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FREDERICK DAVIE
ACTING CHAIR

MEMORANDUM ACCOMPANYING PUBLIC VOTE

Date: February 14, 2018

Re: Sexual Misconduct Allegations

Policy Recommendation

The Policy and Advocacy Unit of the Civilian Complaint Review Board (“CCRB” or “the Agency”), after reviewing current CCRB practices, recommends that the Board investigate civilian allegations of sexual misconduct against New York City Police Department (“NYPD”) members of service. CCRB is empowered by the New York City Charter to investigate civilian complaints of excessive force, abuse of authority, discourtesy, and offensive language (“FADO”).¹ Although it has been the Agency’s practice to refer sexual misconduct allegations to NYPD’s Internal Affairs Bureau (“IAB”) for investigation, sexual misconduct by a police officer is, at its core, an abuse of authority. In some cases, it might also amount to discourtesy or involve offensive language or force—for instance, in cases with allegations of verbal harassment or catcalling. Despite the longstanding practice of referring these complaints to IAB, CCRB has both the jurisdictional authority and a clear ethical obligation to investigate such complaints as FADO violations.

Discussion

1. What is Sexual Misconduct?

The term “sexual misconduct” encompasses a diverse range of behaviors, such as verbal harassment of someone because of that person’s sex, gender identity, or sexual orientation, as well as conduct involving the actual or threatened use of physical contact or force, including rape, assault, unwanted touching, and other forms of physical sexual contact.

In addition to the conduct described above, sexual misconduct by police officers also includes inappropriate intimate contact with witnesses, victims, and defendants with whom members of service come into contact as a result of their job assignments. The reason for casting a wider net when it comes to sexual misconduct by police officers is explained in the 2017 Annual Report released by the New York City Commission to Combat Police Corruption (“CCPC”):

¹ NYC Charter §440(c)(1).

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.”²

The authoritative power described above is increased when an officer is armed. As a result, “consensual” sexual activity between an on-duty officer and a civilian might feel inherently coercive for the civilian because the officer is carrying a gun.

2. Why is Sexual Misconduct by Law Enforcement an Important Issue?

Police officers are entrusted with an enormous amount of power over civilians. Every act of professional misconduct tends to chip away at the public’s trust in its law enforcement officers and, more broadly, in the institution of policing. Perhaps no abuse of authority, however, undermines society’s confidence in the police more than an officer who wields the badge as a tool of sexual intimidation and coercion. Unfortunately, the question is not whether such misconduct occurs. Rather, CCRB must investigate how often it occurs and what can be done to stop it.

CCRB received 117 complaints with allegations of possible sexual misconduct between January 1, 2016 and June 1, 2017 and referred all of these complaints to IAB for investigation. The complaints included a variety of allegations, from catcalls and sexual propositions to unwanted touching and rape. Three of these complaints are summarized below to illustrate the range of allegations CCRB receives.

A woman reported that in 2014 she went to a crime scene in the Bronx after hearing that her friend’s son had just been shot. She was questioned by a detective who gave her his phone number and asked her to contact him with any information about the shooting. Months later, the woman recounted that she encountered the same detective again and he asked her why she never called him. The detective then stated, “You see me? I’m a big guy. I’m a big dude. I have a big penis. You’re going to see it.” The woman left the location. She claimed that she continued to see the detective around the neighborhood occasionally and recalled that he would regularly lick his lips and make lewd expressions toward her. The woman stated that she encountered the detective again in 2016 when she was arrested by a patrol officer for driving with a suspended license. After her arrest, the detective allegedly entered the woman’s holding cell and asked her why she was in the stationhouse. The woman said she refused to respond and the detective raised his middle finger and said, “Suck my dick.” When the woman later filed a complaint with CCRB, she was likely unaware that the detective about whom she complained has been the subject of more complaints than all but one other member of service in the NYPD.

² NYC Commission to Combat Police Corruption, Eighteenth Annual Report, 150, Retrieved November 13, 2017 from <http://www1.nyc.gov/assets/ccpc/downloads/pdf/18th-Annual-Report.pdf>.

On July 4, 2016, another woman stated she was walking with her family after watching the fireworks at the East River. Two male officers allegedly licked their lips and began loudly commenting on the attractiveness and physical attributes of the woman's underage niece. The woman filed a complaint with CCRB, stating that the officers' actions made her family feel "uncomfortable" and "vulnerable."

In 2017, officers stopped a man for jaywalking and conducted a frisk. In his complaint to CCRB, the man alleged that one officer squeezed the man's genitals with two fingers, at which point the man jumped back. The same officer allegedly proceeded to squeeze the man's genitals a second time while laughing. The complainant felt that the officer committed these acts in order to sexually harass him.

3. What is CCRB's Current Practice Concerning Sexual Misconduct Complaints?

CCRB has had a longstanding practice of referring sexual misconduct allegations to IAB. The Policy and Advocacy Unit's review of allegations of sexual misconduct CCRB has received, however, strongly suggests that under the Agency's FADO jurisdiction, CCRB should also be investigating the sexual components of misconduct cases.

4. Why should CCRB investigate Sexual Misconduct?

CCRB's power to investigate sexual misconduct allegations is rooted in the New York City Charter.

"It is in the interest of the people of the city of New York and the New York City police department that the investigation of complaints concerning misconduct by officers of the department towards members of the public be complete, thorough and impartial." So begins Chapter 18-A of the New York City Charter, which establishes CCRB as an independent oversight agency. In setting forth the Agency's mandate, the Charter empowers the CCRB to investigate four types of police misconduct: excessive or unnecessary force, abuse of authority, discourtesy, and offensive language.³

Sexual misconduct toward a civilian by a police officer is a fundamental abuse of authority. As such, all instances of sexual misconduct by members of service fall squarely within CCRB's FADO jurisdiction. Although there are cases in which spin-off investigations may be warranted, CCRB should not automatically refer complaints to IAB simply because sexual misconduct is alleged.

5. What Types of Sexual Misconduct Should CCRB Investigate?

a. Phase 1: Non-Criminal Sexual Misconduct

Sexual misconduct exists on a spectrum ranging from inappropriate comments to violent criminal acts. As a result, certain targets of sexual misconduct might feel discomfort or

³ NYC Charter §440(c)(1).

embarrassment while others might suffer severe trauma and require specialized support. Meeting the needs of sexual trauma survivors requires resources the Agency currently lacks. While efforts are made to obtain those resources, there are categories of sexual misconduct that CCRB can begin investigating almost immediately. It is therefore recommended that the Board begins to investigate non-criminal sexual misconduct, including the following types:⁴

<u>Misconduct</u>	<u>Example</u>
Verbal sexual harassment	A male officer tells a female that she is “the hottest thing [he has] ever seen.”
Sexual harassment using physical gestures	A male police officer grabs his crotch and moves his hand up and down while staring at a female complainant and laughing.
Taking unwarranted photographs or videos	A police officer takes photographs of a prisoner during a strip search when there is no legitimate law enforcement purpose for doing so.
Sexual humiliation	A male officer enters a woman’s home to execute a search warrant and makes the woman undress, squat and cough, after which time the officer asks the woman if her breasts are real.
Sexually motivated traffic stops, street stops, summonses or arrests	A male officer blows a kiss at a woman while driving past her and when she does not respond, the officer drives back and issues the woman a summons.
Sexual or romantic propositions	A woman brings her husband’s property to the precinct where he is being held and a male officer asks her for her phone number.

There are a number of reasons to initially limit CCRB’s investigations to less egregious allegations of sexual misconduct. As mentioned above, the primary consideration concerns resources. The Agency must take great care in acquiring the proper tools to assist victims who allege traumatic sexual violations and such investigations should only be undertaken by a select group of investigators who receive specialized training. On the other hand, it is a relatively easy undertaking to begin investigating lewd conduct. Since CCRB investigators will not have to ask especially probing questions to ascertain the facts surrounding these allegations, allegations in Phase 1 can be investigated by all CCRB investigators with minimal training.

b. Phase 2: More Serious Allegations

CCRB should endeavor to eventually investigate even the most serious complaints of sexual misconduct alleged against members of service, even if doing so is not immediately tenable. To advance this agenda, CCRB has a duty to consult with mental health experts and victims’ advocates about developing adequate training modalities for investigators. Once

⁴ With the exception of the example that illustrates taking unwarranted photographs and videos, each example of sexual misconduct included in the table is an allegation from one of the 117 CCRB complaints referred to IAB between January 1, 2016 and July 1, 2017.

appropriate training and logistical mechanisms can be put in place, more serious allegations, like the following, should be investigated:⁵

<u>Misconduct</u>	<u>Example</u>
Over-the-clothing groping during frisks	A female is stopped by a male officer and is asked to exit her vehicle, at which time the male officer frisks her and touches her genitals over her clothing.
Sexual assault	A male police officer comes to a woman’s home on an ongoing basis and, with his service weapon holstered, forces the woman to engage in oral and anal sexual conduct.
Forcible rape	A woman working as a prostitute is solicited for sex by a plainclothes police officer who then rapes her at gunpoint.
On-duty sexual activity	An underage boy is arrested and when his mother arrives at the stationhouse, the arresting officer takes her into a back room and engages in oral sex and sexual intercourse with the woman before releasing her son.
Penetrative sexual contact	A male officer conducts a cavity search on a male prisoner by inserting his fingers into the prisoner’s anus and asks the prisoner if he likes it.

Given the sensitive nature of serious sexual misconduct allegations, such as those listed above, investigations of complaints included in Phase 2 should only be conducted by a select group of senior investigators with the demonstrated ability to approach difficult cases with dedication and compassion. These investigators should receive specialized training in trauma-informed care and the Agency should seek to appropriate the necessary funding for such training. CCRB should also designate at least one attorney from the Administrative Prosecution Unit to prosecute these complaints. That attorney should have experience prosecuting sex crimes or working with victims of sexual violence.

c. CCRB Referrals to IAB

Until the necessary preparations can be made for investigating the more serious sexual misconduct allegations outlined in Phase 2, such complaints should continue to be referred to IAB for investigation. In addition, the Agency should institute a strict policy of referring any complaint alleging criminal sexual conduct to the appropriate District Attorney’s Office in addition to the IAB referral.⁶ Prosecutors’ high burden of proof may preclude criminal prosecution in many sexual misconduct cases, whereas IAB uses a preponderance standard. Until CCRB can effectively and responsibly serve sexual assault survivors, referring cases to both IAB and District Attorneys’ Offices allows for the possibility of multiple levels of accountability.

⁵ Each example of sexual misconduct included in the table is an allegation from one of the 117 CCRB complaints referred to IAB between January 1, 2016 and July 1, 2017.

⁶ Referrals to District Attorneys’ Offices should be accompanied by language clarifying that the complainant will be informed of the referral, but may not be interested in pursuing a criminal case.

6. *What Are the Next Steps?*

a. Competency Training for Investigators and Agency-Wide Support

CCRB will reach out to victim advocacy organizations for assistance in assessing agency needs and developing a comprehensive plan of action for investigating sexual misconduct by police officers. There are a number of organizations offering training for individuals and agencies dealing with survivors of sexual assault. In collaboration with one or more of these organizations, CCRB should offer basic competency training to ensure that all intake staff, investigators, and prosecutors are equipped to interact sensitively with complainants alleging sexual misconduct by members of service. Prior to the Agency entering Phase 2, additional specialized training will be provided for the select group of experienced senior investigators who will handle such cases.