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MEMORANDUM ACCOMPANYING **AUGUST 8, 2018 PUBLIC PRESENTATION OF** **CCRB'S DISCIPLINARY FRAMEWORK**

In response to Board member concerns about having no formal guidelines for disciplinary recommendations, the Civilian Complaint Review Board (“CCRB”) conducted a statistical analysis of past disciplinary recommendations issued by the various three-member board Panels that vote on CCRB cases. During this review, CCRB found that the lack of a defined process resulted in varied disciplinary recommendations for similar allegations. As a result, the CCRB developed a Disciplinary Recommendation Framework (“Framework”) with the goal of creating more consistent voting recommendations across the various board Panels. The Board began a pilot program to test the application of the Framework in January 2018.

The Framework is not binding on the Board members. Rather, the Framework serves as a consensus building tool after a Panel votes to substantiate an allegation; it applies only to the disciplinary recommendation, not the factual determination.

This memo, along with the accompanying PowerPoint presentation, describes the results of the statistical analysis of past Panel determinations as well as the legal concepts underlying the formation of the Framework. The results of the pilot program are also explained below.

Disciplinary Recommendation Framework

Once a case has been substantiated, this Framework allows the Panel to filter the case through a process that will result in more consistent and fair discipline recommendations. The Framework consists of three tiers, *Substantiated Allegation Type*, *Member of Service History*, and *Case Totality*.

Substantiated Allegation Type

The CCRB has identified six categories that represent the most severe allegations of misconduct, which should prompt the first level of analysis in the Framework. If the Board substantiates at least one allegation against a Member of Service (“MOS”) for Chokehold, Strip Search, Warrantless Entry, Offensive Language, Excessive Force with Serious Injury, or Sexual Misconduct, more weight should be given to a recommendation of Charges and Specifications. The six categories were selected because the New York City Police Department’s (“NYPD” or “Department”) Patrol Guide (hereinafter “Patrol Guide”), state and federal courts, and constitutional law have defined these types of misconduct as more serious:

- 1. Substantiated Chokeholds:** Chokeholds are prohibited by the Patrol Guide.¹ There are exceptions to this section, which, if applicable, would result in the MOS being exonerated and the case falling outside of the Framework. However, if a chokehold is substantiated, the disciplinary recommendation should be Charges and Specifications.

- 2. Substantiated Strip Searches:** Both state and federal courts have deemed strip searches to be “an invasion of personal rights of the first magnitude.”² The importance of conducting a proper strip search is demonstrated by the additional requirements imposed by the Patrol Guide³ on MOS who authorize and conduct them. These supplemental provisions were implemented because the physical and emotional toll of an improper strip search is much greater than that of an improper search during a street encounter.

- 3. Substantiated Warrantless Entries⁴:** Courts have agreed that improper entries into a residence directly infringe on a person’s constitutional

¹ P.G. Section 221-01(2)(a).

² Chapman v. Nichols, 989 F.2d 393, 395 (10th Cir. 1993); See People v. Jones, 3 Misc. 3d 481, 484-85, 776 N.Y.S.2d 750, 753 (Sup. Ct. 2004), *citing* United States v Bazy (1994 WL 539300, *3, 1994 U.S. Dist. LEXIS 14165, *7 (D. Kan. Aug. 29, 1994).

³ P.G. Section 208-05(C).

⁴ In the first six (6) months of 2018 only one (1) of the 40 Framework eligible cases involved the substantiation of an unlawful entry where the MOS put a foot in the door to prevent the complainant from closing it. In addition, according to a 2015 report by the CCRB analyzing unlawful entry cases over a five (5) year span (2010-2015), the CCRB only substantiated 13 cases where an officer unlawfully entered a home by putting a foot in the door. That means less than 3 cases a year, or less than 1%, would be Framework eligible. Crossing the Threshold: An Evaluation of Civilian Complaints of Improper Entries and Searches by the NYPD From January 2010 to October 2015, at 78 (2015). Available at <http://www.nyc.gov/html/ccrb/downloads/pdf/Crossing-the-Threshold-2010-2015.pdf> (Last retrieved August 2, 2018)

right. “In none is the zone of privacy more clearly defined than when bounded by the unambiguous physical dimensions of an individual's home...That language unequivocally establishes the proposition that ‘[at] the very core [of the Fourth Amendment] stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.’”⁵

4. **Substantiated Offensive Language:** The Patrol Guide strictly prohibits Offensive Language. Unlike Discourteous Language, there is never an occasion where the use of racial slurs or derogatory comments about protected categories of people would serve an official law enforcement function.⁶
5. **Substantiated Excessive Force with Serious Injury:** The updated Patrol Guide Force Guidelines increase the gravity with which the NYPD considers serious force with injury cases. The Department now evaluates force based on the type of force used **or** the type of injury sustained. Force with injury now triggers additional reporting requirements by MOS and supervisors.⁷
6. **Sexual Misconduct:** Sexual Misconduct, by its very nature, is a fundamental abuse of authority. “Due to the authoritative power inherent in a law enforcement position, these interactions can be implicitly, if not explicitly, coercive to, for example, a complainant seeking the resolution of allegations or to a defendant seeking a favorable conclusion to a criminal case.”⁸

MOS History

If a discipline determination cannot be reached by the board Panel based on the *Substantiated Allegation Type*, the *MOS History* should be the next level of analysis. Factors to consider during the *MOS History* stage can include:

⁵ Silverman v. United States, 365 U.S. 505, 511 (1961). In terms that apply equally to seizures of property and to seizures of persons, the Fourth Amendment has drawn a firm line at the entrance to the house (quoting Payton v. New York, 445 U.S. 573, 589-90, 100 S. Ct. 1371, 1381-82 (1980)).

⁶ P.G. Section 203-10(1).

⁷ P.G. Section 221.

⁸ NYC Commission to Combat Police Corruption. Ann. Rep. 18, at 150. (2017). Available at <http://www1.nyc.gov/assets/ccpc/downloads/pdf/18th-Annual-Report.pdf>. (Last retrieved November 13, 2017).

- MOS rank;
 - E.g., Police Officer vs. Lieutenant
- Number of years on the force;
 - E.g., three years vs. 10 years
- Command;
 - E.g., Emergency Services Unit vs. 112 Precinct
- Prior substantiated allegations of misconduct;
 - 90% of active MOS have never had a CCRB complaint that contains at least one substantiated allegation.
 - 40% of active MOS have never been a subject officer in a CCRB complaint.

If any of the *MOS History* factors make the allegations more serious, then recommending Charges and Specifications may be appropriate. For example, was the misconduct perpetrated by an officer who has been on the force for less than three years and has no prior substantiations, or by a supervisor with a prior disciplinary history who should be setting an example for more junior officers?

Case Totality

Case Totality is the final category in the Framework and the stage that is most flexible for interpretation. This classification applies where the conduct, taken as a whole, is egregious. For example, where a MOS with no prior disciplinary history is captured on video engaging in misconduct and the officer admits to the conduct, but the Patrol Guide (or any other NYPD training materials) does not sanction the conduct. In that situation, it is clear that the acts occurred and the conduct is so egregious that the Panel members could agree that Charges and Specifications are appropriate.

Case Totality also provides Board members the ability to reduce the discipline recommendation if the facts of the case so warrant. For example, if a MOS who has some information that a person might be in danger, but not enough to meet the legal standard, enters a home without a warrant to conduct a wellness check, the Panel may decide to deviate from a recommendation of Charges and Specifications and recommend a less serious level of discipline.

Deviations

When the Panel deviates from the Framework and reduces the discipline recommendation for a case that may warrant Charges and Specifications, the

rationale for the deviation is noted for tracking purposes. The Framework is a non-binding, evolving document and as patterns arise or shortfalls become known, adjustments will be made.

Other Discipline

Substantiated allegations that do not meet the Framework criteria will result in other appropriate disciplinary recommendations (e.g., Command Discipline, Formalized Training, or Command Level Instructions).

Command Discipline (Schedule “A” or Schedule “B”) is most appropriate when the Panel believes that the officer’s conduct did not rise to a level that would warrant Charges and Specifications, but that the officer deserves formal discipline. Schedule “A” Command Discipline can result in up to five (5) days of vacation forfeiture and is automatically removed from a MOS’ Central Personnel Index (“CPI”) after one (1) year. Schedule “B” Command Discipline can result in up to ten (10) days of vacation forfeiture, and while it is not automatically removed from the CPI, a MOS can petition after three (3) years to have it removed.

Formalized Training and Command Level Instructions are not considered formal discipline by the NYPD and can be imposed even after the statute of limitations has run on a case. Formalized Training is typically retraining at the Police Academy or instruction from another division within the Police Department such as Risk Management or the NYPD Legal Bureau. This type of discipline is usually recommended in less serious cases when the Panel believes that the MOS has a fundamental misunderstanding of the law. Command Level Instructions requires that the MOS’ Commanding Officer instruct the MOS on what he/she did wrong and how to avoid repeating that conduct in the future. The Panel usually recommends this type of discipline where the MOS has committed a technical violation of the law or Patrol Guide, but the Panel understands the reasoning behind the MOS’ actions.

Results of Pilot Program

Through the first half of 2018, the results of the pilot program have been promising. The Board has recommended Charges and Specifications in 31 cases, or 5.2% of all of the cases reviewed in the first six (6) months of 2018. This is just below the statistical average of 6.4% (approximately 33 cases) from the past five (5) years since the formation of the Administrative Prosecution Unit (“APU”).

The Board deviated from the Framework seven (7) times, recommending discipline other than Charges and Specifications for cases within one (1) of the six (6) substantiated allegation types.

In addition, the Board decided not to follow the investigator's recommendations for three (3) cases. In two (2) of those cases, the Panel chose to unsubstantiate the allegations, thus the Framework did not apply. In the third case, the Panel voted to substantiate allegations despite the investigator recommending that they be unsubstantiated. Applying the Framework, the Panel recommended Charges and Specifications based on the totality of the case.

At the end of 2018, the Board will review the full results of the pilot program and decide what, if any, changes should be made to the Framework.