universal, correlation between complaints and history of serious misconduct. Member A, with 14 complaints, two of them substantiated, was one of the most serious offenders identified by the Attorney General’s investigation and has received very serious discipline in the past two years. Member B, with 13 complaints, five of them substantiated, was also one of the most serious offenders identified by the Attorney General’s investigation and is currently facing very serious discipline. Members F and G are no longer with the Department for performance-related reasons.

In addition to those listed in Table 6, there were 13 members of the Department who were full-time members for at least 18 months during 2002 and 2003 and who each

accumulated three or fewer complaints during those two years. Collectively, these 25 full-time members were separately identified—by complainants or subsequent

Member	Complaints	Substantiated
A	14	2
B	13	5
C	11	2
D	8	1
E	8	1
F*	7	0
G*	6	4
H	6	0
I	5	0
J	5	0
K	5	0
L	4	1
<b>Totals</b>	<b>92</b>	<b>16</b>

\*No longer with the Department.

<sup>15</sup> In Wallkill, another variable is being disliked by members who abuse the complaint system by bringing bad-faith complaints against other members.

investigations—in 115 separate instances.<sup>16</sup> The 12 members listed in Table 6 received 80 percent (92 of 115) of the complaints lodged against the 25 members in this analysis, and they accumulated 70 percent of the substantiated findings. Although constituting slightly less than half of the members being considered in this analysis, the members listed in Table 6 were disproportionately represented in both complaints and substantiated allegations.

#### G. Timeliness

The most significant and persistent problem relating to complaints has been the timely completion of investigations. Twice, in January 2002 and in April 2003, the Monitor has cited the Town for non-compliance for failure to timely complete complaint investigations. Significantly, these have been the only citations for non-compliance during the two and one-half years of our monitoring.

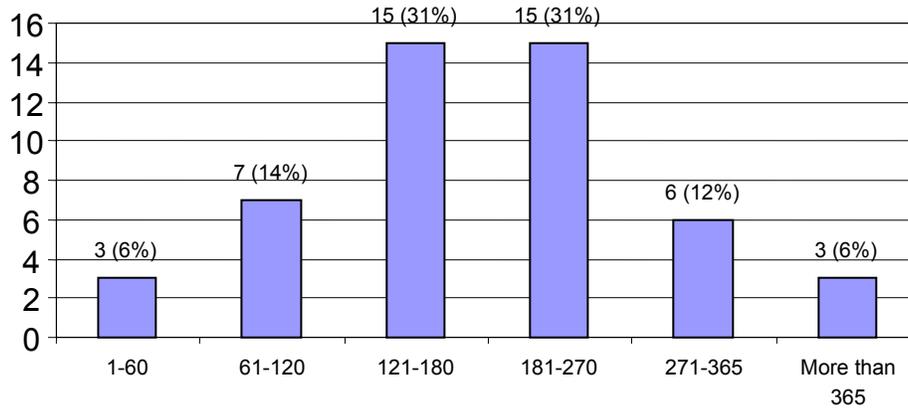
Only three of the 52 cases initiated in 2002 were completed within the 60 days called for by the Best Practices Guidelines (see Table 7). Rule 9.6.b. None of the 53 cases begun in 2003 has been completed within 60 days (see Table 8).<sup>17</sup> Worse, half of the 2002 case closings occurred more than 180 days after the complaint was filed and it appears that by the time all the 2003 cases have been completed, an equivalent portion of the closings may exceed 180 days (see Tables 7 and 8). Not only do cases completed after 180 days exceed the expected completion time by a factor of three, but the union contracts preclude discipline more than 180 days after the misconduct becomes known to

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<sup>16</sup> The number exceeds the number of complaints for the year because many complaints concern more than one officer. Excluded from this discussion are six complaints against five part-time members or members who served less than 18 months during 2002 or 2003.

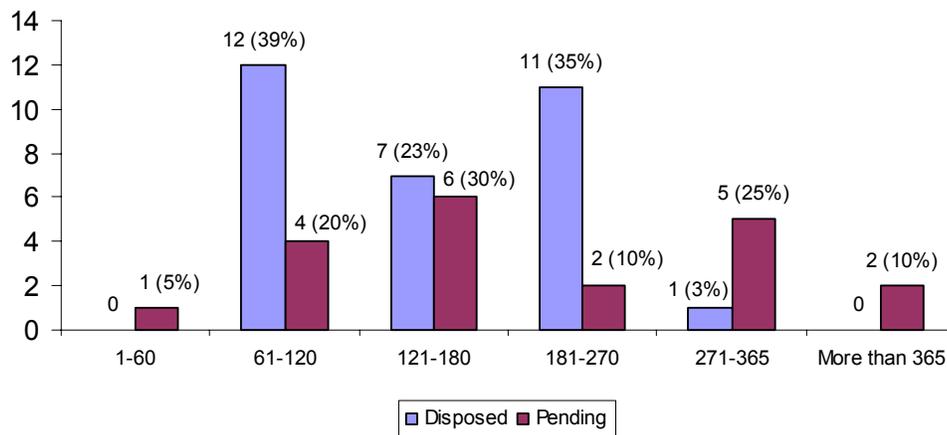
<sup>17</sup> One 2003 case remains within the 60-day window.

**Table 7**  
**Personnel Complaints 2002**  
**Time to Disposition (in days)\***



\*Three 2002 complaints alleged no colorable claim of misconduct, and thus are not included in this graph as no investigation was required to close the case. One 2002 complaint was pending as of February 13, 2003 n=49.

**Table 8**  
**Personnel Complaints 2003**  
**Time to Disposition (in days)**  
**Time Elapsed for Pending 2003 Cases (in days)\***



\*As of February 13, 2004. Disposed n=31. Pending n=20. Two 2003 complaints alleged no colorable claim of misconduct, and thus are not included in this graph as no investigation was required to close the case.

the Town (which in no event can be later than the date the complaint was filed). This is a woeful record on a subject on which we have consistently pushed Chief Hertman to do better.

On April 8, 2003, when the Town was cited for non-compliance, 23 complaints were more than 60 days old, and 12 were more than 180 days old. As of February 13, 2004, there has been slight improvement: 20 complaints were more than 60 days old, and nine were more than 180 days old. In an attempt to help the Department address the problems of overdue investigations and to allow the Town to avoid contempt proceedings, the Chief was required to file a series of status reports on the overdue cases and to update those status reports on a monthly basis. The status reports have helped to encourage one positive development in an otherwise fairly bleak picture. Other than several cases recently reassigned from either the Deputy Chief or the sergeant on sick leave, only two over-60-day cases are assigned to the four sergeants on active duty. All the other cases that are overdue are assigned to Chief Hertman.<sup>18</sup> Through a great deal of effort by the Chief, he has solved the backlog with those he supervises. Now he must address the serious backlog in the cases he is carrying.

The Best Practices Guidelines allow for an extension of the 60 days when “an extension is necessary” and the Chief documents the reason for the extension in writing. Rule 9.6.b. There clearly are cases where there is good cause for extensions, occasionally even of great duration. There certainly is good cause for some of the currently overdue cases. The problem is that the 60-day deadline is virtually never met, so it becomes

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<sup>18</sup> Some of those cases had been assigned to the Deputy Chief who completed none of the seven cases assigned to him. The Deputy Chief, as integrity control officer, was also charged with assuring the timeliness of the sergeants’ investigations, but failed to follow through on those responsibilities.

harder to accept the extensions that are really necessary when almost every case is given an extension. The overwhelming majority of cases can and should be completed within 60 days. Now that the backlog in cases assigned to sergeants has almost been eliminated, we expect the sergeants to remain timely in completion of assigned investigations. We also expect the Chief to put the same sort of pressure upon himself that he put on the sergeants. We also expect the Chief to close cases submitted to him by the sergeants in a prompt manner.

Timely completion of investigations is about more than the rules set forth in the Best Practices Guidelines. The more promptly a case is investigated the better memories will be and the more likely that a complainant will cooperate with the investigator. In a significant percentage of the Department's cases the same complainant who initiated the case later has become uncooperative. While we do not know for sure, experience suggests that at least some of those reluctant complainants would have cooperated if they had been contacted more promptly. In addition, timely completion of cases that are substantiated would mean that discipline would be imposed before an undue passage of time had occurred. The longer the time between an offense and the imposition of punishment, the less likely the discipline will be effective in constructively changing behavior.

Moreover, as noted above, members with union contracts—virtually everyone in the Department—cannot be disciplined on investigations not resolved within 180 days. While complaints can be substantiated after 180 days, and that finding placed in the member's personnel file, no punishment can be imposed. The Chief has insisted that he screens the cases approaching 180 days old to prevent any case where serious discipline

might be imposed from exceeding the statute of limitations. We are not persuaded, however, that the very fact that no discipline can be imposed does not subtly influence investigators to make an “unsubstantiated” finding, to avoid the embarrassment of a toothless finding of “substantiated.” Despite our disagreement on this point, the Chief and we are in agreement that only the rarest of good cause justifies any complaint investigation from not being concluded in under 180 days.

#### H. Conclusion

The quality of the Department’s work on receiving, investigating, and resolving complaints has been excellent. The timeliness of its completion of investigations, however, has been seriously deficient. With a dramatic improvement in completion times, the Wallkill Police Department could serve as a model for other small departments across the country in the handling of complaints.

### IV. **Oversight Activities**

**Stops/Paperwork.** In our prior reports, we discussed numerous problems relating to stops and required paperwork, as well as important improvements as of the last report. The progress and problems we observed since the last report break down into three general areas: use of the cameras and microphones, review of stops and paperwork by sergeants, and quality of required records.

In our Second Report, we noted significant progress in officers’ use of the video cameras and microphones but some persistent technical problems with the equipment. Happily, officers’ appropriate use of the video cameras and microphones has continued and seems to be institutionalized universally, with only the following notable exception.

Video cameras turn off prior to a stop being complete, or, less frequently but often enough, they start well after a stop has begun. We are unable from our review of the tapes to determine the reason for these failures, but we are able to say that neither the portions of the incidents that are incompletely recorded nor the accompanying paperwork suggests that officers are deliberately de-activating the cameras to avoid incidents being recorded. We suspect that the incomplete recordings are the result of a combination of equipment malfunctions and officer error. We request that the Chief direct the sergeants to note every such incomplete recording in their next several video reviews as part of an effort to determine the causes of these failures, and that, armed with that information, the Chief take the appropriate steps to solve the problem or problems.

What are clearly technical problems also persist. In one series of reviews, five of six videotapes made in different vehicles from July 2002 to May 2003 contained periods when the microphones were not working properly. On one of these tapes, the microphone was not working for eight days in a row. Also in this sample, we found two occurrences of out-of-sequence taping, a technical defect that we have previously reported on that causes later footage to be recorded over earlier footage. The Department worked with the vendor of the video camera system to fix this latter problem, and it appears to have improved since the last report. But both types of technical problems require continued attention.

In our Second Report, we put the Department's sergeants on notice that we would be reviewing their reviews of videotapes and stop reports. The sergeants' performance in this regard was mixed. The sergeants are reviewing videotapes, albeit often with considerable delays. These delays worsened in the latter half of 2003 and need to be

addressed by the Chief. In performing the reviews, certain sergeants are consistently more thorough than others. Some of the sergeants' reviews are entirely inadequate, and most of the reviews left room for improvement. That being said, on average, the number, persistence, and seriousness of the rules violations has definitely decreased from what the tapes showed in 2001 and early 2002.

In our sampling of videotapes, we sometimes found occasional and sometimes found numerous instances of potential rules violations by officers that deserved mention, investigation, or action, but which were not noted by the sergeants reviewing those stops. For instance, in one sergeant's review of a tape, he neglected to gather 11 daily activity logs necessary for a proper review; he failed to notice that an officer reported in his log being at the station when the videotape showed the officer was in the field conducting surveillance; he did not cite an officer's late starting of the video during two stops or the same officer's twice failing to activate his microphone; nor did the sergeant note the microphone's failure to work throughout a shift. By contrast, another sergeant properly noted several problems, including an improper search, turning a microphone on late, not recording a stop in the daily activity log, and a late starting of the video camera. And the sergeant who reviewed the tape where the microphone was inoperable for eight days did appropriately note that problem.

Not surprisingly, the sergeants who were more consistently thorough in properly reviewing tapes and paperwork were those whom we have observed to be more diligent in fulfilling their responsibilities generally. The opposite is true as well. For example, we found that the same sergeants who more consistently failed to notice or correct the violations of other officers also kept poor, incomplete records of their own activity in

their daily logs. The one notable exception to these correlations is that one of the sergeants who conducts careful reviews of the videotapes is months behind in his reviews, while one of the sergeants whose reviews are cursory is reasonably up-to-date in fulfilling that responsibility.

In past reports, we cited numerous inadequacies in officers' documentation of vehicle and pedestrian stops and their tracking of activity in the daily activity log. In our Second Report, we noted some improvement due to the creation of a new stop report form. We also observed that officers' compliance was weakest with respect to setting forth the factual basis for the stop. In particular, officers tended to be non-descriptive and conclusory in their reports, writing, for example, "speed in zone" or "suspicious vehicle."

Progress continues. Officers continue to make good use of the stop forms, checking the appropriate boxes and providing appropriate demographic and geographic information. Generally, there has been some improvement in officers' setting forth an adequate and constitutional basis for their stops, but some problems remain. For example, we found instances of officers citing "subject walking appear intox" (sic) as the entire basis for a stop, with no further description of what transpired except "subject sent on way." Similarly, another report—indeed, one for a stop that resulted in arrests, making the officer's documentation especially important—stated merely "Two vehs parked in Dead End with Lights with Engines Running" (sic).

Among the areas of notable improvement is that the sergeants are now signing off on all daily activity logs and, as noted below under "Correction Notices," more often holding officers to the required standards for completing their paperwork. Probably not

coincidentally, officers have become considerably more complete in describing their activities in the daily logs.

**Correction Notices.** Sergeants use two simple forms to record deficiencies in paperwork or performance. “Correction Notices” state what is missing or deficient in submitted paperwork and ask the officer involved to correct the deficiencies and return the appropriately completed paperwork to the sergeant. The “Employee’s Daily Performance Record” form records aspects of performance that should be corrected but do not rise to the level of requiring discipline—from lateness to poor handling of an incident. In our Second Report we asked the Chief to devise a system for preserving these forms—which was then not being done—so that persistent deficiencies might be addressed more systemically.

We recently asked to review six months’ worth of correction notices and daily performance record forms. What we found was both encouraging and discouraging. Two sergeants who take their responsibility to supervise seriously had generated 41 and 28 (respectively) notices in the six-month period. Reading their forms showed how conscientiously they take their responsibilities, including ensuring that paperwork is completed properly and informatively. On the other hand, two sergeants who seem to resist being supervisors generated five and two (respectively) notices in the same six-month period. And, even worse, the fifth sergeant had deemed the generating of these reports unnecessary because he unilaterally determined that oral corrections were sufficient for his squad. The comparison of the documentation was a graphic confirmation of significant other available evidence: some of Wallkill’s sergeants either

do not know how to supervise, know how to but chose not to, and/or fail to follow Department policy because they think they know better.

**Use of Force Reports.** The Best Practices Guidelines require the filing of an incident report in a variety of circumstances, including “each use of force.” Rule 33.5.a. Approximately 2,000 incident reports a year are completed by the Department. The Guidelines also required oral notification to the shift sergeant whenever force was used. Rule 4.4.a. To be able to more easily identify and analyze incidents where force is used, Chief Hertman in January 2003 directed that a newly created use of force report be prepared, in addition to the incident report required by the Guidelines. After being reviewed by the shift sergeant, force reports are forwarded to the Chief.

Only five use of force reports were prepared between January 31, 2003, when the Chief instituted the new procedure, and the end of the year. Because we were surprised at such a low number of force reports, the Department checked its incident reports for those 11 months and found four other uses of force that had not been documented on the use of force form.<sup>19</sup> Only three of the nine reported and unreported cases involved the use of a weapon by the police: two shots were fired to dispatch an injured deer; a Taser was used to subdue a suicidal man holding a knife to his throat; and pepper spray was used on a man resisting arrest.<sup>20</sup> The other six cases involve using hands to restrain individuals. None of the incidents included reports of any officers punching or kicking suspects. Two civilian injuries were reported: a laceration on the man who was subdued

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<sup>19</sup> The cases where a use of force report should have been filed have been referred to the Chief for possible discipline.

<sup>20</sup> The use of pepper spray, and an accompanying takedown in this case, were not reported on a use of force form.

with the Taser and scrapes on the arms of a woman who was reported to have fallen while resisting being taken to a mental health facility. Out of more than 16,000 calls for service during the course of 2003, nine reported incidents (in 11 months) of the use of force is a low rate and the force used in two thirds of the cases involved no weapons and no striking of the persons against whom force was being used.

Although the low incidence of uses of force and the low, and apparently justified, level of force generally employed are undeniably favorable indications, we have two concerns. The first is that not all force employed by officers is being reported—not only not reported on the use of force forms, as we know is the fact, but on any departmental forms. One of the incident reports that was identified by the Department in the search for uses of force not reported on the new form involved the report of an arrestee who resisted arrest “by kicking, throwing hands, and keeping hands to herself” and trying to injure the officers. Despite the detailed recitation of the force used by the arrested woman, the only hint of force by the police was in the statement: “...with the help of 3 police officers she was placed in the back of police cruiser #81.” We are concerned that there may be other incidents involving force that were not identified because the officer completing the incident report masks or omits the fact that force was used. In another case where a use of force report was not filed,<sup>21</sup> the only mention of force was that the man “was removed by force from the residence.” No description of the exact nature of the force or who used it was provided. With no details, it is impossible to determine the appropriateness of the actions by the officers.

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<sup>21</sup> The same officer was involved in both nonreporting cases. Not surprisingly, the officer also generates many personnel complaints and is the subject of many disciplinary proceedings.

We have no indication that the Wallkill PD is inappropriately using force. Indeed, to the extent we have information, it appears that the Department generally does not use excessive or inappropriate force. We do, however, have an indication that the use of force is being under-reported and that some force that is reported is not accurately described. We attribute these gaps to the fact that every new reporting requirement is only partially complied with until the Department makes a concerted effort to ensure compliance with that particular reporting requirement. We have seen the same pattern on stop reports and daily activity logs. We ask the Department in the months ahead to make a concerted effort to ensure that all force used by members of the Department is fully documented and described. And we commend the Department for pursuing this good policing practice even though it is not required by the Consent Decree or the Guidelines.

**Training.** The Consent Decree (§§22-23) and Best Practices Guidelines (Rule 13.3) require that all Wallkill officers receive—in addition to any training mandated by state and local laws—at least 24 hours a year of in-service training in the following areas:

- vehicle stops, specifically arrests for driving while intoxicated, ordering passengers out of a car, search and seizure, and investigative car stops;
- handling evidence;
- safeguarding crime scenes;
- preparation of documents/court appearances;
- sexual harassment; and
- first aid.

In addition, new officers must receive basic training that includes specific topics, such as administrative procedures, ethics and integrity, and community relations. Supervisors are

required to meet certain training requirements upon becoming a supervisor and to receive six hours a year of in-service supervisor training. Rules 13.2; 13.4.

The Training Sergeant is required to keep records for all training courses and programs, including certificates of completion and attendance, the dates and hours of training, the curricula and lesson plans of the programs, and a master list of all courses attended by officers. Further, the Training Sergeant is to file training records in each officer's personnel folder. Rule 13.5. When we monitored the Department's training records during 2003, we made suggestions about how the records could be kept so that they tracked the training each member received in a way that the Department and the Monitor could easily determine what training a particular member received in a particular year. Sergeant Robert Scheuring, who is responsible for training, adopted the essence of our suggestions. As a result, the records for 2003 are far more useful and informative than those for 2002.<sup>22</sup>

We commend the Department for understanding the importance of regularly training its officers and keeping them up to speed with the latest laws, policies, tactics, and tools in the field. Especially when a Department is short on officers, as Wallkill was for most of the reporting period, it is difficult to make it a priority to send its officers for training.

With very few exceptions (most of which are readily explicable), all sergeants and officers received training in the following areas: vehicle stops, justifiable use of force

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<sup>22</sup> The training that members receive is entered in each member's electronic personnel record. Starting in 2002 the dates of the trainings have generally been included in those entries. Before that, the dates of the trainings were generally omitted making those records of far less use, as there is no way to tell from the personnel record when the officer attended the training.

under Article 35 of the Penal Law, first aid, and sexual harassment.<sup>23</sup> All sergeants (except one on sick leave) and full-time officers received more than 24 hours of training during 2003, most of them receiving 24 hours of in-service training at the Rockland County Police Academy. That in-service training included training on car stops and searches. All the sergeants (except the one on leave) received at least six hours of supervisory training in 2003. Most sergeants and officers in 2003, however, did not receive training in handling evidence, safeguarding crime scenes, and preparation of documents and court appearances—all subjects required by the Consent Decree. We expect that in 2004 all the required trainings required by the Consent Decree will be provided to and attended by all required members.

**Early Warning System.** The Consent Decree requires the creation of a computerized information system that tracks Department and member activity concerning arrests, stops, searches, pursuits, complaints, commendations, training, discipline, counseling, civil suits, findings of misconduct, criminal charges against officers, and evidence handling. Consent Decree at ¶44; see also Rule 33.6. The Chief and the Town Board are required on a quarterly and cumulative basis to use the information from the computerized information system, together with reports filled out by the officers, videotapes and complaints filed, to try to identify employee problems before they result in discipline. Consent Decree, at ¶44(d),(e); Rule 12.1. Members whose conduct does not conform to the Guidelines, or whose evaluations show the need for improvement, are to be referred to early intervention services, consisting of specified training and counseling. Rules 7.1(i); 12.1-12.2.

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<sup>23</sup> All the dispatchers also attended the sexual harassment training.

The early warning process revolves around information that is collated and organized by a computer system, but the Department's new police information system, known as IMPACT, did not become operational until May 2002. As stated in our Second Report, even in the absence of computerized data, Chief Hertman conducted a limited non-computerized trial run of portions of the early warning process for the first quarter of 2002. At the time of the Second Report, no complete or computerized early warning system report had been produced.

At this point Chief Hertman has produced five complete early warning system reports. They cover personnel complaints, discipline, car stops (including a gender breakdown), arrests and summons activity, sick days, emergency excusals, video reviews, and remedial actions taken as a result of prior early warning system reports. Chief Hertman prepares the written report for the Town Board and submits it to the Council members in advance of the meeting where he makes an oral presentation with respect to each member who meets the thresholds for early intervention services. Council members participate actively in the discussion with both comments and questions. As a result of being exposed to this type of information all the members of the Town Board know which Department members habitually generate complaints and are repeatedly disciplined.

The Guidelines provide that members with two or more substantiated or unsubstantiated complaints in the preceding four months, or three or more substantiated or unsubstantiated complaints in the preceding two years, must be referred to early intervention services. The Chief also has discretion to refer members who do not meet the mandatory thresholds for services also. Rule 12.1.f. To date, ten members of the

Department have been subject to early intervention services, which have included courses on verbal judo and ethics, and counseling by the Chief. The system has been successful in giving the Chief a perspective on the long-range history of each member of the Department.

While early warning systems have most typically been installed in big departments, where officers may be less known to the chief, Chief Hertman has found the process quite beneficial in providing perspective even in a department the size of Wallkill. The process takes the participant from viewing problems case by case and gives perspective on both trends and cumulative records. That an early warning system creates real value in a department with approximately 30 members should be of significance in the shaping of best practices for policing at the beginning of the 21<sup>st</sup> century. The lesson is that no department is too small to take a retrospective look at both individual members' and the department's cumulative performance at least several times a year. Early warning systems do in fact provide perspective even in small departments.

As with so many responsibilities that rest squarely on Chief Hertman's shoulders, the timeliness of the early warning system process needs to be improved. At this point the reports are lagging two quarters behind—a delay that undermines the purpose of the process.

In addition to improving the timeliness of the reports, we encourage Chief Hertman to explore wider options of early intervention services so as to maximize the benefits that such services bring to the community, the Department, and the individual member.

**Evaluations.** The Best Practices Guidelines require evaluations of the members of the Wallkill PD once every six months: in April for the preceding October through March half-year period, and in October for the preceding April through September half-year period. Rule 7.1.a. Sergeants evaluate the officers and dispatchers,<sup>24</sup> and the Chief evaluates the sergeants. Rule 7.1. The Chief is required to review all evaluations “promptly.” Rule 7.1.i.

In our Second Report (page 35), we suggested, and the Chief agreed, that in the future he should review the evaluations prepared by the sergeants before the evaluations were presented to the members. By doing so, Chief Hertman can make such additions and improvements to the evaluations as he thinks appropriate at a time when those changes will make a difference—*i.e.*, before officers and dispatchers read and sign off on the evaluations. Such review by the Chief is particularly important because only the Chief knows of all personnel complaints and discipline received by employees. If the Chief does not ensure that complaints and discipline are fully reflected in the evaluations, they fail to meet the requirements of the Best Practices Guidelines. See Rule 7.1.f.

Our review of all the evaluations due to be prepared in April and October 2003 left us disappointed. There was no improvement from the evaluations we reviewed in 2002 and in one respect, timeliness of the Chief’s review, there was disturbing deterioration. For the evaluations due in October 2003, the sergeants timely completed their evaluations. In accordance with the suggestion in our Second Report, the Chief reviewed those evaluations before they were presented to the members, but he failed to

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<sup>24</sup> Recognizing the important role that dispatchers play in the work of the Department and its interactions with the public, Chief Hertman initiated the Department’s first evaluations of dispatchers, shortly after his initial appointment in 2002.

start his review before mid-February 2004. This delay of four months subverted the evaluation process. Moreover, because he was so late in conducting his reviews of the evaluations, Chief Hertman failed to provide the additions and changes to the evaluations that, when necessary, would have improved them.

For the evaluations due to be completed in April 2003, two of the sergeants completed their evaluations in April as required, two of the sergeants did not complete their evaluations until June, and the fifth sergeant (who had good cause for the delay) did not complete his evaluations until July. Chief Hertman reviewed the completed evaluations in June and July, but, with one exception, only after the evaluations had been presented to the members. The exception involved the Chief's requiring one sergeant to delete the criticism he twice made of another sergeant in an officer's evaluation.<sup>25</sup> While the Chief added references to particular officers' evaluations of complaints and discipline that were unknown to the evaluating sergeant, those additions were made after those officers had been presented with their evaluations.

Substantively, some evaluations were well done, but that was more often the case when the sergeant, officer, or dispatcher was performing at an excellent level and less often when criticism was warranted. The problem of over-rating members in evaluations is common in police departments across the country. That the problem is a common one does not stop it from being a problem. Evaluations are a way for departments to inform employees how they are performing. Neither employees nor departments benefit when under-performing members are told they are performing well when that is not the case.

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<sup>25</sup> That one sergeant would include wholly inappropriate criticism of another sergeant in an evaluation of an officer reinforces the necessity of the Chief reviewing the evaluations before they are presented to the members.

In such circumstances both members and departments miss important opportunities for improvement.

The Chief and some sergeants were willing in some, but not all, instances to criticize employee performance and to make constructive suggestions for change. But some sergeants rarely made any criticisms, no matter how warranted, and all the evaluators issued at least some unduly generous evaluations. Furthermore, many of the evaluations, particularly of members who should have been highly rated, missed the opportunity to encourage the growth and development that would make excellently performing members perform at even a higher level.

We expect the next set of evaluations in April to be more consistently objective and to encourage growth and improvement by all members, even those doing an excellent job. We expect the Chief to *promptly* review the evaluations completed by the sergeants and to ensure that the evaluations are complete, objective, and calculated to improve performance.

## **V. Relations with Other Law Enforcement Agencies**

One of the clear signs of the Wallkill PD's problems that led to the Consent Decree was the complaints from other law enforcement agencies about its lack of cooperation and its unprofessional police practices. The two agencies with the most contact with the Wallkill Department—the New York State Police and the Orange County District Attorney—were prominent among those gravely concerned with the conduct of the Department. Today, both offices have a productive and relatively problem-free working relationship with the Wallkill PD. We are not aware of complaints

from any other law enforcement agencies. As part of maintaining good communication, Chief Hertman has periodically invited State Police supervisors to attend the Wallkill supervisors' meeting.

The Consent Decree requires the Wallkill PD to contact the State Police concerning all incidents that may involve felonies to determine which of the two agencies should handle them. Homicides must be referred to the State Police, and sex crimes involving victims under the age of 19 must be referred to a specialized task force. Consent Decree at ¶26.

In 2001, Acting Chief John Beirsto and commanders from Troop F of the State Police jointly drew up a broad list of crimes, including virtually all felonies, that would be automatically turned over to the State Police. Because of a variety of complications the agreement between the State Police and Chief Beirsto was never reduced to an executed written agreement. Despite that, the Department adhered to the terms of that informal agreement. In the fall of 2002 Chief Hertman proposed the continuation of Chief Beirsto's agreement, with the modification that the Wallkill PD would be authorized to make arrests on ten agreed-upon felonies, such as low-level grand larcenies and the lowest level of burglary. The District Attorney's office and the State Police captain supervising investigators, however, were concerned about Wallkill's ability to handle felonies. The District Attorney would consent to Wallkill handling only six of the requested ten felonies, striking three of the crimes that occur most frequently.

At this point the Consent Decree may terminate in 16 months. Once the Consent Decree has terminated, there will be no legal restriction on the felony cases that Wallkill

could chose to handle.<sup>26</sup> It therefore seems to us that it is in the best interest of the community, the State Police, the Orange County District Attorney's office, and the Wallkill Police Department, for the State Police and the Wallkill PD to reach agreement that Wallkill can generally handle an agreed-upon and fairly expansive list of Class C, D, and E felonies for the remainder of the Consent Decree. The fact that Wallkill would presumptively handle a particular type of felony would not preclude Wallkill from asking the State Police to handle a case that seemed particularly serious or required a complicated investigation. The proposed agreement would allow the Wallkill PD to ease back into handling felonies during a transition period of approximately a year, instead of being precluded from handling virtually any felonies through June 30, 2005, and being able to handle all felonies from July 1, 2005 forward. During the proposed transition period, the State Police under the power given them by the Consent Decree could insist on modification of the agreement if it were not working. It seems to us that an orderly transition that the State Police can heavily influence is far superior to instantaneous change on July 1, 2005 (or whenever the Consent Decree terminates).

### **Conclusion**

The Wallkill Police Department has continued to progress over the past year. There also remains plenty of room for improvement both in complying with the terms, particularly the time requirements, of the Consent Decree and in upgrading the quality of the police work performed. Notwithstanding the room for improvement, the problems facing the Wallkill Police Department are no longer those of a department the Attorney

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<sup>26</sup> After termination of the Consent Decree Wallkill could still choose to let the State Police handle certain serious crimes; it just would not have to as it does now.

General concluded had run amok or whose members had systematically engaged in unconstitutional and abusive practices.

The Monitor's expectations of the Town and the Department in the next nine months include:

- Adherence to the principles of constitutional, respectful policing, and credible discipline for violations of those principles.
- Speedy hiring of an excellent Deputy Chief.
- Formulation of a definite, workable plan for a permanent and professional stationhouse in the near future.
- Successful conclusion of contract negotiations.
- Maintaining a full complement of sergeants and police officers.
- Effective supervision by the sergeants and conscientious and careful review of paperwork and videotapes.
- Determining the cause(s) of the incomplete videotaping of various incidents and fixing those problems.
- Generally determining civilian complaints within 60 days, while maintaining quality investigations.
- Negotiation of a transition agreement with the State Police that allows the Department to handle a greatly increased number of felony cases, in advance of the end of the Consent Decree.
- Imaginative and helpful early intervention services for those identified in the early warning system process.

- Objective, complete, and timely evaluations, with the Chief making such revisions and additions, as may be required, before the evaluations are presented to the members being evaluated.
- Training that covers all the topics required by the Consent Decree.