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July 11, 2022

ELECTRONIC MAIL

Heather Cook, Esq.
Assistant General Counsel
Civilian Complaint Review Board
100 Church Street, 10th Floor
New York, NY 10007

Re: Civilian Complaint Review Board's Proposed Rule Changes

Dear Ms. Cook:

On behalf of the Detectives' Endowment Association, the Lieutenant's Benevolent Association, and its more than 7,000 members, we hereby submit this letter in response to the Notice of Public Hearing and Opportunity to Comment on Proposed Rules presently scheduled for July 13, 2022, regarding proposed amendments and/or revisions to the CCRB's rules as codified in Title 38-A, Chapter 1 of the Rules of the City of New York.

I. The Proposed Amendment to §1-01, Changing the Definition of "Abuse of Authority," is Improper

The proposed amendment to §1-01 changing the definition of "Abuse of Authority" to include "improper use of body worn cameras ("BWC")," is overbroad and lacks any legislative authority to claim this jurisdiction. As an initial matter, this addition to the "abuse" definition is not tied to any changes or revisions to the NYC Charter. Rather, it is *sua sponte*, self-initiated

expansion without the necessary statutory support. Most, if not all, of the other amendments proposed by the CCRB in its Notice are specifically tied to either amendments or revisions of Chapter 18-A of the New York City Charter, CCRB's jurisdictional authority. Without conceding the rationality or validity of these other amendments, they at least purportedly have a statutory and/or legislative predicate. The proposed amendment to §1-01 changing the definition of "Abuse of Authority" to include "improper use of body worn cameras," has no such predicate.

The Charter limits CCRB's jurisdiction to complaints by members of the public against members of the police department ("Police Officers") alleging "misconduct involving excessive use of force, abuse of authority, discourtesy, or use of offensive language" (commonly referred to as "FADO"). Because these FADO categories are statutory terms and predicates for CCRB's jurisdiction, CCRB is required to strictly adhere to legislative intent, and it is not entitled to discretion or deference in purporting to define or apply these terms.¹

The CCRB is using this purported definition change to unilaterally expand its jurisdiction beyond that granted to it under the NYC Charter and the recent amendments or revisions thereto. In fact, CCRB has acknowledged that the improper use of "body worn cameras" is an issue solely covered by the NYPD Patrol Guide (see Page 4, Notice of Public Hearing). NYPD Patrol Guide Section 212-123 is a lengthy and complex framework governing the use of BWC by officers and as such, is within the sole purview and jurisdiction of the New York City Police Department, not the CCRB. The United States Supreme Court just recently ruled in *West Virginia, et.al. v. Environmental Protection Agency, et.al.*, "something more than a merely plausible textual basis for an agency action is necessary. The agency instead must point to the clear congressional authorization 'for the power it claims'".²

Failing to record an incident or failing to turn on a BWC in violation of the Patrol Guide can be accidental, an omission, and not an intentional act. The accidental, unintentional omission to turn on a BWC is certainly not a "misuse of police power," as the CCRB currently defines an "abuse of authority."

Just as the NYPD Patrol Guide requires officers to complete numerous ministerial duties such as submitting forms during police-civilian interactions (including but not limited to completion of UF-250 -Stop, Question and Frisk Report; TRI Reports; and Activity Log ("memobook") entries), the failure to complete these forms is NOT an "abuse of authority." So it must remain for an officer's failure to properly activate/deactivate their BWC. At a minimum, there would need to be some indication that the failure to activate the camera (or the untimely activation, or the premature deactivation of the BWC) was of such a nature that is something more than just a simple unintentional failure on the officer's part.

CCRB has also failed to provide any rational basis, for this dramatic policy change to suddenly assume broad authority over alleged BWC violations. CCRB has never previously

¹ See *DaimlerChrysler Corp. v. Spitzer*, 7 N.Y.3d 653, 660 (2006); *Teachers Ins. & Annuity Assoc. of Am. v. City of N.Y.*, 82 N.Y.2d 35, 42 (1993)

² *West Virginia v. EPA*, Nos. 20-1530, 20-1531, 20-1778, 20-1780, 2022 U.S. LEXIS 3268, at *38 (June 30, 2022)

taken this position and in fact has acknowledged that such matters must be referred to the NYPD. CCRB is attempting to effectuate this significant power grab using a purported new expanded definition without any valid basis.

CCRB cites to its own report to ostensibly support the proposed amendment. The crux of the purported reason is the alleged impact on CCRB's investigation and its "ability to determine what happened[.]" This reasoning fails for several reasons. First, this is the same reasoning CCRB put forth to support the need for the 2019 Charter revision to allow CCRB to investigate false statements by officers during CCRB investigations and interviews, namely, the detrimental effect it has on "CCRB's ability to determine what happened during a police-civilian interaction." That additional authority, however, was granted as part of the 2019 Charter Revision. CCRB did not, and does not, have the authority to unilaterally grant itself the power to investigate such false statements, regardless of the impact they might have on their investigations. The same is true for alleged BWC violations.

Next, by automatically deeming an allegation of an improper BWC usage to be an alleged "abuse of authority", CCRB is assuming the act was intentional and was done to somehow thwart or impede a yet-to-be-filed CCRB complaint. That is preposterous, and an unjustifiable assumption. It completely ignores (1) legitimate reasons why a BWC may not be activated or deactivated prematurely (for example, unanticipated or exigent circumstances, tactical considerations, privacy concerns, etc.), (2) mere negligence and inadvertent failure on the officer's part. Yet despite these other possible reasons, CCRB will be labeling the officer as misusing his or her police powers, subsequently posting it on its website, all without any legitimate legislative grant of authority to do so.

In this regard, CCRB continually fails to recognize the impact that the "abuse of authority" allegations has on our members. They have now been labeled as having abused their power and misused their authority. The "abuse of authority" label has a stigma attached to it and follows an officer throughout their career. CCRB displays a callous disregard for the negative impact such labels have on our officer's records, and their psyches.

CCRB's overly aggressive actions and continued self-expansion of their jurisdiction acts as a disincentive to officers to take enforcement action in the street. It is no accident that gun violence is at epidemic proportions, the carrying of firearms by the criminal element is prolific, and major crimes are at record levels. Criminals feel emboldened as the police feel abused and subjected to unwarranted oversight. CCRB has sent a clear and unequivocal message to officers and criminals alike – NO PROACTIVE POLICING. If you do, you will be labeled as an abuser of authority, subjected to a lengthy investigation, and potentially bought up on disciplinary charges, which will significantly impact your career and reputation. CCRB's unlawful expansion of its jurisdiction without legislative authority, is now perhaps the biggest danger to public safety that exists today. Police Officers have lost faith in CCRB's ability to conduct unbiased investigations, and justifiably feel that the CCRB literally "nitpicks" everything they do, far beyond what the CCRB was intended to do. CCRB's unlawful expansion of its jurisdiction, under the guise of a definition amendment, furthers this perception by officers and acts as a clear impediment to their ability to perform their job and keep the citizens of New York

City safe.

The Gothamist recently reported on July 8, 2022:

“New York City police officers are leaving their jobs at what some officers and experts say is an alarming rate, and not enough new recruits are taking their place.

Even as 561 new police recruits were sworn in earlier this month, hundreds of officers were handing in their badges and shields to leave the department. According to the Police Pension Fund, over 2,100 sworn officers have retired or resigned since January. That’s more departures in half a year than there were in all of 2019.

Departures surged in 2020. And while fewer people left last year, the department is still struggling to staff up. There are currently almost 1,200 vacant positions, according to NYPD statistics.

This comes as violent crime is still above pre-pandemic levels, and a string of high-profile crimes have left many New Yorkers on edge. Some in law enforcement are concerned that the shrinking ranks lack the manpower needed to keep the city safe.”³

CCRB’s continued overreach of its authority and biased investigations against New York City police officers is a major contributing factor in the record level of retirements and the NYPD’s struggle to attract recruits to the department.

CCRB also cites to NYPD disciplinary statistics as another purported reason for amending the definition of “abuse of authority” to include failing to properly activate a BWC. CCRB’s opinion that the NYPD does not impose sufficient discipline for BWC recording violations does not justify morphing the definition of abuse of authority to now include such allegations. Merely because CCRB wants to discipline officers more severely in these cases does not, and cannot, explain how this definitional change grants CCRB jurisdiction over BWC violations. Nowhere in the Notice of Amendments, or the memoranda submitted with the Notice, does the CCRB justify or explain how this is an abuse of authority. CCRB’s motivation is clear – “CCRB should adopt a rule that specifies that improper usage of BWCs as part of abuse of authority. By doing so, the CCRB will be able to issue discipline recommendations for this misconduct[.]” (Memorandum, at 4).

The CCRB has also improperly interpreted the NYC Charter to be just a mere guideline or framework concerning its jurisdiction and authority. (Memorandum at 1) The CCRB’s jurisdiction is limited by the NYC Charter. The CCRB’s powers and authority are derived exclusively from the legislative actions of the City Council, or on one occasion by a plebiscite of the citizens of New York City. This proposed change to a definition of “abuse of authority” is in violation of the specific and limited jurisdiction that has been granted to the CCRB under the NYC Charter. A perfect example of how the City Council has historically limited CCRB’s expansion of its jurisdiction can be found in the recent amendments to the charter that are also the subject of these proposed Rules changes. The City Council set out specific amendments to CCRB’s powers and authority to investigate “bias-based policing and “racial profiling”. These amendments were narrowly set out and specifically fashioned to provide CCRB with a clear

³ <https://gothamist.com/news/as-fears-about-public-safety-loom-many-nypd-officers-leave-the-force>

definition of its jurisdiction in handling these investigations. The details provided specifically in Chapter 18-A Section 441 cannot be claimed by CCRB to be a guideline or a framework of its jurisdiction. They are specific and limiting of CCRB's powers and authority to conduct this new category of investigations.

Moreover, the Charter requires that CCRB's activities be "impartial" and "conducted fairly and independently, and in a manner in which the public and the police department have confidence." CCRB's continued unlawful expansion of the definition of "abuse of authority" strikes us as anything but fair or impartial. On the contrary, it is part of an improper, calculated effort to have concurrent jurisdiction with the Police Commissioner over matters which fall solely within the clear jurisdictional purview and authority of the Police Department.

II. The Proposed Amendment to §1-33(e), Changing Case Dispositions, are Neither Necessary nor Justified, and Will Create Confusion

We also object to several of the proposed changes to CCRB's case dispositions as set forth in Rule 1-33(e). Specifically, we oppose the amendments to the terms "unsubstantiated," "exonerated," and "unable to investigate."

The ostensible reason for the amendments to section 1-33(e) is "to include new terms to describe certain case dispositions that will be easier for the public to understand." (Memorandum in Support of Amendment, dated July 6, 2022). However, the proposed dispositions are not easier to understand, will tend to be misleading, and will permanently taint an officer's permanent record with less-than-complete information about how the case was concluded.

For example, the Board proposes using the term "Unable to Investigate" to replace no less than five different current dispositions - complainant unavailable, alleged victim unavailable, complainant uncooperative, alleged victim uncooperative, and alleged victim unidentified. This is far too broad. If a complainant or alleged victim is uncooperative with CCRB's investigation, this must be explicitly noted on the case disposition. The public - and everyone else who reviews the officer's record online, including judges, attorneys, prospective employers, and others - should and must know *why* CCRB was "unable to investigate." Even if the disposition were to read something like "Unable to Investigate - Complainant Uncooperative," that would be far better than the over-broad, general disposition of "unable to investigate." Why CCRB was "unable to investigate" is crucial to a fair and accurate description on our members' permanent record.

Likewise, the term "Exonerated" should not be eliminated as a case disposition. While we have no objection to the proposed phrase "within NYPD guidelines," it should be *added* to the disposition, not *replace* it. So, it would read "**Exonerated - Within NYPD Guidelines.**" It is the most fair and complete disposition. *Exonerated* is the clearest indication that our members did nothing wrong. It is not confusing; people understand clearly that the officer acted appropriately. Eliminating the word exonerated evinces an attempt by the CCRB to stop short of actually saying that our officer has been cleared. Why? CCRB has failed to articulate why these changes to case dispositions are even necessary. Were there complaints by members of the public that they were confused? Did police officers complain the dispositions were unfair? Did complainants and/or

victims complain? Simply stating in conclusory fashion that the new terms “will be easier for the public to understand” does not justify such a wholesale change to the case dispositions under Rule 1-33(e). As such, the proposed changes to Rule 1-33(e) should be rejected.

Further, CCRB’s proposed changes would unnecessarily create confusion because CCRB and the NYPD would use different terminology for the same determination. The existing categories are not only used by CCRB, but by the NYPD as well, and the changes will create inconsistency between these agencies. It makes no sense for CCRB – an agency that does not have final disciplinary authority and whose recommendations are provided to the NYPD for final determination – to unilaterally change its case disposition categories to make them different from those used by the NYPD. These inconsistencies will create a confusing record to the detriment of officers and the public. For example, the record of the CCRB disposition would show “unable to determine,” while the record of the NYPD disposition would show “unsubstantiated,” which suggests a different result, notwithstanding that CCRB and the NYPD reached the same determination.

Moreover, it is not just the NYPD that has long used, and continues to use, the existing case disposition categories such as “unsubstantiated” and “exonerated.” These disposition categories have also long been used, and continue to be used, by other agencies and bodies – such as District Attorneys’ Offices – and courts. For example, discovery and disclosure laws and procedures have been crafted around these case disposition categories.⁴ The existing case disposition categories therefore inform prosecutors and agencies responding to discovery or disclosure requests whether the records are subject to disclosure or are protected under the law. These laws serve important privacy, safety, and evidentiary purposes. CCRB’s proposal to unilaterally and unnecessarily change its case disposition categories makes compliance with confidentiality and evidentiary laws more difficult and in turn promotes the serious risk of improper disclosure or use of records subject to protection. As such, the proposed changes to Rule 1-33(e) should be rejected.

We urge the Board to withdraw the proposed amendments consistent with the concerns outlined above. Thank you for your attention.

⁴ See, e.g., *People v. Montgomery*, 74 Misc.3d 551, 552-53 (Sup. Ct. N.Y. Cty. 2022) (specifically referring to the NYPD’s and CCRB’s case disposition categories of “exonerated” and “unfounded” and holding that records classified as such need not be produced by prosecutors under CPL 245).

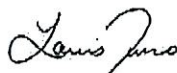
Very truly yours,

Detectives' Endowment Association



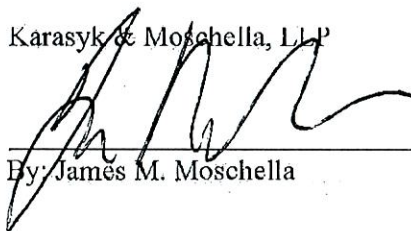
By: Paul DiGiacomo, President

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