



Testimony of LatinoJustice before the Civilian Complaint Review Board

July 13, 2022

Dear members of the Board and agency staff, thank you for inviting LatinoJustice to comment on the proposed changes to the agency's rules. We are in favor of implementing the proposed rules and the proposed procedures for videoconferencing and want to thank the Board for taking action to implement its new powers. We are glad to hear that the racial profiling and biased policing unit will be robustly staffed and is receiving additional training to tackle these complaints, which are among the most important that the agency handles and the most challenging to investigate.

In the interests of time, we wish to address specifically only four issues among those that have been proposed: first, we wish to discuss the reclassification of "unsubstantiated" complaints as "unable to determine"; second, we wish to suggest additional categories of misconduct that could be included in the "Improper Use of Body Worn Camera" category; third, we would like to address investigations of past misconduct; and fourth, we would like to address the Board's process for reviewing individual complaints in light of the new policy authorizing virtual meetings under exceptional circumstances.

"Unable To Determine" Should be Used Sparingly, If Ever

We agree that dispositions previously categorized as "unsubstantiated" should be labeled "unable to determine," at least in part because it indicates that such findings represent an investigative shortcoming. In the early 2000s, the CCRB closed about a quarter of all fully investigated allegations as "unsubstantiated," a figure that rose to 45% in 2016 and peaked at 48% in 2018. The high number of unresolved complaints reflects a failure to abide by the evidentiary standards as set forth in the CCRB's rules. The CCRB makes findings on a "preponderance of the



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evidence” standard.¹ This standard means only “the greater weight of evidence.”² A preponderance of the evidence standard has been described by practitioners as “50% plus a feather of proof.”³ Under this standard, virtually no CCRB investigation—particularly in the age of Body-Worn Cameras—should be closed with a finding that the agency was “unable to determine” whether misconduct occurred. Any additional evidence—a contradictory statement by an officer, a failure to engage a Body Worn Camera, or another inconsistency—can be the “feather” that tips the scale away from this finding. Year-to-date in 2022, the agency has made progress: only 28% of fully investigated allegations have been closed as “unable to determine,” while the substantiation rate is at an all-time high. We hope that this designated name change encourages further reduction in the use of this finding.

Failure to Provide BWC Evidence Should be Included in Improper Use of BWC

We applaud the CCRB for using the power granted under the City Charter to exercise any power necessary to carry out its mandated functions.⁴ The creation of a rule governing the agency’s findings regarding improper use of Body Worn Cameras is an effective and appropriate use of that power. We would like to add that investigators should note that improper use of Body Worn Cameras can be, in addition to misconduct in its own right, evidence supporting substantiation of other allegations. The agency should adopt as policy the position that failure to engage a BWC is itself evidence that, had the BWC been engaged, it would have supported the complainant’s view of the encounter.

But in addition, officers who fail to provide BWC access to the agency in a timely and appropriate manner should themselves be held accountable for improper use of BWC footage, and

¹ CCRB Rules § 1-33(b)

² *People v. Addimando*, 197 A.D.3d 106, 112 (2d Dep’t 2021).

³ <https://www.alecrose.com/blog-index/the-preponderance-of-evidence-standard-of-proof-for-sexual-harassment-and-sexual-violence-grievances/>

⁴ See N.Y. City Charter Ch. 49 § 1120.

additionally for impeding an investigation. As you know, the NYPD's failure to provide BWC footage provoked a near-crisis two years ago.⁵ The CCRB averted another potential crisis at the same time—one stemming from officers' refusal to participate in CCRB interviews—by publicly claiming it would bring allegations of impeding an investigation against the defiant officers. The tactic worked, and the officers submitted to interviews. The board should use the same strategy to ensure that any officers, including supervisors, who fail to provide BWC footage upon request from the CCRB are themselves subject to investigation and discipline.

Off-Duty Conduct Can Be Instructive in Investigating Racial Profiling Complaints

The rules implementing the Board's recently granted authority to investigate past professional misconduct appropriately reflect the scope and nature of its new powers and should be approved. The Board and staff should also note that investigations into conduct outside of the four corners of a particular allegation can be useful in the course of investigating complaints of racial bias. Off-duty conduct demonstrating racial bias is properly the subject of discipline, up to and including termination from the NYPD. *See Locurto v. Giuliani*, 447 F.3d 159 (2d Cir. 2006). Therefore, searches for off-duty demonstrations of racial animus—on social media platforms, in internet forums, and elsewhere—are properly within the scope of the RBPB Unit. President Biden's May 25, 2022 Executive Order stated that local law enforcement agencies should develop policies that “help avoid the hiring and retention of law enforcement officers who promote unlawful violence, white supremacy, or other bias against persons based on race, ethnicity, national origin, religion, sex (including sexual orientation and gender identity), or disability.”⁶ By conducting a thorough and rigorous investigation or the online presence of every subject officer of a complaint of racial bias, the RBPB Unit can play a critical role in fulfilling the executive order. In an era where white

⁵ See <https://www.propublica.org/article/the-nypd-is-withholding-evidence-from-investigations-into-police-abuse/>

⁶ Executive Order 14074 of May 25, 2022, Section 3(a)(iv)

nationalist organizations have been actively working to infiltrate police departments, such work is all the more critical.⁷

Board Panels Do Not Need to Review Each Case File

We applaud the Board's actions in implementing rules for remote meetings, which will add efficiency to the Board's process and ensure quorums at meetings. Board efficiency is a critical and under-reported issue. One additional way to increase Board efficiency is by limiting or eliminating the process of reviewing every individual case file. Board review of each case is a legacy of the 1987 Board, which was a civilian board that reviewed investigations conducted by the NYPD's Civilian Complaint Investigative Bureau to evaluate the cases for pro-police bias. With the establishment of the civilian investigative staff in 1993, concern for such bias diminished. Now that the CCRB can prosecute its own cases in the trial room, that forum, rather than the board vote, serves as the final word on the outcome of a case. You know as board members that reviewing hundreds of investigations presents a burden on you and delays the final resolution of each investigation. You could devote more time to policy matters like those the subject of this meeting if you limited case review to an audit of sample cases to ensure they remain of high quality but delegate the authority to close other cases to the agency itself.

Conclusion

Thank you for the opportunity to address your upcoming rule changes, and LatinoJustice thanks you for taking the initiative to further implement the powers granted to you by the City Charter.

⁷ See <https://www.politico.com/news/magazine/2020/12/09/oath-keepers-far-right-group-infiltrate-local-government-texas-443773>.