

**Recommendation xx: When MPD receives a complaint against the Chief of Police or high-ranking MPD command staff, the Independent Monitor should review the complaint and decide whether an outside investigator should be appointed and produce a transparent public document about that decision-making process. If the PFC receives a complaint against the Chief of Police or high-ranking MPD command staff, it should consider retaining an outside investigator to conduct an independent investigation. In the absence of an Independent Monitor, the decision must be based on an objective evaluation process like just culture to establish an internal decision tree process. [OIR 145]**

**Discussion:** As OIR noted, “When a complaint is lodged against the Chief or high-ranking command staff of a police agency, it presents questions regarding how an investigation can be effectively and fairly conducted. Obviously, there are challenges for any such investigation to be undertaken objectively by the agency itself.” Due to the inherent conflicts of interest, in many municipalities, such a complaint is regularly assigned to an outside investigator.

The original OIR recommendation stated: “When the PFC [Police & Fire Commission] or MPD receives a complaint against the Chief of Police or high-ranking MPD command staff, it should consider retaining an outside investigator to conduct an independent investigation.” The Committee recognizes that some complaints might be frivolous or trivial, and do not require outside investigation.

But for a complaint submitted to MPD, inherent conflicts of interest would affect not just the capacity of the Department to conduct an unbiased investigation, but also its capacity to make an unbiased decision on whether an outside investigation was warranted. Command officers would have an inherent conflict of interest about whether to appoint an outside investigator to investigate themselves or one of their colleagues (i.e., you would be asking the people against whom the complaint has been lodged to decide whether it’s frivolous enough to not warrant an outside investigation).

Fortunately, the existence of an Independent Monitor could resolve this issue. The Independent Monitor could review the complaint and make a decision on whether an outside investigator should be appointed, and publicly document the decision-making process in a transparent fashion. In the absence of an Independent Monitor, the Committee believes that it would be necessary to build an objective evaluation process for making this decision – an institutional mechanism that would remove bias with a structured algorithmic analysis, so the decision was not just a personal opinion. Potentially, a decision tree process could incorporate factors such as whether the complaint alleged violation of a law or departmental policy (i.e., was alleging misconduct), whether it involved a potentially intentional or reckless act, whether an attorney of ordinary competence would recognize it as so lacking in merit that there is no substantial possibility that it would be sustained, etc.

A complaint could also be brought to the PFC. One major weakness of the current PFC process is that it provides no real mechanism to investigate the facts of a case prior to proceeding to hearing. Moreover, the complainant does not have appointed counsel whereas the officer is always represented by counsel, creating a difficult, asymmetric situation. As OIR notes: “The current mechanism provides no formal discovery process akin to civil litigation through which facts could be developed.... Instead of requiring a complainant to proceed to a hearing conducted by the PFC itself, as was recently undertaken, PFC could refer any such future complaint to an outside independent investigator. That way, facts could be collected efficiently and objectively, and PFC and the complainant could rely on the facts developed during the investigation resulting in a streamlined hearing process. There is precedent for such a process in Madison; in the 1960’s a complaint made by the [Madison Professional] Police [Officers] Association

against the Chief was referred out for an independent investigation.” As Mike Gennaco of OIR further explained: "I do think there is an advantage to telegraphing to the PFC that when there is an allegation against the Chief, it shouldn't necessarily be processed by the complainant, which is what has happened the most recent couple times that there have been complaints against the Chief. The citizen who makes a complaint has either had to hire counsel or find counsel to go forward and there wasn't any outside investigator collecting the facts.” Using outside investigations should enable fairer and better-informed adjudication by the PFC. (Note also that this recommendation works in tandem with the Committee’s recommendation #1 to improve the PFC process; Recommendation #1 urges the City to create the office of the Independent Monitor with authority to appoint counsel for individuals who have brought potentially meritorious complaints to the PFC.)

The Ad Hoc Committee thus adopted a modified version of the original OIR recommendation. The MPD representative present for the Committee’s deliberations expressed no opposition to this recommendation. MPD did note that currently, it elects, on occasion, to request that an outside agency perform an investigation or review of a complaint, deciding this on a case-by-case basis.