

MEMORANDUM

To: Civilian Complaint Review Board (CCRB)

From: Policy

Date: July 6, 2022

Re: Changing CCRB's Rules to Include Improper Usage of Body Worn Cameras Against Members of the Public as Part of Abuse of Authority

The New York City Civilian Complaint Review Board ("CCRB" or "the Board") investigates complaints of excessive force, abuse of authority, discourtesy, and offensive language ("FADO") against civilians, as well as the truthfulness of statements made by members of the New York City Police Department ("NYPD") to the CCRB during the CCRB's resolution of a complaint.¹ Abuse of authority is the broadest category under CCRB's jurisdiction; it refers to the misuse of police powers by NYPD officers.

CCRB's Proposed Rules includes improper use of Body Worn Camera ("BWC") as part of CCRB's definition of its abuse of authority jurisdiction. While the CCRB has not historically exercised its authority to investigate these allegations, they are 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.² The Charter merely provides a framework for the CCRB's jurisdiction and authority, including 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."³ An agency's interpretation of its charter authority is valid where it "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."⁴ Where an agency alters a previous practice, that action is not arbitrary where the agency sets forth valid reasons for deviating from its "prior stated course."⁵

Improper Use of Body Worn Camera is A Fundamental Abuse of Authority

In its 2013 ruling in *Floyd v. City of New York*, the United States District Court for the Southern District of New York found that the NYPD's stop, question, and frisk practices violated the Fourth and Fourteenth Amendments of the Constitution.⁶ As a result, the Court ordered changes

¹ NYC Charter §§ 440(c)(1); 441(b)(1).

² 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."

³ *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 N.Y.2d 411, 418 (1996).

⁴ *Id.* [internal citations removed].

⁵ *Matter of Field Delivery Serv.*, 66 NY2d 516, 520 (1985).

⁶ *Floyd v. City of N.Y.*, 959 F. Supp. 2d 540 (S.D.N.Y. 2013).

to certain policies, practices, and training curricula, as well as a one-year BWC pilot to determine whether BWCs were an effective oversight mechanism for reducing unconstitutional stops. The Court specifically mentioned the CCRB as a stakeholder in the reform process and recognized that BWCs were “uniquely suited to addressing the constitutional harms at issue,” because they “provide a contemporaneous, objective records of stops and frisks, allowing for the review of officer conduct.”⁷

In its 2020 BWC report, the CCRB found that “BWC evidence greatly increases the CCRB’s ability to determine what happened during a police-civilian interaction, resulting in a greater number of cases being closed with a disposition of substantiated, unfounded, or exonerated (on the merits).”⁸ The report noted that the percentage of fully-investigated CCRB cases involving BWC footage increased significantly from 1% to 33% between 2017 and 2019.⁹ Since the CCRB issued the BWC report, this percentage has continued to increase.¹⁰

The BWC report also identified instances where officers failed to comply with NYPD policy with respect to when BWCs must be activated. The CCRB found that officers often turned their BWCs on too late, turned them off prematurely, or failed to turn the BWC on at all—in violation of PG § 212.123.¹¹ In 2021, 53% of all Other Possible Misconduct allegations referred to the NYPD by the CCRB involved improper use of BWC. The improper use of BWCs is a clear abuse of authority that directly impacts the civilians involved in the interaction and implicates the CCRB’s jurisdiction. These actions may result in the CCRB not having the evidence necessary to thoroughly investigate a complaint and reach a conclusion on the merits, which runs counter to the officer conduct review function of BWCs identified in *Floyd*.¹²

CCRB’s Current Practice

The CCRB has been tracking possible improper use of BWC since the adoption of the pilot program by the NYPD. Envisioning officers would have a learning curve on how to properly use the cameras, the CCRB initially referred these allegations to the NYPD as Other Possible Misconduct Noted (“OPMN”)—actions uncovered during a CCRB investigation that are alleged violations of the Patrol Guide, but not currently within the CCRB’s jurisdiction.¹³

In summer 2019, the CCRB updated its internal guidelines to clarify when and how NYPD should be alerted to problematic usage of BWCs. Under the current policy, when an investigator determines that an officer who has been issued a BWC for at least 90 days before the incident failed to turn on the BWC at the start of the tour, failed to activate the BWC during a mandatory

⁷ *Id.* at 685.

⁸ Strengthening Accountability: The Impact of the NYPD’s Body-Worn Camera Program on CCRB Investigations, pp. 6, available at: https://www1.nyc.gov/assets/ccrb/downloads/pdf/policy_pdf/issue_based/20200227_BWCReport.pdf

⁹ *Id.* at 68-69.

¹⁰ In 2021, for example, the percentage of fully-investigated CCRB cases involving BWC footage was 59%.

¹¹ Strengthening Accountability: The Impact of the NYPD’s Body-Worn Camera Program on CCRB Investigations, pp. 9, *supra*.

¹² *Floyd*, 959 F. Supp. 2d at 685.

¹³ “Other Possible Misconduct Noted” was previously referred to as “Other Misconduct Noted.”

event when it was feasible and safe to do so, or terminated the activation before the incident concluded, such conduct will be referred to the NYPD as an OPMN. Where an officer has committed the same misconduct, but was issued a BWC less than 90 days before the incident, the CCRB will send a letter to the NYPD Risk Management Bureau (“RMB”) to alert NYPD that the officer may require additional training.

In 2020 and 2021, the CCRB referred 444 instances where there was evidence that an officer improperly used their BWC. Of these 444 referrals, the NYPD has reached a final decision in 154 allegations:

- 62 allegations (40%) resulted in Instructions
- 22 allegations (14%) resulted in Formalized Training
- 5 allegations (3%) resulted in Command A Discipline
- 2 allegations (1.3%) resulted in Command B Discipline
- 1 allegation (0.6%) resulted in a Guilty verdict
- 38 allegations (25%) were Closed Administratively
- 15 allegations (10%) resulted in No Disciplinary Action
- 9 allegations (6%) were closed as Other (Resigned, Retired, Miscellaneous).

Steps Forward

In May 2020, the Appellate Division, First Department determined that the CCRB must proceed by rulemaking in order to exercise its jurisdiction over a category of misconduct it had historically referred as a matter of policy.¹⁴ Given the (a) importance of BWC footage in making a determination on the merits of a complaint in a full investigation, (b) prevalence of BWC footage in CCRB’s full investigations, and (c) hundreds of instances in which the Board noted that members of service possibly used their BWCs in violation of the Patrol Guide, the improper use of BWC is an integral part of the CCRB’s investigation of a complaint that should not be separated and referred to NYPD. As noted by the court in *Floyd*, the purpose of the BWC implementation was to allow for the review of officer misconduct, which is precisely the CCRB’s role as an NYPD oversight entity. Officer misconduct now includes the improper usage of BWCs, which deserves investigation by an independent entity to ensure that these allegations are reliably evaluated and that officers face appropriate discipline for BWC usage violations.

As seen in the above statistics, where the NYPD has issued a final determination on OPMN referrals for improper BWC usage, the vast majority of cases have resulted in instructions or formalized training—the least severe forms of discipline available. Under the discipline matrix, instructions and training are available penalties for unintentional or negligent improper BWC usage.¹⁵ Intentional or reckless failure to record or commencing/terminating a recording at an improper time carries a minimum of 10 penalty days and a maximum of 30 penalty days.¹⁶ The

¹⁴ *Matter of Lynch v. New York City Civilian Complaint Review Bd.*, 183 A.D.3d 512, 518 (1st Dept. 2020).

¹⁵ NYPD Discipline Guidelines, pp 43, available at:

https://www1.nyc.gov/assets/nypd/downloads/pdf/public_information/disciplinary-system-penalty-guidelines-effective-01-15-2021-compet-e-pdf

¹⁶ *Id.* at 44.

CCRB's BWC report identified instances where officers took actions to prevent or halt the recording of police misconduct,¹⁷ yet the discipline imposed by the NYPD thus far does not reflect that officers are being disciplined under the intentional/reckless category in the discipline matrix. Given that nonexistent or incomplete footage can have a significant impact on the CCRB's ability to evaluate officer conduct on the merits, and consequently result in officers not being held accountable for their actions, it is important that violations of BWC guidelines are appropriately disciplined.

Furthermore, if CCRB investigates and substantiates instances of improper BWC usage, serious violations that result in charges and specifications would be prosecuted by the CCRB's Administrative Prosecution Unit (APU) alongside any other substantiated allegations in the complaint, which would be the most efficient and effective use of resources as these allegations are inextricably linked. Accordingly, the CCRB should adopt a rule that specifies that improper usage of BWCs as part of abuse of authority. By doing so, the CCRB will be able to issue discipline recommendations for this misconduct consistent with the First Department's decision.

¹⁷ Strengthening Accountability: The Impact of the NYPD's Body-Worn Camera Program on CCRB Investigations, pp. 60-62, *supra*.