July 11, 2022

VIA FACSIMILE & 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:

The Police Benevolent Association of the City of New York, Inc. and Sergeants Benevolent Association (collectively, the "Unions") submit this letter on behalf of their more than 30,000 members, who do the difficult and dangerous work of protecting every resident, visitor, and business in New York City. We present our concerns and objections with respect to certain of the Civilian Complaint Review Board's ("CCRB" or the "Board") proposed changes to its rules published in June 2022 (the "Proposals").

Continued Avoidance of Public Transparency

CCRB's process with respect to these Proposals continues a disturbing pattern of CCRB seeking to avoid or minimize public knowledge of, or input into, its actions and policy changes.[1]

[1] At a recent Board meeting, CCRB was again called out by the public for its lack of transparency: "Finally, I have a problem with your rules changes. You keep changing these rules down to two minutes for public presentation and then change it to four minutes. But there are no public ac -- there's no public accountability, there's no report to the public about the proposed rules change, so we'll have an opportunity to even comment on your proposed rules, changes in the rules, and I think that's improper." CCRB, May 11, 2022 Tr. at 20:11-20 (*available at* https://www1.nyc.gov/assets/ccrb/downloads/pdf/about_pdf/board/2022/Minutes/05112022_boardmtg_minutes.pdf).

First, CCRB devised these Proposals without any discussion of them, or even mention of them, during the Board's public meetings. There was no notice whatsoever that CCRB was considering these proposed changes until they were published as part of the formal rulemaking process (and, as addressed below, even then the memoranda allegedly containing the rationale were not provided). While some of these proposed changes incorporate language from the recent Charter amendments, other proposed changes – such as the enlargement of CCRB's jurisdiction to body-worn camera ("BWC") compliance (discussed further below) – have nothing to do with the recent Charter amendments and were never mentioned publicly. It is not plausible that CCRB devised and published these extensive Proposals without any prior deliberation or approval by the Board.

The Board's process with respect to these Proposals is in stark contrast to the rule changes CCRB adopted in 2017, where the proposed changes were discussed at numerous public meetings over the course of a year, resulting in the publication of many revised drafts of the proposals, before CCRB formally submitted them into the rulemaking process. That process gave constituents the opportunity to provide thoughtful consideration of the proposals, and the Board likewise the opportunity to fully consider such input. CCRB's lack of transparency with these Proposals is particularly concerning because CCRB was recently admonished by the court for violating public-vetting requirements with respect to its putative "resolution" adopted in 2018,[2] and, thereafter, CCRB was found to have repeatedly violated the Open Meetings Law ("OML"), including by conducting unlawful executive sessions over the course of at least a year between May 2020 and June 2021, during the same time period that CCRB adopted another round of changes to its rules in early 2021. As the court stated, "Why the CCRB would act accordingly is beyond comprehension."[3]

Yet CCRB appears to have flouted the OML again. These Proposals are indisputably matters of public concern subject to the OML's requirements. The OML requires that deliberations of a public body, such as CCRB, be "open to the general public."[4] None of the OML's exceptions would apply to the Board's deliberations over or vote on the Proposals. Indeed, "[t]he purpose of the [OML] is to prevent public bodies from debating and deciding in private matters that they are required to debate and decide in public, *i.e.*, deliberations and decisions that go into the making of public policy," such as these Proposals.[5] "The [OML] is intended to provide the public with the right to observe the performance of public officials in their deliberations," and thus "a series of communications between individual members or telephone calls among the members which results in a collective decision" violates the OML.[6] In

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[2] *Lynch v. N.Y. City Civilian Complaint Review Bd.*, 183 A.D.3d 512, 518 (1st Dep't 2020) ("*Lynch v. CCRB I*").

[3] *Lynch v. N.Y. City Civilian Complaint Review Bd.*, 2021 WL 5206292, at *4 (Sup. Ct. N.Y. Cty. Nov. 8, 2021), *aff'd*, 2022 WL 2308895 (1st Dep't June 28, 2022) ("*Lynch v. CCRB II*").

[4] Pub. Officers Law ("POL") § 103(a).

[5] *Zehner v. Bd. of Educ. of Jordan-Elbridge Cent. Sch. Distr.*, 91 A.D.3d 1349, 1350 (4th Dep't 2012) (internal quotes omitted).

[6] N.Y. Dep't of State, Comm. on Open Gov't, Adv. Op. 2986 (Jan. 15, 1999) (*available at* https://docs.dos.ny.gov/coog/otext/o2986.htm).

connection with any deliberations over or vote on the Proposals, the Board was also required to provide a copy of the Proposals to the public.[7]

We request that the Board make public the record of its deliberations over the Proposals, including whether there was any Board vote regarding the Proposals in advance of their publication. To the extent the Board is claiming that any exception to the OML allegedly allowed the Board to discuss or vote on the Proposals during an executive session or otherwise in secret – whether under POL § 105 or any claimed privilege – we request that CCRB identify when and how such deliberations/vote occurred and the basis for the claimed OML exception/privilege. Moreover, even if there were a claimed exception, to the extent there was a Board vote regarding the Proposals, the OML still requires that the Board publish minutes setting forth "a record or summary of the final determination of such action and the date and vote thereon."[8]

The date to comment on the Proposals and the public hearing should be extended until a reasonable time after the foregoing information is made public.

Second, CCRB withheld information necessary for a meaningful public comment period, in violation of both the letter and spirit of the City Administrative Procedure Act ("CAPA"). The Statement of Basis and Purpose ("Statement") for these Proposals states that "CCRB will publish a Memorandum on our website prior to public comment that outlines the rationale for these proposed rule changes[.]" CCRB's reasoning for enlarging its jurisdiction to BWC compliance likewise is "outlined in the accompanying memo."[9] Yet, CCRB did not publish the referenced "memo" with the Proposals. Rather, CCRB deliberately withheld this information, and appallingly waited until the afternoon of July 8, 2022 – the Friday afternoon before the Monday public comment deadline – to publish three memoranda relating to these Proposals. It is further obvious that the allegedly "accompanying" memoranda were not even drafted when the Proposals were put out to comment on June 10, 2022, as the memoranda are dated July 6 and 8, 2022. And even as to the two memoranda dated July 6, 2022 (relating to the proposed new BWC rule and the changes to the case disposition categories), CCRB still waited until the afternoon of Friday, July 8 to release them, knowing that releasing this information at the last minute would deprive the public of a meaningful opportunity to scrutinize and comment on it.

CAPA § 1043(b)(1) prohibits this type of gamesmanship in agency rulemaking. It requires an agency to publish the Statement at least thirty days prior to the public hearing date. "This policy serves, on a local level, to inform the public generally, and any reviewing court, that the agency conducted a legal process and had a rational basis for adopting the rule change."[10]

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[7] POL § 103(e).

[8] POL § 106(2).

[9] CCRB, *Notice of Public Hearing and Opportunity to Comment on Proposed Rules* (*available at* https://rules.cityofnewyork.us/wp-content/uploads/2022/06/CCRB-Rules-FINAL-5-31-22-with-Certifications.pdf).

[10] *St. Vendor Project v. City of N.Y.*, 10 Misc.3d 978, 985 (Sup. Ct. N.Y. Cty. 2005), *aff'd*, 43 A.D.3d 345 (1st Dep't 2007).

Further, "the requirement that a rule-making administrative body give a reasoned explanation for its actions serves to discourage the promulgation of arbitrary rules."[11] The Statement here is incomplete and deficient where it incorporates by reference a separate document (which in fact turned out to be three separate memoranda), but those memoranda were not also published at least thirty days before the hearing date. By waiting to publish the referenced memoranda until the Friday afternoon before the Monday public comment deadline, CCRB violated the law and deprived the Unions and the public of the statutorily-required meaningful opportunity to review and respond to CCRB's basis and purpose for these Proposals, including in written comments.

There was no valid or good faith reason for CCRB to delay the publication of the memoranda, or to rush to publish the Proposals if its written rationale was not ready for simultaneous publication. CCRB must know its putative rationale at the time of the Proposals, and then cannot withhold that rationale from the public until the last minute.

To comply with CAPA and remedy CCRB's impropriety with its last-minute, Friday-afternoon data dump, the public comment deadline and hearing should be adjourned to a date that is at least thirty days after CCRB's July 8, 2022 release of the memoranda.

Specific Comments

In addition to the deficiencies with CCRB's process, the Unions also objects to the following specific Proposals for the reasons set forth below.[12]

I. CCRB Does Not Have Jurisdiction Over BWC Compliance

CCRB is once again proposing unilaterally to enlarge its jurisdiction into a new area that is already comprehensively addressed under NYPD disciplinary procedures: for the first time, it adds "improper use of body worn cameras" to the rules' definition of CCRB's statutory jurisdictional predicate "abuse of authority." The Proposals define "Improper Use of BWC" as "when a member of service fails to turn it on, turns it off prematurely, or fails to record an incident in violation of the NYPD Patrol Guide." BWC compliance is a complex issue not within CCRB's jurisdiction, as CCRB has repeatedly acknowledged.

Under the Patrol Guide, officers are subject to extensive and complex requirements regarding when a BWC must be activated or deactivated.[13] The BWC obligations depend on the particular facts and circumstances of an encounter, and can rapidly change as the circumstances

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[11] *Id.* at 986.

[12] The discussion of specific Proposals should not be viewed as the Unions agreeing to the validity of, or acquiescing to, the Proposals not specifically discussed. Nor do the Unions endeavor to address herein all of the factually and legally erroneous assertions in the belatedly-released memoranda. The Unions expressly reserve all rights to challenge any of the Proposals in any appropriate forum(s). The Unions also expressly reserve all rights with respect to the claims and arguments in *Lynch v. CCRB II* and any appeals therein.

[13] *See* Patrol Guide Proc. No. 212-123.

of the encounter change. There are many situations when the BWC is properly deactivated, including certain situations to protect the privacy of members of the public.

There is already a comprehensive oversight and disciplinary framework relating to this highly-specialized issue of BWC compliance. For example, as set forth in the NYPD's *Body Worn Cameras: Impact and Use Policy* (Apr. 11, 2021)[14]:

> The NYPD has multi-tiered levels of review and engages in self-initiated auditing to ensure that officers are properly using BWCs and recording when required. Sergeants review a sampling of police officers' footage on a monthly basis, which is then reviewed by lieutenants within the command, which is then reviewed by the relevant patrol borough. Once approved, those documents, which contain the reviewed files, are sent to the Risk Management Bureau's (RMB) BWC Unit from an executive's email address, which serves as a digital signature that the files were reviewed. Upon receiving the files, they are logged and reviewed for completeness.
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> In addition, BWC compliance analysis is incorporated into weekly assessments by RMB BWC Unit and COMPSTAT. The RMB BWC Unit conducts visits to commands experiencing compliance issues to reinforce policy and address any procedural questions. The RMB BWC Unit also informs the commands when the unit identifies a mandatory activation incident that was not recorded. The Commanding Officer is mandated to investigate the incident and report back to the RMB BWC Unit with their findings, including disciplinary action taken. The RMB BWC Unit also informs commands with their compliance rates so commands can track their compliance.

Allegations of BWC noncompliance are the jurisdiction of the command level or the Internal Affairs Bureau ("IAB").[15] These procedures have been in place since BWCs were adopted in the NYPD several years ago, and, notwithstanding the fact that the City Council and a Charter Revision Commission have revisited CCRB's Charter-imposed jurisdiction three times in the last four years, CCRB has not been granted jurisdiction over BWC compliance.

CCRB's "rule-making authority, which is derived from the delegation of legislative power, must be exercised within the parameters of the agency's enabling statutes," *i.e.*, the Charter.[16] CCRB "cannot create rules, through its own interstitial declaration, that were not contemplated or authorized by the Legislature and thus, in effect, empower [itself] to rewrite or

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[14] *Available at* https://www1.nyc.gov/assets/nypd/downloads/pdf/public_information/post-final/body-worn-cameras-nypd-Impact-and-use-policy_4.9.21_final.pdf.

[15] *Id.*

[16] *Law Enforcement Officers Union, Dist. Council 82, AFSCME, AFL-CIO v. State of N.Y.*, 229 A.D.2d 286, 292 (3d Dep't 1997).

add substantially to the administrative charter itself."[17] Thus, whatever policy interests CCRB may seek to serve, it cannot unilaterally adopt rules that exceed the provisions of its Charter.

BWC compliance is not a matter of "abuse of authority" for purposes of CCRB's jurisdictional predicate.[18] CCRB was established as an agency to receive and investigate civilian complaints, but BWC compliance is not a matter that would traditionally be the subject of a civilian complaint. Rather, any such issue would typically arise after an investigation has been commenced when evidence is being reviewed. In fact, CCRB admits in the Statement and in the BWC Memo that this Proposal is motivated for an evidentiary reason (*i.e.*, "these actions may result in the CCRB not having the evidence necessary to thoroughly investigate a complaint and reach a conclusion on the merits").[19]

Additionally, CCRB's proposed new definition demonstrates that it does not understand the complex procedures regarding BWCs, nor is it ready or willing to understand that noncompliance, if and when it occurs, is typically due to this complexity and is completely unrelated to "abuse of authority." The new definition broadly announces that any "fail[ure] to record an incident in violation of the NYPD Patrol Guide" is automatically an "abuse of authority." But an error in the use of the BWC has nothing to do with "abusing authority." An officer may turn the BWC on or off during an incident as he or she attempts to *comply* with the rules in the Patrol Guide. Indeed, BWC footage frequently exonerates the officer, and thus CCRB cannot simply assume, as it does with this proposed new rule, that a BWC compliance error is an "abuse of authority." Even if an error is made, given the complexity of the BWC scheme and the rapidly-changing circumstances of a police encounter, the error does not suggest at all an effort to "abuse" the officer's "authority." CCRB's simplistic definition fails to appreciate the issue involved, and is manifestly erroneous on its face.

Contrary to this new proposed rule, CCRB has repeatedly acknowledged that violations of the Patrol Guide, including violations of BWC compliance, are not "abuses of authority" or within CCRB's jurisdiction. Indeed, BWC compliance is akin to other record-keeping matters under the Patrol Guide that CCRB has long recognized, and continues to recognize, as being outside its jurisdiction. For example, CCRB acknowledges that "[a]n officers failure to properly document an encounter or other activity in his or her memo book as required by the Patrol Guide," and the failure to produce a stop and frisk report, are matters outside CCRB's

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[17] *Tze Chun Liao v. N.Y. State Banking Dep't*, 74 N.Y.2d 505, 510 (1989); *see also Lynch v. CCRB I*, 183 A.D.3d at 517 ("neither the CCRB nor the NYPD has the power to override the Charter").

[18] The term "abuse of authority" in the Charter is a jurisdictional predicate, and therefore its interpretation is not a matter of CCRB discretion, but rather is governed by legislative intent. *See Teachers Ins. & Annuity Assoc. of Am. v. City of N.Y.*, 82 N.Y.2d 35, 42 (1993). But even if a discretionary standard were applied, this Proposal must be rejected because BWC compliance does not fall even within a plain reading of the statutory term "abuse of authority." *See Toys "R" Us v. Silva*, 89 N.Y.2d 411, 418-19 (1996) (agency interpretation must be rejected where it is "irrational, unreasonable [or] inconsistent with the governing statute" (internal quotes omitted)).

[19] Statement at 4; *see also* CCRB, *Memorandum Re: Changing CCRB's Rules to Include Improper Usage of Body Worn Cameras Against Members of the Public as Part of Abuse of Authority* (July 6, 2022) ("BWC Memo"), at 2.

jurisdiction, constituting "other misconduct noted" (OMN) that CCRB refers to the NYPD.[20] CCRB has similarly acknowledged that BWC compliance is a type of OMN (now referred to as "other possible misconduct noted") outside its jurisdiction that CCRB refers to the NYPD.[21] As recently as February 2020, in CCRB's report, *Strengthening Accountability: The Impact of the NYPD's Body-Worn Camera Program on CCRB Investigations* ("*CCRB BWC Report*"), CCRB again acknowledged that BWC compliance constitutes OMN outside its jurisdiction.[22] There, CCRB gave a nod to the complexity of the BWC requirements under the Patrol Guide, stating that CCRB would only refer an OMN relating to BWC compliance if an officer had the BWC for more than 90 days, and CCRB confirms in the BWC Memo that this is its policy.[23] Indeed, further affirming that BWC compliance is neither "abuse of authority" nor any other prong of FADO, CCRB stated that this "90-day grace period does not apply to FADO allegations; it applies only to non-FADO Patrol Guide violations."[24]

CCRB has also failed to provide a rational basis for this complete policy reversal (even if it had jurisdiction over BWC compliance, which it does not). CCRB premises this sudden change on a case from almost a decade ago before the NYPD adopted the BWC program and having nothing to do with CCRB's "abuse of authority" jurisdiction.[25] That decision was followed by the NYPD's adoption of the BWC program and its monitoring and disciplinary procedures that have been in place for years. Since that time, it has been CCRB's policy to refer BWC compliance issues to the NYPD, in recognition that they are outside CCRB's FADO jurisdiction. The Board provides nothing to show that this change is warranted now (and, as set forth below, has failed to consider the adverse impacts this power grab will have on the already-flawed CCRB process).

Instead, for the first time in the belated BWC Memo, CCRB merely cites data of the NYPD's disciplinary determinations with respect to 154 BWC allegations that have reached final determination, and notes that "the vast majority of cases have resulted in instructions or formalized training," meaning that any alleged improper BWC usage was not intentional.[26] From this bare and limited data, and without any knowledge of or inquiry into the results of the actual investigations, CCRB improperly speculates that these investigatory determinations should have been more severe.[27] Such unfounded speculation demonstrates, as discussed above, that CCRB does not understand the issue at hand and/or underscores a troubling bias by CCRB

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[20] CCRB, *2019 Annual Report*, at 40 (*available at* https://www1.nyc.gov/assets/ccrb/downloads/pdf/policy_pdf/annual_bi-annual/2019CCRB_AnnualReport.pdf).

[21] *Id.*

[22] *Available at* https://www1.nyc.gov/assets/ccrb/downloads/pdf/policy_pdf/issue_based/20200227_BWCReport.pdf.

[23] *Id.* at 41 n.119; *see also* BWC Memo at 2-3.

[24] *CCRB BWC Report* at 41 n.119.

[25] BWC Memo at 1-2 (citing *Floyd v. City of N.Y.*, 959 F. Supp. 2d 540 (S.D.N.Y. 2013)).

[26] *Id.* at 3.

[27] *Id.* at 3-4.

against officers – *i.e.*, CCRB prejudging that alleged incidents must have been intentional when CCRB has not even reviewed the evidence. This claimed justification underscores the arbitrariness of this change based on improper "theory and assumption" without "empirical documentation, assessment and evaluation."[28] In fact, the cited data is entirely consistent with the complex nature of the BWC rules and officers' good faith efforts to comply in the face of difficult, dangerous, and rapidly changing encounters on the job, and confirms that BWC issues, which are overwhelmingly unintentional, are not an "abuse of authority."

Nor does CCRB have expertise in BWC compliance, and it has not provided any information to suggest that it is prepared with appropriate training, staffing, *etc.* to handle this highly specialized new subject matter, let alone to show that CCRB is better-suited than the existing experienced bodies that have been handling BWC compliance issues for years. Rather, by adding yet another broad new matter within CCRB's scope, this will only exacerbate the already-inordinate delays in the CCRB process, to the serious detriment of officers whose careers are stalled during a CCRB investigation, even when the allegations are meritless.[29] Similarly, CCRB's own data establishes that CCRB has an enormous problem of meritless complaints against officers being filed. CCRB's data shows that well more than 90% of complaints filed with CCRB that CCRB deems to be within its jurisdiction are not substantiated year after year.[30] These results are unquestionably due in part to the civilian nature of CCRB and CCRB's failure to impose any consequences for the filing of false complaints.[31] CCRB's proposed expansion of its scope yet again to the entirely new area of BWC compliance will only exacerbate this problem, particularly because the complexity of BWC rules and the general public's lack of familiarity with them create an area ripe for unfounded or retaliatory complaints against officers to be submitted to CCRB.

The Proposal (i) to add BWC compliance to CCRB's "abuse of authority" jurisdiction, and (ii) the overbroad definition of the scope of this new power, must be rejected.

II. The Proposed Definitions Relating To Alleged Bias Violate The Recent Charter Amendment

Bias-motivated conduct cannot be condoned and must be properly addressed when it occurs. In the law enforcement context, allegations of bias-based policing acts have long been

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[28] *N.Y. State Ass'n of Counties v. Axelrod*, 78 N.Y.2d 158, 168 (1991).

[29] Between 2019 and 2021, the average number of days for CCRB to complete an investigate went from the already high number of 245 days to *430* days. CCRB, *2021 Semi-Annual Report*, at 24 (*available at* https://www1.nyc.gov/assets/ccrb/downloads/pdf/policy_pdf/annual_bi-annual/2021_semi-annual.pdf).

[30] *See id.* at 25, 30; CCRB, *2018 Annual Report Statistical Appendix*, at 61 (*available at* https://www1.nyc.gov/assets/ccrb/downloads/pdf/policy_pdf/annual_bi-annual/2018_annual-appendix.pdf). This is the most recent Annual Report Statistical Appendix CCRB has published.

[31] *See* Shawn Cohen *et al.*, *CCRB Considering Perjury Charges For False Police Complaints*, N.Y. Post (Mar. 13, 2015) (quoting CCRB's then-Chair as acknowledging that CCRB "has failed to do its job" with respect to the problem of false complaints) (*available at* https://nypost.com/2015/03/13/ccrb-considering-perjury-charges-for-false-police-complaints/).

the jurisdiction of the IAB. Additionally, Administrative Code § 14-151 provides jurisdiction for the New York City Commission on Human Rights to receive and investigate complaints of bias-based policing. The fact that CCRB's proposed new rules are overbroad (for the reasons set forth below) does not in any way lessen the seriousness of these types of allegations. But a Charter-mandated civilian agency cannot unilaterally endow itself with authority that goes beyond the Charter, and, under blackletter administrative law, CCRB's rules in this important area must provide predictable, objective standards for their application. CCRB's proposed new definitions of "bias-based policing" and "severe act of bias" violate these principles.

Definition Of "Bias-Based Policing" Exceeds The Scope Of The Charter Amendment

The proposed new definition of "bias-based policing" violates the Charter because, when the City Council granted CCRB this new category of jurisdiction with the 2021 Charter amendment, it explicitly limited the scope of alleged conduct within this new grant of jurisdiction, and the proposed new definition, on its face, exceeds that scope.[32]

With the 2021 Charter amendment, the City Council granted CCRB a new category of "abuse of authority" jurisdiction for "bias-based policing."[33] The Council expressly defined an "act of bias" for purposes of this amendment as "an act stemming from a specific incident: (i) that is motivated by or based on animus against any person on the basis of race, ethnicity, religion, gender, sexual orientation or disability, and (ii) that the board is empowered to investigate pursuant to paragraph 1 of subdivision c of section 440."[34] As noted above, prior to this amendment, CCRB did not have jurisdiction over acts of bias-based policing, which CCRB referred to the IAB. The City Council made this clear in the Committee Report leading to the amendment:

> The CCRB is authorized by the Charter to deal with four kinds of public complaints against police officers: excessive force, abuse of authority, discourtesy, and offensive language. If a member of the NYPD displays bias while policing, there are two potential routes for investigation of the action: through the IAB if the allegation is that the actions an officer took (or did not take) were biased, or through the CCRB if the complaint only alleges that offensive language was used. If a complainant alleges both that the NYPD officer took some type of action (or refrained from taking an action) based on the complainant's protected status and an offensive remark was made, the IAB will retain the action allegation while the CCRB will investigate the offensive language allegation. Proposed Int. No. 2212-A would clarify the CCRB's power

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[32] The fact that a Charter amendment was required to add bias-based policing and racial profiling to CCRB's "abuse of authority" jurisdiction further confirms that the statutory phrase "abuse of authority" has limits and does not encompass any alleged misuse of police powers or Patrol Guide violation as CCRB now claims.

[33] Charter § 440(c)(1).

[34] Charter § 441(a).

to investigate bias-based policing and racial profiling complaints made by the public.[35]

In Charter § 441(a), the City Council specified the bias-based acts that fall within this new grant of jurisdiction to CCRB: "motivated by or based on animus against any person on the basis of race, ethnicity, religion, gender, sexual orientation or disability." This list is exhaustive. The Council did not include any language to suggest otherwise. Moreover, this definition controls the use of the term "bias" in both Charter § 441 and Charter § 440(c)(1). These provisions were added to the Charter as part of the same legislative amendment, and therefore CCRB is required to interpret them the same.[36]

CCRB's proposed definition of "bias-based policing" includes matters that go beyond the categories listed in the statutory definition in Charter § 441(a). The proposed "bias-based policing" definition in the rules includes "an act of a member of the force of the Police Department that relies on actual or perceived creed, age, immigration or citizenship status, gender, sexual orientation, disability, or housing status as the determinative factor." The proposed definition includes matters that are not included in the Charter's definition, and thus remain outside CCRB's jurisdiction and within the jurisdiction of the IAB and the Commission on Human Rights. Indeed, the City Council has demonstrated that it knows how to include a broader definition when it intends to do so, because in Administrative Code § 14-151, the Council expressly granted jurisdiction to the Commission on Human Rights over categories that it did not include in its grant of jurisdiction to CCRB.[37]

According, the proposed definition of "bias-based policing" must be revised to be consistent with the statutory definition under Charter § 441(a).

Definition of "Severe Act of Bias" Is Overbroad And Subjective

The proposed definition of "severe act of bias" – the new statutory threshold in the Charter for a mandatory past professional conduct investigation – is also improper because it is (i) so overbroad, encompassing an enormous range of conduct, that it would effectively read

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[35] City Council, Committee on Civil and Human Rights Report (Mar. 25, 2021), at 10-11 (*available at* https://legistar.council.nyc.gov/View.ashx?M=F&ID=9264678&GUID=6761309B-CF0A-48E0-AC6E-C0398022E0A3).

[36] *Albany Law Sch. v. N.Y. State*, 19 N.Y.3d 106, 121 (2012) (statutes passed as part of the same legislative session addressing the same subject matter must be interpreted consistently).

[37] CCRB's statement in the belated memo accompanying its proposed new bias/profiling rules that it relied on Administrative Code § 14-151 as the source of the definition of "bias-based policing" confirms CCRB's error. As noted above, § 14-151 pertains to the jurisdiction of the Commission on Human Rights, not CCRB. CCRB's unilateral adoption of another agency's jurisdictional definition violates the more limited jurisdiction that the City Council granted to CCRB pursuant to Charter § 441(a). Moreover, CCRB's proposed definition fails to comply even with Administrative Code § 14-151, as the proposed definition does not include the several exceptions that are specified in § 14-151, such as when the alleged conduct "(A) is necessary to achieve a compelling governmental interest and (B) was narrowly tailored to achieve that compelling governmental interest." Admin. Code § 14-151(c)(1)(i).

"severe" out of the Charter, in violation of the legislative mandate; and (ii) defectively vague and subjective, depriving officers and the public of any predictability and allowing for inconsistent application.

In the Charter amendment, the City Council recognized that alleged acts covered by this new jurisdiction are subject to varying degrees, creating a statutory distinction between "act of bias" and "severe act of bias."[38] This distinction carries significant consequence, because, in addition to the connotation carried by the label itself, pursuant to this new statutory scheme, where a covered entity has found in a final determination that an officer committed a "severe act of bias," CCRB "shall" conduct a past professional conduct investigation, whereas the past professional conduct investigation is permissive where the covered entity makes a final determination of "an act of bias other than a severe act of bias."[39] As discussed above, the City Council defined "act of bias" in the Charter, but it did not define "severe act of bias."

CCRB's proposed definition of "severe act of bias" is "an act of bias by a member of the Police Department that (i) causes death, physical injury, or serious psychological or economic injury to the victim(s) of the act, (ii) subjects the victim(s) of the act to demeaning, degrading, or humiliating treatment, or (iii) involves criminal conduct, sexual misconduct, threat of violence, or conduct that otherwise shocks the conscience." This definition is overbroad because it fails to account for the City Council's statutory recognition that there are degrees of alleged conduct that may constitute an act of bias. The City Council's choice of the word "severe" creates a high standard to trigger the significant consequence of a mandatory past professional conduct investigation. Moreover, the proposed definition is impermissibly vague and highly subjective, making it impossible for officers, the public, and covered entities to understand where the line is between an "act of bias" and a "severe act of bias." The vagueness and subjective nature of the definition would impermissibly allow for uneven application against officers.[40] CCRB is required to adopt a definition that provides "objective standards for implementing the program."[41]

By way of example, subpart (ii) of the proposed definition is insufficient for two reasons. First, it would require CCRB or a covered entity to somehow make a determination within the state of mind of the alleged victim as to whether that individual felt demeaned, degraded, or humiliated, which is not only highly subjective, but provides no predictability because different persons may have different responses to the same alleged conduct. Second, this subpart entirely fails to do what CCRB was directed to do: account for the City Council's recognition of a sliding scale of conduct, which distinguishes "severe" conduct from lesser conduct. There are varying degrees of conduct that could be characterized as demeaning, degrading, or humiliating,

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[38] *See* Charter § 441(b)(1).

[39] *Id.*

[40] *N.Y. Statewide Coalition of Hispanic Chambers of Commerce v. N.Y. City Dep't of Health & Mental Hygiene*, 2013 WL 1343607, at *20 (Sup. Ct. N.Y. Cty. Mar. 11, 2013), *aff'd*, 110 A.D.3d 1 (1st Dep't 2013), *aff'd*, 23 N.Y.3d 681 (2014).

[41] *In re Law Enforcement Officers Union, Dist. Council 82, AFSCME, AFL-CIO*, 229 A.D.2d 286, 292 (3d Dep't 1997).

and an alleged act that allegedly creates such a subjective feeling would not in every case be "severe." Indeed, by essentially viewing all such conduct as "severe," the definition swallows the statutory distinction.

Similarly, subpart (iii), for example, incorporates CCRB's defined term "sexual misconduct," but that defined term in itself includes a wide range of alleged conduct, ranging from a single alleged verbal comment to alleged physical conduct. CCRB itself has recognized that there are varying degrees of such allegations, in that when it adopted the resolution in 2018, it created a distinction between Phase 1 and Phase 2 allegations of sexual misconduct based on the perceived degree of the alleged conduct, stating that "[s]exual misconduct exists on a spectrum" and "encompasses a diverse range of behaviors."[42] As such, it is inconsistent and overbroad for CCRB to include the broad phrase "sexual misconduct" within the definition of "severe act of bias" without requiring any inquiry into the degree of the conduct alleged.[43]

Accordingly, the proposed definition of "severe act of bias" must be revised to create a predictable, objective standard and to properly account for the statutory distinction between an act of bias and a "severe" act of bias.

III. The Proposed Definition Of "Final Determination" Fails To Provide Statutorily Required Information To Officers And The Public

Charter § 441(b)(2) provides that, for purposes of triggering a potential past professional conduct investigation, CCRB, "shall define . . . in consultation with each covered entity, what constitutes a covered entity's final determination that such a member engaged in an act of bias or severe act of bias." Section 441(b)(3) goes on to state that CCRB "shall communicate such definition . . . to each covered entity and shall make such definition . . . publicly available online."

In the Proposals, CCRB includes a definition for "final determination," but the definition merely parrots the language of Charter § 441(b)(2) that CCRB will, at some time in the future, "define, in consultation with each covered entity, what constitutes a covered entity's final

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[42] CCRB, *Memorandum Accompanying Public Vote* (Feb. 14, 2018) (*available at* https://www1.nyc.gov/assets/ccrb/downloads/pdf/policy_pdf/20181402_boardmtg_sexualmisconduct_memo.pdf).

[43] With respect to subpart (i) of the proposed definition, while CCRB included the term "serious" perhaps as an effort to identify "severe" conduct, the definition provides no predictable or objective standard as to what constitutes "serious" psychological or economic injury for purposes of deeming an act "severe," or how CCRB or a covered entity would purport to get into the mind of the alleged victim to determine whether an alleged victim suffered a psychological injury, let alone the "seriousness" of the alleged psychological injury. If CCRB seeks to use serious economic injury as a threshold, it could attempt to remedy these defects by, for example, including a monetary threshold to create an objective standard to distinguish economic injury from "serious" economic injury. Similarly, the reference in subpart (iii) of the proposed definition to "conduct that otherwise shocks the conscience" does not provide sufficient, objective guidance as to what type of conduct the rule purports to encompass. It is improper for CCRB to define a statutory phrase in its rules with another phrase that requires definition.

determination." This "definition" clearly does not comply with Charter § 441(b)(3) and is largely meaningless, as it does not specify the proposed substance of what constitutes a "final determination" for each covered entity. The memo accompanying this proposed rule does not provide this information either.

Officers and the public need, and have a statutory right, to advance notice and an opportunity to comment on what CCRB and each covered entity propose as a "final determination." The definition has a significant impact on officers, since it is the trigger for a potential past professional conduct investigation. Until CCRB, in consultation with each covered entity, publishes an actual definition of "final determination" for each covered entity, CCRB cannot commence past professional conduct investigations under Charter § 441.

IV. The Board Does Not Have Authority To Delegate Its New Power To Initiate Complaints

The 2022 amendment to Charter § 440(c)(1) granted the Board new jurisdiction to investigate "complaints initiated by the board" that are within CCRB's jurisdiction. Proposed new Rule 1-14 violates the Charter by purporting to allow the Board to "delegate its power to initiate complaints to the Civilian Complaint Review Board's Chair, Executive Director, General Counsel, or Board member panel."

Nothing in the Charter authorizes the Board to delegate this important new power to initiate complaints. The Charter does not grant the Board any generalized delegation authority. To the contrary, where the City Council intended to grant the Board delegation authority, it explicitly said so. In particular, there are only two limited areas where the Charter grants the Board the ability to delegate its powers. First, Charter § 440(c)(3) provides that the Board may "delegate to and revoke from its executive director" the Board's power to issue subpoenas and institute court proceedings to enforce them. This delegation authority was only recently added to the Charter as part of the 2019 Charter Revision Commission process. Second, Charter § 441(e)(1) provides that the Board may "delegate to and revoke from its chair or executive director" responsibility or authority in connection with past professional conduct investigations. The fact that the Charter expressly identifies two areas where the Board has delegation authority confirms that the Board does not have general delegation authority. Otherwise, these provisions would have been superfluous. The City Council did not grant the Board delegation authority with respect to the new jurisdiction to initiate complaints.

To the extent CCRB is relying on Charter § 440(c)(5) for this proposed rule, that reliance would be misplaced. Section 440(c)(5) states, "The board is authorized, with appropriations available therefor, to appoint such employees as are necessary to exercise its powers, including but not limited to the power to initiate complaints in accordance with paragraph 1 of this subdivision, and fulfill its duties." This provision merely authorizes the Board to hire employees to support the Board in exercising its powers and fulfilling its duties. But § 440(c)(5) does not authorize the Board to delegate its ultimate responsibilities to CCRB's employees. This is made clear by the difference in language in § 440(c)(5) authorizing the Board to "appoint" employees versus the City Council's use of the word "delegate" in other provisions of the Charter, as discussed above, when the Council intended to grant delegation authority.

The City Council's restriction of this new power to the Board makes sense, because the initiation of a CCRB complaint against an officer – even a complaint that is ultimately deemed meritless – has significant adverse consequences for the officer. Among other things, simply the filing of a compliant impairs the officer's ability to be promoted or transferred or receive certain assignments while the complaint is pending. These consequences are exacerbated due to the inordinate time it takes CCRB to investigate a complaint, as discussed above. Moreover, when the Board initiates a complaint without a complaint from a member of the public, the Board will necessarily be relying on second-hand information. As such, the new power to initiate a complaint must be exercised prudently and narrowly and, as per the Charter, only by the Board itself.

Accordingly, proposed new Rule 1-14 must be stricken because the Board does not have authority to delegate its new power to initiate complaints.

V. The Proposed Changes To The Case Disposition Categories Would Create Confusion And Inconsistency, Are Prejudicial To Officers, And Further Reduce CCRB's Transparency

The proposed changes to the long-standing case disposition categories are perplexing and highly problematic, as they serve no valid purpose, while (i) creating inconsistency with the NYPD, prosecutors, and other bodies that have long used and relied on the same disposition categories; (ii) creating obvious prejudice to officers – and especially officers who have not been found to have committed any wrongdoing after undergoing a complete CCRB investigation – by labeling them with inaccurate and seemingly blameworthy disposition terms; and (iii) impairing the accuracy and completeness of CCRB's reporting of data necessary to hold CCRB accountable.

In Rule 1-33, the Proposals would change the following case dispositions:

- "Unsubstantiated" to "Unable to Determine"
- "Exonerated" to "Within NYPD Guidelines"
- The following existing dispositions would be swept into a single new disposition of "Unable to Investigate": "Complainant Unavailable," "Alleged Victim Unavailable," "Complainant Uncooperative," "Alleged Victim Uncooperative," and "Alleged Victim Unidentified"[44]

[44] CCRB violated the rulemaking requirements under CAPA § 1043, because CCRB has admittedly already implemented these changes prior to giving any public notice or commencing this rulemaking process. *See* CCRB, *Memorandum Re: Changing CCRB's Rules to Include Clearer Language for Case Dispositions* (July 6, 2022) ("Dispositions Memo"). This suggests that this public comment process is a sham, because CCRB has already implemented these changes. This is particularly egregious because CCRB was admonished just two years ago by the Appellate Division, First Department for violating

CCRB states that these proposed new terms "would be used in all reports, communications, and data issued by the CCRB."[45]

Case disposition categories carry significant importance for officers, the public, and other bodies. Among other things, CCRB refers its case dispositions to the Police Commissioner for final determination; the CCRB case disposition becomes a permanent part of the officer's personnel file; CCRB publishes its case dispositions in a public database; and the case disposition may be determinative of whether a record is subject to discovery or disclosure. As such, it is vital that these disposition categories be fair, accurate, and consistent across agencies.

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.[46] 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.

While CCRB vaguely states that these changes are meant to use "clearer" or "plain" language, CCRB entirely ignores the confusing inconsistencies these changes would create as discussed above.[47] Moreover, the proposed new disposition categories are, in fact, ambiguous

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rulemaking requirements, *Lynch v. CCRB I*, 183 A.D.3d at 518, yet CCRB responded by sneaking these changes without any prior public notice or vetting.

[45] Dispositions Memo.

[46] *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).

[47] Dispositions Memo.

and inaccurate, and create the serious concern that these unnecessary proposed changes are biased against officers, in contravention of the Charter's mandate that CCRB conduct itself "fairly and independently, and in a manner in which the public and the police department have confidence."[48] Indeed, since the definitions of these disposition categories remain the same and the proposed changes do not add any clarity as to their meaning – and in fact do the opposite – CCRB has no rational basis whatsoever for making these changes.

For example, when an investigation determines that there was insufficient evidence to establish whether an act of misconduct occurred, CCRB (and the NYPD) have long deemed the case "unsubstantiated." This is a fair and accurate description, because in that situation, the officer went through a complete CCRB investigation where all available evidence was presented and considered, and the person charging the offense did not meet his or her burden to establish that there was any misconduct. As such, the officer is entitled to the clear disposition that the allegation was "unsubstantiated." The new proposed disposition for this situation – "unable to determine" – is inaccurate and unfairly carries a negative connotation for the subject officer, because it suggests that the investigation was somehow incomplete, and does not project the fact that no misconduct was proven.

Similarly, where a preponderance of the evidence shows that the alleged acts occurred but did not constitute misconduct – a determination that CCRB (and other agencies) have long deemed "exonerated" – the officer is entitled to the clear, unambiguous disposition that he or she has been exonerated. Exonerated is the accurate, fair description, because in this situation there has been a finding by a preponderance of the evidence that there was no misconduct. The proposed new disposition for this scenario – "within NYPD guidelines" – does not sufficiently provide a statement clearing the officer's reputation from what was established to be a meritless complaint.

Additionally, in situations where a complaint is filed and then the case is closed because, for example, the complainant or alleged victim became uncooperative or could not be located, the officer is entitled to a clear disposition stating what occurred. The existing case disposition categories such as "complainant uncooperative" or "alleged victim uncooperative" provide an accurate, specific statement as to why CCRB closed the investigation. The proposal to sweep these various scenarios into a single, ambiguous disposition category of "unable to investigate" reduces the transparency and accuracy of the disposition, and the reason for the disposition is lost. CCRB offers no reason to change its case disposition categories to provide *less* information to officers and the public than those used for years, and none exists.

Indeed, CCRB has reported on case disposition data for more than a decade broken down by whether the complainant/alleged victim was uncooperative, unidentified, or unavailable.[49] CCRB's data shows that these categories constitute a significant number of complaints submitted to CCRB. For example, in 2019, 1,340 complaints were filed and subsequently closed because

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[48] Charter § 440(a).

[49] *See, e.g.*, CCRB, *2019 Annual Report*, at 32 (*available at* https://www1.nyc.gov/assets/ccrb/downloads/pdf/policy_pdf/annual_bi-annual/2019CCRB_AnnualReport.pdf).

the complainant was uncooperative.[50] The specific data is necessary for transparency and accountability of CCRB. Data such as large numbers of uncooperative or unavailable complainants could indicate systemic problems with the CCRB process, and publicly tracking this detail facilitates needed policy changes. Thus, while CCRB gives lip service to "improv[ing] transparency,"[51] it is troubling that CCRB in fact is proposing to use inaccurate and ambiguous dispositions and to provide *less* data to the public on a matter that significantly reflects upon the integrity of the CCRB complaint and investigation process.

Accordingly, the proposed changes to the case disposition categories in Rule 1-33(2), (3) and (6) through (10) – and the other portions of the rules where these proposed changes to the case disposition categories appear – must be rejected. CCRB must also immediately cease using these improper new case disposition categories that CCRB implemented without public notice or vetting in violation of CAPA.

VI. Proposed Rule 1-37(c) Would Impose An Unfair And Unreasonably Short Time For Officers To Answer In A Past Professional Conduct Investigation

Proposed Rule 1-37(c) must be revised because it does not afford officers sufficient time to provide a written answer to the Board's written statement of final determination following a past professional conduct investigation.

The proposed rule would impose a fixed, 30-day deadline on the subject officer to provide a written answer. Such a short deadline to answer would impose an entirely one-sided burden on the officer, as the Proposals do not impose any time limit on CCRB to conduct a past professional conduct investigation. As noted above with respect to FADO complaints, CCRB's data shows that CCRB takes many months, and sometimes more than a year, for its investigations. CCRB cannot fairly manufacture urgency for an officer to answer in 30 days when there is such delay in CCRB's own investigation process. Of course, with a longer deadline, the officer could still submit his or her answer in a shorter time if he or she chooses to do so.

Additionally, 30 days would not afford the subject officer sufficient time to gather documents and other information necessary to prepare his or her written answer. A past professional conduct investigation could have a significant scope. Charter § 441(c) provides that such an investigation could encompass matters "from the date of hire by the police department until and including, for a former member of the police department, the last day of employment by the police department, or, for a current member of the police department, the date of initiation of an investigation pursuant to this section." As such, a past professional conduct investigation could conceivably encompass years or decades of an officer's career. This creates the potential for a variety of issues that the subject officer may need to address in his or her answer. Additionally, the fact that the investigation may encompass matters that are years or decades old could make it extremely difficult and time-consuming for officers to gather documents and other

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[50] *Id.* CCRB itself recognized that "[m]any truncations (48%) were closed as "Complainant/Victim/Witness Uncooperative." *Id.* at 31.

[51] Dispositions Memo.

relevant evidence necessary to prepare their answer. The 30-day deadline also fails to account for the fact that an officer's time and focus are simultaneously occupied doing his or her dangerous job protecting the residents, visitors, and businesses of this City on a daily basis.

Moreover, a past professional conduct investigation is an entirely new concept outside of the existing disciplinary scheme, and it is unknown how these final determinations will be presented or what they will contain. Officers and their counsel need to be afforded sufficient time to evaluate and respond to these novel determinations. Indeed, particularly with the initial roll-out of this new program, CCRB should err on the side of providing the officer more time rather than arbitrarily imposing an unnecessarily short 30-day deadline.

To provide officers a fair and reasonable time to answer a final determination in a past professional conduct investigation, proposed Rule 1-37(c) should be revised to provide a 90-day deadline for officers to answer. Additionally, given the fact that there could be enormous variance in the scope of such investigations depending on the applicable facts and circumstances, and unique issues relating to the collection of historic documents and evidence, the rule should include a procedure for the subject officer to obtain an extension of his or her time to answer.

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We urge the Board to revise the Proposals in a manner consistent with the concerns outlined above. If the Board would like to discuss any of our comments or has any questions, please let us know. If the Board disagrees with any of our comments, we request that the Board provide an explanation of the reasons for its disagreement.

Very truly yours,

Police Benevolent Association of the City of New York, Inc.

By: Patrick J. Lynch, President

Sergeants Benevolent Association

By: Vincent J. Vallelong, President