



# **POLICE REVIEW COMMISSION**

## **POLICY REPORT:**

# **EVIDENCE THEFT WITHIN THE BERKELEY POLICE DEPARTMENT**

APPROVED OCTOBER 12, 2007  
BY THE SUBCOMMITTEE ON EVIDENCE THEFT ISSUES

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## TABLE OF CONTENTS

I.	PREAMBLE.....	4
II.	ACKNOWLEDGMENTS. ....	5
III.	INTRODUCTION.....	6
	A. Legal Authority: Berkeley Municipal Code, Chapter 3.32.010, Police Review Commission Ordinance	
	B. Objectives of the Subcommittee Investigation	
	C. Not a Personnel Investigation	
	D. Limitations of Investigation	
IV.	OVERVIEW OF INVESTIGATION.....	8
	A. City Manager directive	
	B. Formation of Subcommittee	
V.	FACTS.....	10
	A. Cary Kent: 18 year veteran of Berkeley Police Department	
	B. Sergeant Kent’s responsibilities	
	C. Theft of narcotics from Property Room	
VI.	EARLY WARNING SIGNS.....	13
	A. Officers noticed problems/early warning signs	
	B. Officers who suspected substance abuse	
VII.	MANAGEMENT RESPONSE.....	15
	A. Captain Gustafson’s supervision of Sergeant Kent	
	B. Performance Evaluations	
	C. Reasonable Accommodation	
	D. Conflict of Interest	
VIII.	THEFT OF MONEY FROM SUSPECTS.....	18
IX.	MONITORING OF EVIDENCE ROOM/DRUG VAULT.....	19
X.	CRIMINAL INVESTIGATION OF EVIDENCE THEFT.....	20
XI.	FINDINGS.....	22
XII.	RECOMMENDATIONS.....	24
XIII.	EXHIBITS	
	A. Timeline of Incident	
	B. Observations of Sergeant Kent	
	C. Chief Hambleton’s interview transcript	

- D. Memorandum to Mayor and City Council dated April 14, 2006
- E. Memorandum to Police Review Commission dated April 19, 2006
- F. Letter from Berkeley Police Union dated April 26, 2007
- G. Newspaper articles

#### H. APPLICABLE LAW AND POLICIES

- 1. Health and Safety Code, Section 11550
- 2. Penal Code Section 487
- 3. Penal Code Section 503
- 4. City of Berkeley Drug-Free Workplace Policy
- 5. Reasonable Accommodation Policy
- 6. Performance Evaluation Policy

#### I. BERKELEY POLICE DEPARTMENT POLICIES

- 1. General Order C-62: Subpoenas and Court Appearances
- 2. General Order D-4: Special Enforcement Unit (SEU)
- 3. General Order E-13, Complaint Intervention – Early Warning System
- 4. General Order P-26: Personnel Complaint Procedure and Disposition and the Internal Affairs Bureau
- 5. General Order P-28: Performance Appraisal Report
- 6. General Order P-65, Procedures for Care and Handling of Property Evidence
- 7. General Order R-4: Responsibility and Accountability of Delegated Authority
- 8. Police Regulations, Chapter 4: Duties and responsibilities of the Ranks and Department Organization
- 9. Asset Management Manual
  - a. Chapter 1 – Property Room Procedures
  - b. Chapter 2 – Special Enforcement Unit Procedures
  - c. Chapter 3 – Property Room/Asset Seizure Account Codes
  - d. Chapter 4 – Asset Management Process

## I. PREAMBLE

While the Police Review Commission has investigated hundreds of incidents of individual allegations of police misconduct over its 34-year history, rarely has a single case had such an impact on the public trust as the case of former Sergeant Cary Kent. The possibility that a sworn and armed officer was not only working while under the influence of narcotics, but that he was able to steal drugs from what should have been the most secure location in Berkeley, cast a shadow of doubt on the entire department. Revelations six months later that theft from the department continued to be a problem further shook the public confidence.

The Police Review Commission (PRC) established the Subcommittee on Evidence Theft Issues. The following report represents a review, not of individual officer conduct, but of systems within the department that provide for the security of drug related evidence and accountability for the officers and supervisors who manage these cases. The basic questions for this report focused on identifying these systems and evaluating their effectiveness in addressing these issues.

While some have characterized this investigation as simply a policy review, it must be remembered that policies are only one part of the systems required to effectively manage a police department. Well-written policies are useless without thorough implementation, training, assessment and supervision of the employees charged with implementing the policies. In addition, policies of the police department require interaction between the Berkeley Police Department (BPD), PRC, the City Auditor, the Finance Department and the City Manager. It is hoped that this report will provide insights as to areas where interagency coordination could be improved for the benefit of the citizens of Berkeley.

The purpose of this report is not to place blame or to accuse individual employees of the City of Berkeley. Former Sergeant Kent served the City honorably for many years. The personal failings of one individual may be forgiven. The systemic failure of a department to identify and remedy major lapses in security, personnel management and administration must be addressed immediately. The hope is that those who read this report will understand that a systemic failure of this magnitude represents an urgent need for improved management, and will work to address the findings in this report.

## **II. ACKNOWLEDGEMENTS**

This report is a collective effort by the citizens of Berkeley. Subcommittee Chairperson William White, Commissioner Sharon Kidd, Commissioner Sherry Smith, and community members Jim Chanin and Andrea Prichett spent countless hours conceptualizing the investigation's areas of concern, pouring over 800 pages of the police report, writing various pieces and meeting monthly to analyze the evidence. All the Subcommittee members were highly committed to contributing their insight and making thoughtful findings and recommendations.

PRC Investigators Fred Vides and Barbara Mann gathered evidence on narcotics symptoms and detection, lupus, summarized officer interviews and conducted research on the court cases.

Maritza Martinez and Rebecca Webb assisted in coordinating the Subcommittee meetings, copying and collating the report.

U.C. Berkeley interns Stephanie Ahn and Melodie Yashar read through the reports and provided interview summaries, news stories and additional questions.

James Mason of the City's Human Resource Department provided an historical City perspective on drug testing.

### III. INTRODUCTION

#### A. **Legal Authority: BMC, Ch. 3.32.010, Police Review Commission Ordinance (Section 1 and 10b selected)**

Section 1. The general purpose of this chapter is to provide for community participation in setting and reviewing Police Department policies, practices and procedures and to provide a means for prompt, impartial and fair investigation of complaints brought by individuals against the Berkeley Police Department. (Ord. 4644-NS § 1, 1973)

Section 10 b. The Commission established by this Ordinance shall have the following powers and duties: to review and make recommendations concerning all written and unwritten policies, practices and procedures of *whatever kind and without limitations* (emphasis added), in relation to the Berkeley Police Department....

#### B. **Objectives of the subcommittee investigation**

The original intention of the Subcommittee was to identify policies related to the handling and storage of drug evidence, money, and evidence related to drug cases and to evaluate whether these policies were adequate to provide proper management and to prevent irregularities such as mismanagement or even theft in the future. As the Subcommittee's investigation progressed, it became clear that policies related to the supervision of officers, personnel policies, early detection of problematic behavior as well as policies directly related to the handling and auditing of physical evidence also required some examination. This report addresses some of our findings and recommends policy changes as well as additional actions to be taken by the City Council.

#### C. **Not a personnel investigation**

The Subcommittee believed the investigation should focus on a policy review and not a personnel investigation. First, Government Code §3304, which states that investigations of peace officers must be completed within one year, had already expired, so the issue would have been moot for any disciplinary recommendations. More importantly, there were no specific allegations of misconduct against any specific officer remaining in the department.

In February of 2007, the PRC voted to open an investigation into BPD's evidence theft issues as a policy complaint. The subcommittee believed that the larger issue was not about officer misconduct or a failure of any one individual, but that a policy review of the incident would render lasting impact and guidelines for command staff to consider in dealing with similar evidence theft issues.

#### D. **Limitations of investigation**

The Subcommittee attempted to gather further information by interviewing members of

the department with direct experience in the handling of evidence and the prosecution of drug related cases. Although one officer was interviewed, this process was abandoned after objections from the Berkeley Police Association (BPA). The BPA's attorney wrote to Chief Hambleton and threatened to sue the City if officers were interviewed about this incident. The objections raised were connected with the recent California Supreme Court decision in *Copley Press Inc. v. Superior Court*, (2006) 39 Cal.3d 1291 and the *Berkeley Police Association v. City of Berkeley and City of Berkeley Police Review Commission* ACSC No. 2002 057569, which has essentially suspended the hearing of complaints in Berkeley.

Despite the assurance that information gathered by the Subcommittee was specifically related to evaluation of policies and procedures within the department, and the fact that no discipline issues were being investigated, the Subcommittee was forced to desist from its effort to interview officers. The Subcommittee believes that not being able to interview officers concerning the incident was a major setback to the investigation, because the Subcommittee could not obtain follow-up information that was lacking from the police report. The PRC Ordinance states that the Commission can review BPD policies *without limitation* (emphasis added).

The Subcommittee believes that the Chief of Police and the City Manager should have ordered the BPD to have individual officers appear for interviews so long as there was a clear understanding that such interviews would only further policy development and would not constitute an investigation of individual officers. The City Manager and BPD Chief Hambleton took the position that line officers could not contribute to policy development since policy was set by the Command Staff and the City Manager. The Subcommittee believes otherwise. While these officers do not make policy, their insight is extremely helpful towards suggesting needed change. The failure to have these officers provide their perspective is unfortunate and this information would have been beneficial to the City of Berkeley.

The Berkeley Police Association's reaction was unfortunate, but characteristic of its critical attitude toward the concept of civilian review in general and the Police Review Commission in particular. The citizens of Berkeley have every right to suggest policy changes for their own police department, as civilian control of the military and the police is a cornerstone of democracy. It is very unfortunate that individual police officers either refused or were prevented from providing their perspective as to why these incidents took place and how they could be prevented or minimized in the future.

## IV. OVERVIEW OF INVESTIGATION

### A. City Manager directive

In April of 2006, City Manager Phil Kamlarz issued a memorandum to the PRC to inform them that the Peace Officer Standards and Training (POST) would conduct an independent review of BPD's narcotics-handling procedures. Mr. Kamlarz advised that the appropriate role of PRC was to review and comment on the POST recommendations. Our suggestions regarding the POST recommendations are included in this report and none of the report's recommendations were opposed by the Subcommittee. They are a good first step toward regaining control and providing accountability.

### B. Formation of Subcommittee

On May 24, 2006, the Police Review Commission voted to approve the formation of a Subcommittee to examine the department's investigation of Sergeant Kent and report back to the full Commission. On September 13, 2006, in light of the second criminal investigation involving the theft of evidence, the Commission voted to accept the Subcommittee's proposal to expand its purpose by reviewing evidence theft problems within BPD.

The Subcommittee examined the police report related to the investigation of Sergeant Kent (#06-3074). In addition, the police report for the investigation of Officer Steve Fleming (#06-41966) was also reviewed. On May 3, 2007 Chief Hambleton met with the Subcommittee and answered questions from Subcommittee members. City Auditor Anne-Marie Hogan also met with the Subcommittee in order to identify information that the Subcommittee would need in order to understand the processing of assets seized and booked into evidence and to review the effectiveness of policies regulating these transactions and the handling of such evidence.

The Subcommittee made oral and written requests to Chief Hambleton for documents and information related to the investigation. Our written communication dated April 23, 2007 included a request for the following information:

- A total inventory of the missing drug evidence including quantities as measured in grams, ounces, etc.
- A copy of the CRIMES database as well as the results of any audits or inquiries made about the CRIMES database or any investigations or inquiries concerning theft or loss of evidence in the BPD's possession.
- Any audits, policies or procedures related to maintaining an asset forfeiture account of any kind,
- Any policies related to the processing of drug evidence, other property or cash seized in drug arrests or from any arrests,

These requests for information were not honored and the Subcommittee believes that greater cooperation would have increased the quality of our inquiry and the value of this



report in terms of recommending policy changes and identifying areas of concern for the department and the City.

A basic assumption of the department's investigation of the evidence tampering was that the missing drugs were being used by Sergeant Kent to supply his personal addiction to drugs. He was the only identified suspect in the investigation. During the time of the investigation, the City of Berkeley had a 1988 resolution adopted by the City Council, which prohibited the City from conducting any drug or alcohol testing on any of its employees, except the federally mandated drug testing required by the Department of Transportation regulations for commercial drivers. On June 26, 2007, the City Council repealed the law prohibiting drug testing of City employees.

Although Sergeant Kent's suggested addiction to drugs was never independently confirmed, court records show that he participated in the Continuing Care Program at the John Muir Behavioral Health Center for Recovery.

Without knowing the total amount of drugs missing, the possibility that the amount of missing drugs was more than what would have been required to supply one addict can not be ruled out. It is important to note that, in addition to 286 tampered envelopes, it was also discovered that Sergeant Kent purchased drugs at least 2-3 times per week from informants (BPD Report #06-3074 Supplemental Report pg.3 and Interview with CRI #1 January 31, 2006).

If the quantity of drugs missing, plus what he purchased, is greater than what one drug addicted person could consume, the question remains as to what happened to the rest of the drugs. As Inspector Scarlett #214 wrote in his Affidavit for Search Warrant, " I believe, based on the facts above, that any evidence removed from sealed BPD drug evidence envelopes could be sold, traded, provided to others, or used by Sergeant Kent #S24".

Were these drugs consumed or did they leave the department? Were other individuals with access to the drug locker also involved in removing drugs? To the Subcommittee's knowledge, these troubling questions remain uninvestigated.

## V. FACTS

### A. Cary Kent: 18 year veteran of Berkeley Police Department

Cary Kent, 55 years old, was a Sergeant in the Administrative Narcotics Unit of BPD. He worked for approximately eighteen years before retiring in March of 2006. He enjoyed baseball and would attend games with fellow officers. He coached Little League, was a swim team judge and, in 1997 he competed in the U.S. Masters Swimming Men's competition and finished among the top five.

Chief Hambleton stated he "earned a reputation as being a very thorough, very, very good investigator. He had....a number of informants. He seemed to be getting very good information on cases." Sergeant Kent taught officers how to conduct surveillances of drug dealers and drug pushers.

### B. Sergeant Kent's responsibilities

Sergeant Kent worked as the Administrative Narcotics Sergeant. His responsibilities included retrieving narcotics envelopes from the drop safe in the SEU (Special Enforcement Unit) office and the Property Room. His duties also included making certain that evidence was properly entered into the CRIMES database. He was also expected to note the chain of evidence when he picked up the evidence from the drop safe and process it so that it could be ready for use as evidence and that the evidence could be located when needed.

Sergeant Kent was also required to check the court board to see what cases were going to court, so that he could know which officers need certain evidence. He was supposed to check the SEU box to determine what cases had been charged. On parole violation cases, he was expected to take those envelopes to the lab and have the narcotics tested. It was Sergeant Kent's responsibility to pick up the envelopes from the lab and obtain the lab reports.

In an email dated July 8, 2006 Captain Gustafson outlined Sergeant Kent's responsibilities. The following list of responsibilities was sent to Sergeant Kent:

*I depend on you for these things:*

- 1. Processing, tracking, and storing all drug evidence.*
- 2. Reviewing drug evidence for in-custody cases, determining which cases should be lab tested, and insuring that the drug evidence is tested and returned prior to being needed in court.*
- 3. Being in the office and available to distribute drug evidence to officers who are called to testify, on the mornings that they are due in court. I would appreciate it if you were in the office by 0800 hours on these days to handle any problems, but*

*it is fine if you are in the office no later than 0830 hours. Officers should have their evidence and leave for court by 0845 hours to avoid having to return to the afternoon session.*

4. *Processing assets that are seized in SEU cases, and monitoring the forfeiture process.*
5. *Preparing the SEU monthly report by the 10<sup>th</sup> of each month.*
6. *Preparing other statistical reports related to the disposition of drug evidence as assigned.*
7. *Attending the Monday morning staff meeting.*
8. *Maintaining a liaison with the DA's office regarding SEU cases.*

*Work Schedule:*

*Monday-Thursday*

*Court days – 0830 to 1830*

*Non-court days – no later than 0930, please, without prior approval.*

*Please don't flex or take time off, without prior approval.*

*Availability:*

*Please be readily available by your departmental Nextel during your work hours. I usually don't have a need to contact you, but when I do, it is usually somewhat urgent, and related to court/evidence matters.*

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*If you have the time, working on these things would be a great benefit to the unit.*

1. *Participating in SEU operations (when it does not conflict with your other duties).*
2. *Interviewing prisoners to gather intelligence information.*
3. *Aggressive investigation and pursuit of financial assets that are associated with any SEU case.*

**C. Theft of narcotics from Property Room**

Sergeant Kent was scheduled to rotate out of the SEU in mid-January 2006. He had intended to conduct the scheduled drug burn that would have destroyed any evidence of drug evidence tampering. The January 6, 2006 audit of the evidence locker was in keeping with departmental policy (General Order P-65 section 100) that when a new

Property Officer is appointed, a joint inventory should be conducted.

Chief Hambleton explained that as a result of contradictory information about Sergeant Kent's physical fitness for duty, he decided to conduct the audit of the drug evidence locker.

According to Chief Hambleton, there is no written policy regarding what should be done if an officer fails to report for a physical examination. In fact, Sergeant Kent failed to report for a medical examination on several occasions. When he finally did report for his physical examination on December 28, 2005, he refused to submit to a blood test or an EKG and was deemed unfit for duty. Additional medical clearance forms were faxed to the department on January 5, 2006 by Dr. Peterson, which cleared Sergeant Kent for administrative tasks. He was allowed to return to work to continue to process drug evidence envelopes for destruction.

On January 5, 2006, Captain Stephanie Fleming stated during the Captains' staff meeting that she had serious concerns about Sergeant Kent, who had been the subject of discussion for the previous months.

On January 6, 2006, former BPD Sergeant Kent was placed on administrative leave due to BPD's preliminary audit that discovered that evidence envelopes in the property room had been tampered with. After Lt. Cynthia Harris and Inspector Mark Scarlett, from the District Attorney's Office, conducted an investigation, Sergeant Kent was charged with grand theft by embezzlement, possession of methamphetamine and possession of heroin. On January 13, 2006, the Berkeley Police Department issued a press release regarding the initiation of an investigation into "irregularities in the handling of some evidence."

In March of 2006, Sergeant Kent retired from BPD. On April 18, Sergeant Kent pled guilty to all three counts. Judge Don Clay sentenced Sergeant Kent to five years probation and one year in county jail, which Sergeant Kent completed through the Contra Costa County Sheriff's alternative custody program (electronic home detention). Sergeant Kent provided no statement to investigators regarding the issues of missing drug evidence or his activities while employed by BPD.

On May 12, 2006, the police report on the investigation of Sergeant Kent's activities was made public. Based on this report, the Police Review Commission (PRC) began its inquiry.

## **VI. EARLY WARNING SIGNS**

### **A. Officers noticed problems**

1. Twenty-one (21) officers noticed that Sergeant Kent had problems. (See Exhibit B, Observations of Kent). Most officers observed that Sergeant Kent gained weight. Other comments concerning his health and behavior included:
  - “sweat,”
  - “eyes had dark circles,”
  - “sallow look,”
  - “unkempt,”
  - “falling asleep,”
  - “tired,”
  - “depressed,”
  - “eyes bloodshot,”
  - “withdrawn,”
  - “appearance disheveled,”
  - “less reliable,”
  - “tore up,”
  - “sniffles frequently, long lasting symptoms of a cold,”
  - “extremely talkative,”
  - “behavior erratic,”
  - “wore old clothes,” and more.
2. Officer Bjeldanes stated that on a Saturday at about 1:40 am, he and Officer Smith saw Sergeant Kent in the department parking lot behind the Public Safety Building. Officer Smith asked Sergeant Kent what he was doing; Sergeant Kent said he was getting ready for a purge of the dope. Ofc. Bjeldanes said he was shocked at Sergeant Kent’s appearance and he looked “weird.” Ofc. Bjeldanes said, “...it would be like if my mom told me that she was a heroin addict...I mean if that’s what it is...everything about that stuff and what it does to you and how it brings you down and makes you a criminal and makes you do stupid things like rob banks. And I mean for him to do that I can’t, I can’t imagine.”
3. Twelve officers (12) stated that Sergeant Kent had been late or missed appointments when he was responsible for bringing tested narcotics evidence into court. Sgt. Reece stated that all the officers he supervised complained about not getting drugs to court on time. Some officers called Sergeant Kent at home to wake him up. Sergeant Kent typically had some excuse. Consequently, officers had to stay in court until the afternoon. Some criminal cases were affected because the evidence was not tested.
4. Nine (9) officers stated that Sergeant Kent was either late to work, worked different hours or did not show up at all. He missed meetings, his door was shut, and some officers reported that they did not know if he was even in his office. Ofc. Parsons noticed Sergeant Kent working midnight to around 6:00 am. Officer Friedman said Kent would show up on weekends or later at night and he would be gone for long

“chunks of time throughout the day. Officer Friedman further stated, “Over time, it was generally understood that Kent was not going to be around.”

5. Twelve (12) officers reported these complaints to their supervisors, who then reported these issues to Lt. Yuen and Capt. Gustafson.

## **B. Officers who suspected substance abuse**

Although several officers noticed that Sergeant Kent had health issues and poor work performance, four officers actually suspected substance abuse. Each officer, who suspected that Sergeant Kent might have had a substance abuse problem, told a colleague or supervisor, thus giving notice to the chain of command. Despite these four separate incidents of suspicion, the Chief was never informed and did not suspect any drug abuse until November of 2005 (*Statement of Chief Hambleton pg. 5*).

1. In spring of 2005, Lt. McBride expressed concern to Capt. Gustafson that Sergeant Kent’s physical changes might be related to drug use.
2. In the summer of 2005, Captain Fleming suspected that Sergeant Kent might be using drugs. She asked Captain Gustafson and Lt. Yuen whether they suspected the possibility of drug abuse, given his position and responsibilities in the department. They did not believe so.
3. Detective Jack Friedman stated that it crossed his mind that Sergeant Kent might be using drugs due to his weight gain and different behavior. He stated that although some officers speculated that Sergeant Kent was sick, it was clear that something was wrong outside of work pressures.
4. Officer Katie Smith stated she saw Sergeant Kent around 1:40 am one night in December of 2005 and was surprised to see that Sergeant Kent changed significantly from the last time she saw him a year before. She gave him her telephone number to offer him support. When asked why she gave her phone number, she said she was concerned and “Because it looked to me like he had (been) abusing alcohol or drugs. Not particularly that night, but his appearance.” Officer Smith then told fellow Officer Jennifer Wilson with the intent that Officer Wilson would inform her husband, Officer Brian Wilson, which she did.

## **VII. Management Response**

Under City of Berkeley Administrative Regulation 2.3, permanent employees are to have performance evaluations conducted on an annual basis. Section 2A.3 states that “Terminating or reassigned supervisors shall make every attempt to complete all performance evaluations due for employees up to and including the month they will be leaving the City service or their previous assignment...”

### **A. Captain Gustafson’s supervision of Sergeant Kent**

1. When Captain Gustafson took over the unit in January of 2005, he immediately began to notice Sergeant Kent’s performance problems. Capt. Gustafson noticed during the first month that Sergeant Kent was adjusting his schedule and did not look well. He decided to monitor his behavior and noticed that Sergeant Kent was not at work when expected, not involved in any active investigations, and not always available during morning hours to give the officers needed narcotics evidence for court.
2. Around April, Capt. Gustafson spoke to Sergeant Kent about his deficient work performance. Capt. Gustafson inquired about Sergeant Kent’s health, but Sergeant Kent said he could not talk about it. Capt. Gustafson noticed minimal improvement in Sergeant Kent’s performance following the conversation.
3. As early as May 2005, Sergeant Kent was believed by Capt. Gustafson to be “flatly unreliable” for his failures to attend to his duties and answer his cell phone. He spoke with Sergeant Kent at that time about his poor job performance.
4. On July 8, 2005, Capt. Gustafson sent an electronic message to Sergeant Kent to discuss these concerns, follow-up on previous discussions about deficient performance, and outline his responsibilities and what needed to be improved. The email listed Sergeant Kent’s required hours of attendance and additional activities that Captain Gustafson believed Sergeant Kent should be performing. (See pages 10-11 of this Policy Report).
5. It took Capt. Gustafson about four months to talk to Sergeant Kent about his performance and six months to issue a written directive on Kent’s performance, despite eight officers who complained to their supervisors about Sergeant Kent.

### **B. Performance evaluations**

1. It is unclear if Lt. Yuen or Captain Gustafson completed any formal evaluations of Sergeant Kent’s work or if, according to department policies, a formal process with a timeline for meeting performance standards was required. Captain Gustafson has described himself as a “personal friend” of Cary Kent’s and this may be a factor in understanding why, despite numerous complaints and concerns about job performance, Sergeant Kent was allowed to continue in his position without interruption.

2. Inspector Scarlett asked Capt. Gustafson whether a performance evaluation had been completed prior to Capt. Gustafson taking over the unit in January 2005. He stated, "I don't know how Allen (Lt. Yuen) manages those." (Interview Transcript of Capt. Gustafson, Page 14) "Usually those things are done informally person to person where you discuss problems in the unit or problems with people or something like that."
3. According to the Chief, "...supervisors are supposed to let us know if they get informal complaints about an officer, we review officer's attendance records...Individual supervisors are responsible for monitoring their employees and bringing the issues about the performance to our attention". It is not clear what happens when an officer is identified as not meeting performance standards.

### **C. Reasonable accommodation**

Since Sergeant Kent explained that his lacking job performance was due to a medical condition, and given the serious nature of his responsibilities, Lt. Yuen or Captain Gustafson could have inquired whether Sergeant Kent required reasonable accommodation. When a City employee has a "known physical or mental impairment that limits a major life activity that prevents them from performing the essential functions of their job classification," the Americans with Disabilities Act (ADA) and the California Fair Employment and Housing Act (FEHA) allow the employer to modify or adjust their duties, work environment or schedule to accommodate the employee.

Here, 21 officers noticed Sergeant Kent had health problems and 12 officers noticed poor work performance. Under the City's Reasonable Accommodation policy, Sergeant Kent would be required to bring a medical notice concerning his condition to determine if he was "fit for duty."

In December 2005, Sergeant Kent was ordered to take his annual physical examination, which is required of police officers. The problem here is that officers noticed problems beginning in 2005. Captain Gustafson stated that when he took over the SEU unit, he heard that there were problems with Sergeant Kent, but he did not realize how serious these problems were.

The failure of BPD officers, particularly supervisors, to intervene given their observations of Sergeant Kent is unacceptable. Even worse, Chief Hambleton admitted to the Subcommittee that:

1. Not all officers, even those in narcotic enforcement, are trained to recognize people who are under the influence of narcotics;
2. Officers are not trained to tell their supervisors if they see an officer who is unable to perform his or her duties;
3. Officers are not trained to report another officer when he or she feels the officer is



medically compromised; and

4. There is no computerized early warning system or any written materials or early warning system as exists in other cities such as Oakland and San Francisco. As a result, the subcommittee believes there is a need for policy development in this area and has provided for specific recommendations elsewhere in this report.

**D. Conflict of interest**

Sergeant Kent had several close friends within the department. Lt. Ahearn considered him a “personal friend.” (Interview transcript: Lt. Ahearn, page 2) In 2005, Sergeant Kent went to baseball spring training with Capt. Gustafson, former Officer Lopes, and Lt. Ahearn.

Officer B. Wilson stated that he worked with Sergeant Kent for about 3 years. Around 2003, Officer Wilson stated that everything seemed okay with Sergeant Kent. Around 2004-2005, he said, “Then I started noticing something going worse and worse and worse. Then when Captain Gustafson came in there, he seemed to have gotten really bad and that’s when I thought he was taking advantage of his friendship with Captain Gustafson.” Officer Wilson states that Sergeant Kent was counseled and he “got better...And then Al (Lt. Yuen) came back in he just reverted back to how he was before with Captain Gustafson.”

### **VIII. Theft of Money From Suspects**

1. In January of 2006, former BPD Officer Steven Fleming was investigated for stealing money from individuals whom he had arrested or was responsible for transporting to jail. Chief Hambleton contacted the California Department of Justice to assist in conducting an investigation. During this time, the PRC was not yet made aware that a second evidence theft case concerning Officer Fleming was under investigation.
2. In September 2006, Officer Fleming was placed on administrative leave pending an investigation into allegations that he had stolen money. He left the department in February 2007. A police report was issued in this case of evidence theft (06-41966) and was used by the Subcommittee to expand its inquiry beyond a single review of the Kent investigation into an examination of evidence theft issues generally.
3. In March 2007, the District Attorney concluded that there was insufficient evidence to obtain a conviction of Officer Fleming and declined to press charges. Since the District Attorney did not file criminal charges against Officer Fleming, this report will not focus on this case, but use it in reference to two common themes of theft by police officers occurring around the same time frame.

Officer Fleming left the department and the Subcommittee finds it disturbing that six months after revelations of drug evidence theft, policies and actions by the department were not taken that could have secured and monitored evidence and assets.

## **IX. Monitoring of Evidence Room/Drug Vault**

1. Policies already exist that require monitoring of the evidence room. General Order P-65 issued May 27, 2005 established procedures for the inspection of evidence/property storage areas. These procedures include specific instructions on how often and how these inspections should be conducted. In addition, an automated property system was instituted in December of 2000. General Order P-65 describes procedures for auditing seized cash property as well as drug evidence. These procedures include monthly and quarterly audits in addition to requiring an inventory to be conducted by outgoing and incoming personnel when a new Property Officer is appointed. It appears that these policies were adopted but never implemented.
2. According to Chief Hambleton, "We did not do as thorough an examination of those envelopes as we should have...we did not hold the envelopes up to the light to inspect and see that there was no tampering with the edges" (pg. 7 Statement of Chief Hambleton). However, the Subcommittee was not provided with any written verification that any regular audits were conducted prior to January 6, 2006 or that audits included an examination of the records of property and cash received and booked into evidence by BPD and compared with the physical evidence stored in the evidence room.
3. The evidence room was not actually restricted due to failure of the keypad access system to track entry. The system stopped working as of September 8, 2005 and there are no logs of any entries either by access code or by key from that time. It is unclear who within the department is responsible for tracking entries into the drug vault or what action should be taken if unauthorized entry occurs.
4. In addition to processing drug evidence, Administrative Narcotics Unit Sergeant Kent was responsible for processing assets seized in drug related cases. In fact, although he was officially a signatory to the Asset Forfeiture accounts, he was able to make withdrawals without even a second signature being required. Despite repeated requests to the Chief of Police for information about related BPD procedures, the Subcommittee has not been briefed on how cash transactions were reconciled within the department. If officers booked cash assets into the CRIMES database along with drug evidence related to a particular case, it is important to determine if these assets were actually deposited into any of the (four) Asset Forfeiture accounts maintained by the city.
5. The City Auditor has conducted an audit of the asset forfeiture accounts held by the city, but it did not reconcile the deposits to these accounts with the amount of cash booked into the city as evidence in drug related cases. Although the audit raised important questions about the handling of funds, without a reconciliation between assets booked into evidence and assets deposited into various police-managed accounts, it is difficult to confirm how accurate these records are and how well they track the flow of these assets.

## **X. Criminal investigation of evidence theft**

1. According to Chief Hambleton, there is no standard for conducting “this type” of criminal investigation. Valuable evidence was not secured during this investigation in a timely manner. Immediately following the January 6, 2006 preliminary audit, access to Sergeant Kent’s office was monitored by a handwritten Entry/Exit log taped to the door of the office. This remained in effect until the locks were changed sometime later.
2. Sergeant Kent was placed on Administrative Leave on January 6, 2006. However, a search warrant for Sergeant Kent’s office and car was not issued until January 25, 2006. A search warrant for Sergeant Kent’s computer was not issued until February 17, 2006. The last call Sergeant Kent made before he turned in his department-issued cellular telephone was to a known drug dealer and informant (Search Warrant No. 2006-0098, January 25, 2006, Statement of Probable Cause, pg. 7). Therefore, it appears that evidence in this case was not secured in a timely fashion.
3. The CRIMES database was not “backed up” and secured when it became known that there were discrepancies in the evidence room inventory. An audit was done by Sgt. Reece, Captain Fleming and Lt. Yuen. Because this was a criminal investigation, the Subcommittee believes that this database should have been copied and this evidence should have been secured to safeguard against alterations.
4. 4. Amount of drugs missing has not been disclosed. Although the number of envelopes was determined to be 286, the amount of drugs contained in these envelopes has not been revealed or is not known. Inventories of drug envelopes were incomplete and failed to list quantities of missing drugs for all of the envelopes. For example, the evidence bag labeled -SEAL BROKEN.LISTED AS MULTI BAGS INSIDE INSIDE BAGS NOT SEALED.NO EVID TAPE.CONFIRMED (3 BAGS INSIDE & 4 LBS LOOSE seems to raise more questions than it answers. The theory that all missing drugs were used to supply the drug habit of one officer does not explain why, in addition to a large number of heroin and methamphetamine envelopes, drugs such as cocaine, amphetamine, vicodin, ecstasy, oxycontin, and methedrine and numerous envelopes containing “pills” were also missing or tampered with.
5. No other individuals were investigated or regarded as possible suspects despite the fact that (at least) five other officers were authorized to enter the evidence room and the fact that that entry to the evidence room had been unregulated since September 2005.
6. The Subcommittee has not been provided with documents related to an audit which the Chief directed Sgt. Curtin to perform on January 27, 2006. Although the City Auditor has done an audit at the request of the Subcommittee, the funds examined were not reconciled with records of cash evidence seized by the department and deposited into the asset forfeiture accounts. The Subcommittee would be better informed if the Chief would provide the results of Sgt. Curtin’s audit and share what was learned about the asset forfeiture accounts at that time.

7. When it became clear that criminal conduct had occurred, Sergeant Kent was given preferential treatment that may have endangered himself or others. It also potentially gave him time to destroy evidence. He was not taken into custody and his gun was not taken despite the fact that other officers were concerned that he might be so distraught that he could pose a threat to himself. His badge was not taken and there are interviews from which it can be inferred that he was later able to represent himself as an officer while participating in drug deals.
8. There is no written policy regarding restricting officers who are placed on administrative leave from accessing their computers. According to the Chief, this is done on a “case by case” basis.

## XI. FINDINGS

**Finding #1: Systems for auditing of drug evidence were not adequate to detect unauthorized removal of drugs from the evidence locker.** Systems for monitoring access to drug storage locations were also inadequate and the evidence was not properly secured. Although policies and procedures exist, they were not implemented and monitored regularly. Revised policies have been drafted by BPD (Asset Management Manual, August 27, 2007) but do not yet reflect input from other agencies.

**Finding #2: The police investigation of the Sergeant Kent case was insufficient.** Valuable evidence was not secured in a timely fashion, and no other individuals were investigated to determine what, if any, knowledge or involvement they may have had in the illegal movement of drug evidence. Police made no effort to determine whether Cary Kent was involved in illegal drug dealing after he was placed on Administrative leave.

**Finding #3: Systems for tracking and monitoring the movement of assets (cash evidence) seized by police in drug and non-drug related cases are inadequate.** The potential for mishandling of these funds was high and the same officer responsible for booking cash evidence was also responsible for making deposits and was able to make withdrawals from asset forfeiture accounts without detection or intervention from the Finance Department, the City Auditor, the City Manager or the Chief of Police. All of these agencies are involved in the management and dispersal of seized assets and police accounts.

**Finding 4#: Systems for evaluating job performance by employees were unable to identify and correct the poor job performance of Sergeant Kent.** Although his supervisors were aware that he was physically challenged in his position and “flatly unreliable” in executing his responsibilities, this information did not lead to early intervention.

- a. There is no written policy regarding what action should be taken if an officer is consistently late to work or to meetings. Officers routinely had to call Sergeant Kent in order to directly ask him for help getting their evidence for court.
- b. There is no written policy requiring officers to report the fact that they are having problems getting their evidence from the evidence room in time for court. The Chief expected officers to notify their supervisors about such difficulties.
- c. While it is commendable that the Chief decided to proceed with the drug audit on January 6, 2006, no early warning systems related to suspicion of Sergeant Kent’s use of drugs or his poor job performance activated earlier interventions.

**Finding 5#: BPD supervisors were unable or unwilling to verify that Sergeant Kent was under the influence of narcotics while on duty at Berkeley Police Department.** Despite numerous observations, conversations and concerns expressed by other officers that it was possible that Sergeant Kent was using drugs, no intervention was made by command staff even though supervisors were aware of the problem for one year to 18 months prior to his being placed on Administrative leave.

**Finding 6#: Policies do not currently exist to require BPD officers to:**

- a. Report misconduct by other officers
- b. Report when they suspect that an officer is under the influence of drugs or alcohol
- c. Receive advanced training in detecting individuals who are under the influence of drugs as a prerequisite to transfer into the Special Enforcement Unit (Drug Task Force) or to making arrests of individuals charged with Health & Safety Code Sec. 11550.

Even though officers can sometimes be misled as to whether a person is under the influence of heroin or methamphetamine, the fact remains that officers are authorized to arrest people who are under the influence of such controlled substances (See Health & Safety Code Sec. 11550). These offenses carry stiff consequences including county jail and even state prison for people who are on parole. Police with such powers who are inadequately trained and claim that they are unable to recognize an officer under the influence of drugs, should not be allowed to arrest others (citizens) for that same offense and send them to jail. While recognition of drug intoxication will never be an exact science, officers must receive all available training in recognizing drug intoxication so long as our current narcotic laws remain in effect.

**Finding 7#: The current systems of accountability for the conduct of police have been reduced/compromised.** The ability of a city to monitor the performance of its department requires a coordinated approach between the City Manager and the Police Review Commission. The Evidence Theft Subcommittee did not receive adequate access to information, documents, and other information crucial to the investigation. Police accountability is dependent upon access to information. In addition, the ability of the commission to investigate the effectiveness of policies requires that the Commission be able to evaluate policy with the assistance of information and experience provided by officers and BPD personnel responsible for implementing these policies. Currently, the PRC has been prevented from meeting with BPD officers and making inquiries necessary to monitor the impact and effectiveness of policies.

## XII. RECOMMENDATIONS

### **Recommendation For Finding # 1: Systems for auditing of drug evidence were not adequate to detect unauthorized removal of drugs from the evidence locker.**

- a. Require that Chief of Police report to the City Council on the implementation of General Order P-65, recommendations from POST committee, newly drafted Property Room Procedures and an overall action plan to ensure that drug evidence and assets seized by the Berkeley Police department are secure. Chief of Police should also provide quarterly audit reports to the City Council and Police Review Commission for review. An interagency protocol for monitoring drug evidence and related assets (based on the Asset Management Manual, August 27, 2007) should be written and submitted to related agencies for comment and revision (including the Police Review Commission).
- b. BPD should hire an outside auditor to examine the CRIMES database and design a system for generating detailed accounts of the quantities of drugs and assets seized by police. Monthly asset reports should be made public. This database should be available for inspection by members of the public and Police Review Commissioners
- c. Train interagency group with members from Finance, Auditor, City Manager, Police Department and any other agencies or individuals involved in processing or accounting for evidence in drug and asset tracking procedures. These should include but not be limited to reconciling seized assets with deposits into police/city accounts, tracking the status of individual cases including the status of court proceedings to promote consistency and to enable members of the public whose assets have been wrongly seized to recover their assets with due process and efficiency. In addition, written criteria for seizures of cash in drug and non-drug related cases should be established along with procedures for distributing unclaimed assets and returning assets to arrested individuals shall be established and made public.
- d. Identify who is responsible for monitoring entry into secured drug storage areas and chain of command related to unauthorized entry into these areas. A hard copy verifying the amount of drugs and/or assets should be created and signed by the responsible officer at the time of booking evidence into custody.
- e. Require the Chief of Police and City Manager to create a timeline and action plan for implementing relevant policies and procedures and providing necessary training to involved staff.



**Recommendation For Finding # 2: The police investigation of the Kent case was insufficient.**

- a. Police Department should identify policies and training information related to securing crime scenes and evidence. Review these policies and provide to the PRC.
- b. Preserve all documents related to the security and handling of drug evidence and seized assets and provide these to the PRC.
- c. Identify the EXACT amount of drugs missing from the evidence locker.
- d. Remove from the SEU and replace as soon as possible any officers who had access to the drug vault when Sergeant Kent was Administrative Narcotics Sergeant.

**Recommendation For Finding # 3: Systems for tracking and monitoring the movement of assets (cash evidence) seized by police in drug and non-drug related cases are inadequate.**

- a. Chief of Police should ensure that monthly statements of drugs and assets seized by BPD officers be made available to the PRC each month. Prioritize this measure until processes for reporting are well established.
- b. City Auditor should provide monthly bank statements to PRC regarding deposits made into police related accounts. These accounts must be reconciled with assets booked as evidence and monthly reconciliation of these accounts should take place.
- c. The Police Department should not be responsible for banking and should operate no accounts. All police spending must be approved and conducted through the office of the City Manager and the City Auditor. Expenditures beyond what has been allocated through the City's budgeting process should be authorized by the City Manager and the City Auditor. Release of assets should be documented and verified by the City Manager and City Auditor.
- d. The City Manager should be responsible for creating (interagency) procedures for processing assets including:
  - 1. Criteria for confiscating assets.
  - 2. Standards for ensuring and crosschecking amounts seized.
  - 3. Policies describing when and by what process assets shall be returned to members of the public.
  - 4. Process for correlating cash and drug evidence with case numbers.
  - 5. Descriptions of all assets forfeiture related accounts and criteria for making withdrawals from these accounts.

**Recommendation For Finding # 4: Systems for evaluating job performance by employees were unable to identify and correct the poor job performance of Sergeant Kent.**

- a. Police supervisors should review existing personnel policies.
- b. Supervisors should provide written performance reviews annually. If an employee is no satisfactory in any criteria, a written performance review will be created that identifies the area for improvement and a plan and timeline for gaining compliance with these standards.
- c. Supervisors who fail to produce written performance reviews of employees should be disciplined or reprimanded.
- d. It should be the responsibility of the Chief of Police to ensure that supervisors are conducting performance reviews and addressing personnel matters in a timely fashion.
- e. The current BPD Early Warning System needs major revisions. It is limited only to intervention when an employee receives three formal complaints. Therefore, someone who works inside the Department and has little contact with the public, like Sergeant Kent, would not be identified by the current Early Warning System and would not be provided with the necessary intervention.

In Oakland, by contrast, the early warning system is triggered by a combination of many factors including (but not limited to) uses of force, officer involved shootings, traffic violations, firearm discharges, citizen complaints, civil suits, in custody deaths or injuries, Penal Code 148, 69 and 243 citations, and sick leave usage. The use of these criteria is far more successful in identifying officers who may need intervention.

Finally, the existing BPD Early Warning System appears to include identifying problem officers on the basis of unfounded complaints. This is manifestly unfair to officers and is probably illegal under existing California law.

**Recommendation For Finding # 5: BPD supervisors were unable or unwilling to verify that Sergeant Kent was under the influence of narcotics while on duty at Berkeley Police Department.**

- a. All BPD officers who take individuals into custody for violations related to the use of drugs should receive advanced training in detecting drug use.
- b. BPD officers should not be supervised by family members or personal friends when it is possible to find another officer to conduct this task. Conflict of interest should be avoided to the greatest extent possible. Under no circumstances should a police officer suspected of misconduct be investigated by a family member or personal friend. All investigators should sign a statement or form verifying that they are not related to or personal friends with the subjects of their investigations.

- c. BPD should develop training procedures that clarify policy and require that officers who suspect another of drug use become mandated reporters and report to the officer's supervisor as well as the Chief of Police.
- d. The development and implementation of drug testing policies and procedures subject to review by the Police Review Commission prior to implementation.

**Recommendation For Finding # 6: Policies do not currently exist to require that BPD officers report misconduct, report officers who are unfit for duty, receive training in drug detection:**

- a. The BPD should create a policy that requires officers to report misconduct by other officers.
- b. The BPD should create a policy to require officers to report when they suspect that an officer is under the influence of drugs or alcohol (see RECOMMENDATION 5c).
- c. Require that officers receive advanced training in detecting individuals who are under the influence of drugs as a prerequisite to transfer into the Special Enforcement Unit (Drug Task Force).

**Recommendation For Finding # 7: The current systems of accountability for the conduct of police have been reduced/compromised.**

- a. Direct City Manager to make information public and direct city staff (and the Police Department) to assist the public in accessing documents.
- b. Work with the Police Review Commission to review updated models of civilian review measures, including provisions of Oakland Police Department's consent decree ("Negotiated Settlement Agreement" United States District Court Northern District of California, Delphine Allen, et al., Plaintiffs, v. City of Oakland, et al., Defendants.) to increase the strength and ability of the Police Review Commission to fulfill its mission and responsibility to provide meaningful oversight of the police for the people of Berkeley.