

## MEMORANDUM

To: Civilian Complaint Review Board (CCRB)  
From: General Counsel's Office  
Date: January 8, 2021  
Re.: Changing CCRB's Rules to Include Sexual Misconduct and Untruthful Statements Made Against Members of the Public as Part of Abuse of Authority

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The New York City Civilian Complaint Review Board ("CCRB" or "the Board") investigates civilian complaints of excessive force, abuse of authority, discourtesy, and offensive language ("FADO"), as well as the truthfulness of statements made by members of the New York City Police Department ("NYPD") to CCRB during CCRB's investigation of complaints.<sup>1</sup> Abuse of authority is the broadest category under CCRB's jurisdiction, and it refers to the type of misconduct in which NYPD officers misuse their police powers.

On February 14, 2018, the Board voted unanimously to pass a resolution to begin investigating civilian allegations of sexual misconduct by members of the NYPD.<sup>2</sup> The Police Benevolent Association ("PBA") sued CCRB shortly thereafter, arguing that the new rules and sexual misconduct resolution were invalid. On May 28, 2020, the Supreme Court of the State of New York, Appellate Division, First Department, declared that CCRB's sexual misconduct resolution "announced a sweeping policy... and thus amounted to the adoption of a new "rule" [...]"<sup>3</sup> The Court did not question CCRB's authority to define abuse of authority nor did it dispute that sexual misconduct is an abuse of authority. It nullified the procedure by which CCRB undertook sexual misconduct investigations.

CCRB's proposed Rules now include sexual misconduct as part of CCRB's definition of its abuse of authority jurisdiction. The proposed Rules further define abuse of authority to include allegations of intentionally untruthful testimony and written statements made by members of service against members of the public in the performance of official police functions. Like sexual

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<sup>1</sup> NYC Charter § 440(c)(1).

<sup>2</sup> Before passing the sexual misconduct resolution at CCRB's February 2018 Board Meeting, the Board considered a written memorandum detailing the agency's reasoning at the time, public comment, and a presentation from policy expert Andrea Ritchie offered at CCRB's October 2016 Board Meeting. At CCRB's October 2018 Board Meeting, the Board and public received an update from CCRB's Director of Training, Monte Givhan, on the Agency's work towards undertaking sexual assault investigations. These materials are incorporated into this memo by reference. The minutes and video recordings from the October 2016, February 2018, and October 2018 Board Meetings are available on CCRB's website at the following link:

<https://www1.nyc.gov/site/ccrb/about/news/previous-board-meetings.page>

The Board's 2018 resolution and memorandum may be found directly under the minutes and video recording from the February 2018 Board Meeting.

<sup>3</sup> *Matter of Lynch v New York City Civilian Complaint Review Bd.*, 183 A.D.3d 512, 518 (1<sup>st</sup> Dept. 2020) [internal citations removed].

misconduct, CCRB has not historically exercised its authority over these allegations, which are also fundamental abuses of authority.

### *CCRB's Authority to Define FADO*

The New York City Charter authorizes each board or officer governed by the Charter to exercise any power necessary to carry out its Charter-mandated function.<sup>4</sup>

As the Charter merely provides a framework for the agency and offers little to define or explain CCRB's jurisdiction and authority beyond listing the FADO categories, the CCRB's interpretation of its Charter, particularly in the context of the rulemaking process, is entitled to "great weight and judicial deference."<sup>5</sup> A court must uphold an agency's interpretation of its own charter authority and mandate if the agency "has a rational basis and is supported by substantial evidence, and so long as the interpretation is neither irrational, unreasonable nor inconsistent with the governing statute."<sup>6</sup> To avoid dismissal for arbitrariness, an agency must set out reasons for changing a "prior stated course."<sup>7</sup>

### ***Part I: Sexual Misconduct is A Fundamental Abuse of Authority***

In requiring CCRB to adopt sexual misconduct as a rule, the First Department did not dispute CCRB's assertion that "sexual misconduct by a police officer is, at its core, an abuse of authority."<sup>8</sup> There is no more clear abuse of authority than an officer using their official position as a tool of sexual intimidation or coercion.<sup>9</sup> In addition to violating the civil rights of individual victims of police sexual misconduct,<sup>10</sup> these acts undermine the public's trust in law enforcement.<sup>11</sup> Following an extensive period of preparation, the Agency is now prepared to investigate these allegations of police misusing their powers.

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<sup>4</sup> NYC Charter §1120, "Any elected or appointed officer of the city or any board or commission or any member thereof shall, in addition to the powers and duties vested in such officer, board or commission by this charter, perform any duties and exercise any powers vested in such officer or in such board or commission by any other provision of law and any power necessary to carry out the powers and duties vested in such officer, board or commission."

<sup>5</sup> *Lynch v. New York City Civilian Complaint Review Bd.*, 64 Misc. 3d 315, 341 (N.Y. County 2019), citing *Matter of Toys "R" Us v. Silva*, 89 NY2d 411, 418 (1996).

<sup>6</sup> *Id.* [internal citations removed].

<sup>7</sup> *Matter of Field Delivery Serv.*, 66 NY2d 516, 520 (1985).

<sup>8</sup> *Matter of Lynch v New York City Civilian Complaint Review Bd.*, 183 A.D.3d 512, 518.

<sup>9</sup> Addressing Sexual Offenses and Misconduct by Law Enforcement: Executive Guide, Published June 2011, p. 1, available at <https://www.theiacp.org/sites/default/files/all/a/AddressingSexualOffensesandMisconductbyLawEnforcementExecutiveGuide.pdf>

<sup>10</sup> 18 U.S.C. § 242.

<sup>11</sup> Addressing Sexual Offenses and Misconduct by Law Enforcement, at p. 2.

CCRB defines sexual misconduct as misconduct of a sexual nature alleged by a civilian against a member of the police department acting in their official capacity. It includes, but is not limited to, the following examples of police misconduct: verbal sexual harassment; sexual harassment using physical gestures; sexual humiliation; sexually motivated police actions such as stops, summonses, searches, or arrests; sexual or romantic propositions; and any intentional bodily contact of a sexual nature, including but not limited to, inappropriate touching, sexual assault, rape, and on-duty sexual activity.

These examples are drawn directly from CCRB’s experience in receiving and investigating complaints of sexual misconduct. The definition itself largely mirrors one proposed by the International Association of Chiefs of Police (“IACP”).<sup>12</sup> The IACP explicitly noted concerns beyond criminal sexual misconduct while on duty, such as adult consensual sexual contact while on duty, voyeuristic behavior, and non-sexual contacts (e.g., unnecessary call backs to crime victims and witnesses).<sup>13</sup> The IACP further notes the reluctance of victims to report to the authorities,<sup>14</sup> and that the propriety of the investigation is less likely to be questioned when an outside investigative agency is involved.<sup>15</sup>

### **CCRB’s Current Practice**

After the Board voted to begin investigating civilian allegations of sexual misconduct by members of NYPD, CCRB developed the capacity to investigate these cases responsibly and effectively. Following the Board’s 2018 sexual misconduct resolution, CCRB immediately began investigating allegations of non-criminal sexual harassment by NYPD officers against civilians. CCRB also began building competency to investigate allegations of sexual assault.

In May 2020, the First Department determined that CCRB must proceed by rule-making. Before the ruling, CCRB had fully investigated 57 complaints including at least one allegation of sexual harassment. In response to the First Department’s decision, CCRB stopped investigating sexual misconduct allegations and spun off open sexual misconduct allegations to NYPD’s Internal Affairs Bureau. Any underlying conduct that also constituted another FADO allegation, such as discourtesy or offensive language, was still pled and investigated. Given the First Department’s ruling, CCRB cannot investigate sexual misconduct allegations without this Board adopting a new Rule.

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<sup>12</sup> Addressing Sexual Offenses and Misconduct by Law Enforcement: Executive Guide, Published June 2011, pp. 3-4, available at <https://www.theiacp.org/sites/default/files/all/a/AddressingSexualOffensesandMisconductbyLawEnforcementExecutiveGuide.pdf>

<sup>13</sup> *Id.* The IACP further notes the reluctance of victims to report to the authorities, and that the propriety of the investigation is less likely to be questioned when an outside investigative agency is involved. *Id.* at pp. 3, 11.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at p. 11.

## **CCRB Is Prepared To Investigate Sexual Misconduct**

### *a. Investigators Trained to Conduct Trauma-Informed Interviews*

CCRB's Training Unit has developed and implemented a training plan to prepare investigators to handle sexual misconduct allegations consistent with trauma-informed best practices. Twenty-one CCRB employees have completed an intensive five-day Forensic Experiential Trauma Interview ("FETI") training. FETI is a science-based, trauma-informed interviewing technique developed to maximize opportunities for information collection and accurately document the participant's experience in a neutral, equitable, and fair manner.

In addition, the Training Unit collaborated with the New York City Alliance Against Sexual Assault to develop and deliver a series of tailored trainings to investigators, including The Neuroscience of Trauma; The Impact of Trauma on Reporting and Investigations; Documenting a Sexual Assault Investigation; and Understanding and Addressing Vicarious Trauma. All investigators receive training in receiving and addressing sexual misconduct and other highly sensitive allegations.

### *b. Civilian Assistance Unit Created; Director Hired*

CCRB hired an experienced Licensed Clinical Social Worker to develop and lead a new Civilian Assistance Unit ("CAU"). CAU will be staffed by victims' advocates, licensed social workers, and trauma services professionals. These professionals will empower and support vulnerable civilians as they navigate the CCRB case process. The CAU director has partnered with CCRB's civilian-facing units, including Investigations, the Administrative Prosecution Unit ("APU"), and Mediation, to identify the needs of civilians and develop workflow mechanisms. She has also written a CAU manual, identified key partners and community resources, and overseen the purchase and customization of a web platform to serve civilians' needs. Finally, the CAU director is developing a "Trauma Informed Care" training manual for all CCRB staff. Immediately before the pandemic, CCRB was preparing to hire professionals to staff CAU.

### *c. Experienced Sex Crimes Prosecutor Hired*

CCRB's Administrative Prosecution Unit hired a prosecutor with experience prosecuting crimes with vulnerable victims, including victims of domestic and sexual violence, and working with survivors of such crimes. CCRB connected with sex crimes prosecutors in all five boroughs and systematically refers potential crimes for investigation by these bodies.

### *d. Technical and Institutional Capacity Built*

CCRB's Information Technology department is ready for the Agency to undertake all sexual misconduct allegations. The production database has been updated and the new allegations are incorporated into CCRB's line-of-business application, CTS+. The Policy Unit has revised the reports database and edited agency reports to include reporting on sexual misconduct allegations.

Investigations has developed guidelines and best practices for the investigation of sexual misconduct cases, including new pleading language and improved communication protocols with civilians. They have also developed a selection process to identify and train senior investigators to prepare them to undertake sexual misconduct investigations. In August and December of 2019, CCRB Board members participated in training sessions led by the NYC Alliance Against Sexual Assault. Additional Board trainings will continue to be offered periodically.

## ***Part II: Untruthful Statements Made by NYPD Officers Against Members of the Public Are Abuses of Authority***

In the 2019 election, New Yorkers voted to grant CCRB jurisdiction over a specific subset of untruthful statements made by police officers: material official statements made by a member of the police department who is the subject of a complaint received by the board, if such statement was made during the course of and in relation to the board's resolution of such complaint.<sup>16</sup> This new allegation is distinct from CCRB's FADO jurisdiction, which requires a complaint from a member of the public against a member of the police. A civilian is not in a position to know about an officer's untruthful statement to CCRB and therefore is not able to complain about it.

Some untruthful statements by police officers are clear misuses of their police powers over civilians and may reasonably result in civilian complaints. When an officer makes an intentionally false statement against a member of the public in oral testimony or a written statement in the performance of official police functions, there is a direct civilian victim. False testimony in a court proceeding can result in loss of liberty. An intentionally falsified police report may lead a civilian to suffer severe collateral consequences from court involvement, even if the charges are ultimately dismissed before trial. When officers lie in these ways, they betray the public trust.<sup>17</sup> This misconduct therefore directly implicates CCRB's abuse of authority jurisdiction.

CCRB has historically referred these allegations to the NYPD. Like sexual misconduct, this area is ripe for independent oversight. As of February 2020, District Attorneys in all five boroughs reported creating lists of officers with potential credibility problems.<sup>18</sup> The Brooklyn and Staten Island District Attorneys also reportedly keep "Do Not Call" lists of officers whose credibility is so damaged that they cannot be called as witnesses.<sup>19</sup> In 2018, former Police Commissioner James O'Neill reported that between 2010 and 2018, 98 Police Department employees, including

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<sup>16</sup> NYC Charter § 440(c)(1).

<sup>17</sup> O'Neill, James, *Police Commissioner O'Neill on his Zero-Tolerance Policy for Perjury*, NY Daily News, March 4, 2018, available at <https://www.nydailynews.com/opinion/nypd-commissioner-o-neill-zero-tolerance-perjury-article-1.3853294>

<sup>18</sup> Joseph, George, *Staten Island Prosecutors Are Creating A List of Cops They Don't Trust To Testify*, Gothamist, February 17, 2020, available at <https://gothamist.com/news/staten-island-prosecutors-are-creating-a-list-of-cops-they-dont-trust-to-testify>

<sup>19</sup> *Id.*

87 police officers, were fired or left the NYPD because of perjury or false statements.<sup>20</sup> The same month, the *New York Times* reported that, on more than 25 occasions in the preceding three years, judges or prosecutors determined that “a key aspect of a New York City police officer’s testimony was probably untrue.”<sup>21</sup> The *Times* further reported that NYPD’s Internal Affairs Bureau rarely substantiates allegations against officers who have been accused of lying.<sup>22</sup> Given the importance and timeliness of this issue, CCRB should now consider exercising its authority over this abuse of police powers.

### **Steps Forward**

CCRB must proceed by rulemaking in order to undertake investigations in areas under its jurisdiction that it has not historically investigated. CCRB has spent the past three years building its infrastructure and is now ready to undertake all sexual misconduct investigations. In order to investigate untruthful statements made against members of the public, CCRB would need to begin a similar process of preparation and staff and board education. By adopting new rules explicitly naming these allegations as part of abuse of authority, CCRB will be able to investigate these misuses of police power consistent with the May 2020 First Department decision.

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<sup>20</sup> O’Neill, James, *Police Commissioner O’Neill on his Zero-Tolerance Policy for Perjury*.

<sup>21</sup> Goldstein, Joseph, ‘*Testilying’ by Police: A Stubborn Problem*, NY Times, March 18, 2018, available at <https://www.nytimes.com/2018/03/18/nyregion/testilying-police-perjury-new-york.html>

<sup>22</sup> Goldstein, Joseph, *Promotions, Not Punishments, for Officers Accused of Lying*, NY Times, March 19, 2018, available at <https://www.nytimes.com/2018/03/19/nyregion/new-york-police-perjury-promotions.html>