



NYPD
New York City Police Department

New York City Police Department

**Process of Developing the NYPD
Disciplinary System Penalty Guidelines
and Response to Public Comments**

Introduction

Effective July 15, 2020, the New York City Council passed, and the Mayor signed, Local Law 69 to amend the administrative code of the City of New York to require the New York City Police Department (NYPD) to develop an internal disciplinary matrix. The Department has taken numerous steps to develop the attached Disciplinary System Penalty Guidelines (Guidelines) including consultation with external stakeholders and a public comment period to solicit input. This process is described in more detail below. The Guidelines describe acts of misconduct, presumptive penalties for violations, and mitigating and aggravating factors that are considered by the Police Commissioner in adjudicating discipline for acts of misconduct. In accordance with Local Law 69, the Department is publishing the attached Guidelines to be effective as of January 15, 2021. Any subsequent modifications to the Guidelines will be described and posted accordingly.

Review of the Process to Develop the Guidelines

The NYPD is committed to a fair and transparent disciplinary process. In 2018, the NYPD asked an independent panel of experts to conduct a top-to-bottom review of the Department's disciplinary system. While the panel determined that, in all, the system is robust and fair, it also found that the disciplinary process lacked transparency and that too much time passes between an incident and final adjudication. The Department accepted all 13 recommendations made by the panel. One of these recommendations was for the Department to consider adopting a non-binding disciplinary "matrix" to help guide the Police Commissioner in determining appropriate and consistent penalties for acts of misconduct. Discipline matrices are utilized by a number of law enforcement agencies around the country and can increase the transparency, accountability, and efficiency of the disciplinary process. The panel found that even the perception of favoritism or bias can undermine the legitimacy of the system and that, by publishing such Guidelines, the NYPD could increase the legitimacy of the process and detect trends of bias or inconsistency. Other noted benefits include: reinforcing the Police Commissioner's accountability without limiting the Commissioner's discretion, providing transparency into the relationship between the type of violation and penalties imposed, and increasing efficiency in the system by giving the NYPD Department Advocate and Civilian Complaint Review Board (CCRB) a framework within which to negotiate timely and consistent settlements.

The process to develop the Guidelines has been comprehensive. Subject matter experts within the Department formed a working group, evaluated disciplinary guidelines from other municipalities, reviewed NYPD disciplinary cases decided within the past 5 years, and consulted with external oversight organizations to develop penalty baselines. Prior to promulgation of these Guidelines, penalty decisions were based upon the historical precedent established by similar cases involving similarly situated officers. These disciplinary decisions served as the starting point for analysis. The working group looked back 5 years or more to identify acts of misconduct, relevant attendant facts, aggravating and mitigating factors, and the penalties that were imposed. Of course, the particular facts and circumstances in any incident may vary, but overall the exercise established baseline penalties or penalty ranges for core acts of misconduct. Next, the penalties were assessed to determine whether they were relevant, proportional and aligned with the Department's mission and disciplinary goals. Finally, penalties were right-sized in order to address incongruities across different acts of misconduct. The primary result was significant increases in the presumptive penalties for acts of misconduct related to public contact.

While Local Law 69 became effective on July 15, 2020, the NYPD had been working on a draft of the Disciplinary Guidelines for more than a year prior. Importantly, the Department received and incorporated input from the public before publishing the draft Guidelines. As part of the federal monitorship, the NYPD participated in a community-input process, the Joint Remedial Process, from 2015 through 2017. During that process, the NYPD engaged with various stakeholders, including advocacy groups, community organizations, New York City government officials, members of Congress, local District Attorneys, Borough Presidents, the Speaker of the City Council, members of the City Council, CCRB, and religious leaders. The NYPD heard from the community their primary goals are transparency, accountability, and fairness in the NYPD disciplinary process.

The NYPD posted a draft of the Guidelines on the Department's website on August 31, 2020, which was available for review and public comment until October 5, 2020. The draft Guidelines provided an overview of the goals of internal discipline, defined the presumptive penalties for specified acts of misconduct by officers, and outlined potential aggravating and mitigating factors that might be considered when assessing disciplinary penalties. The Department solicited comments from the Department's various oversight bodies, including the CCRB, the Commission to Combat Police Corruption (CCPC), the Department of Investigations, and the federal monitor. Additionally, the Department publicized the draft through various media platforms. Lastly, the Department reached out to various organizations, including the New York Civil Liberties Union (NYCLU), Communities United for Police Reform, and the plaintiffs' class from *Floyd, Ligon, and Davis* litigations to solicit their feedback as well.

Overview of the Feedback

Between August 31, 2020 and October 5, 2020, the NYPD received total of 439 relevant comments through the Department's website and a dozen letters from various organizations, such as the NYCLU, Communities United for Police Reform, the CCRB, the CCPC, Brooklyn Defender Services, the Center for Constitutional Rights, the federal monitor, the Legal Aid Society, the Center on Race, Inequality, and the Law (NYU), Executive Order 203 facilitators, and the New York State Office of the Attorney General. CCRB also held an online public meeting, which the NYPD attended, and collected comments from board members, elected officials, advocacy organizations, and the public. Their letter was a compendium of the comments they received, and these comments were considered. CCPC conducted a comprehensive analysis that was also reviewed and considered. Many of the recommendations from these oversight entities have been incorporated.

Many of the letters were highly critical and expressed ideological points of view regarding police discipline and policing in general. Most began with overarching issues such as the transparency of the disciplinary system, accountability, authority of the Police Commissioner, and the need for increased deference to CCRB findings and penalty recommendations, among others. Most comments advocated for stronger penalties, narrowing the mitigation factors, and reducing discretion.

The written comments ranged from specific criticisms of certain penalties to broad overall impressions of the document as a whole. Specifically, one hundred and sixty-seven of the 439 comments concerning the disciplinary Guidelines judged the penalties to be too lenient. The common themes of these comments were that the proposed Guidelines lacked transparency and accountability, permitted too much discretion for the Police Commissioner, and that the proposed penalties were inadequate to address the harm caused to civilians by police misconduct. Two hundred and sixty-nine of the 439 comments judged that the penalties were too severe. These included comments that the proposed Guidelines lacked due process for the members of the service, ignored the need to address public safety, and established unfair mandatory minimum penalties. These comments also expressed the view that the processes and penalties in the Guidelines were inconsistent with, and harsher than, the penalties assessed by the criminal justice system, particularly when compared with recently enacted criminal justice reforms. Three of the 439

comments concerning the Guidelines judged the penalties to be appropriate and the language to be clear. Off-topic comments expressed general support for the police (39 comments), anti-police/defund the police sentiment (11 comments), and other topics (50 comments). Written submissions and public comments had some commonalities that the NYPD considered in making the changes to the Guidelines. The most common comments the NYPD received are listed below and were considered in making the changes to the final version:

1. Too much discretion rests with the Police Commissioner
2. The Guidelines are too confusing and include too many legal principles
3. The aggravating and mitigating factors are too subjective, too vague, contain too many loopholes, perpetuate stereotypes, and can be used to justify any outcome
4. Penalties are not severe enough generally or otherwise incongruous (e.g. termination for marijuana use or petit larceny but not for excessive force)
5. Penalties are too severe and will discourage cops from doing their job/cause them to retire
6. Termination should be the presumptive penalty for any use of excessive force (including failing to intervene/report/obtain medical aid) or any prohibited use of force in the Patrol Guide
7. Penalties for excessive use of force should be based upon the nature of the misconduct and not the manner in which the act is carried out and/or the outcome. Consideration of outcomes (e.g. nature of force used, injury sustained, etc.) should be deferred to the application of aggravating and mitigating factors
8. Termination should be the presumptive penalty for any violation of law (e.g. DWI, failure to offer a business card under the Right to Know Act, 4th Amendment violation, etc.)
9. The Guidelines are too detailed with respect to distinctions between bad acts
10. The Guidelines are not detailed enough, all violations of the Right to Know Act and specific acts of force (e.g. CEW use) should be listed
11. Forfeiting vacation time should not be a penalty. Suspension without pay should be the penalty, unless termination applies
12. The penalties for body-worn camera policy violations are too low

Revisions to the Guidelines

Upon receipt of all of the comments, the NYPD re-convened its working group of subject matter experts within the Department, including representatives from the First Deputy Commissioner's office, Risk Management Bureau, Office of Equity and Inclusion, Deputy Commissioner Legal Matters, Department Advocate's Office, and Deputy Commissioner of Trials to review all of the comments and to identify areas of the Guidelines that should be modified.

The Department reviewed and considered every recommendation and point of view, despite the conflicts between many of the comments received from the public. In some cases, the Department was limited in what changes could be made by factors such as civil service law, collective bargaining, and other local, state or federal legislation (e.g. length of a member's probationary period, amount of time a member can be suspended, etc.). In others, the Department disagreed with the recommended approach. But overall, significant changes were made between the draft released for public comment and the version of the Guidelines effective January 15, 2021. Some of the changes to highlight include:

- Adding specific mitigated penalties and aggravated penalties to each presumptive penalty to establish a defined range for each offense. These ranges ensure consistency by limiting the effect of any mitigating or aggravating factors that may be used to deviate from presumptive penalties
- Specifying the impact of repeated violations and defining an escalation of penalties for multiple offenses (i.e. progressive discipline)
- Adjusting some of the penalties to reconcile inconsistencies

- Adding language that defines and clarifies terms such as penalty days, forced separation, and training
- Revising the language describing aggravating and mitigating factors to eliminate any ambiguity
- Removing any emphasis on the characteristics of civilians involved in incidents, as opposed to the civilians' actions
- Eliminating consideration of an officer's lack of prior disciplinary history as a mitigating factor
- Adding less-lethal weapons (e.g. CEW, OC spray, batons etc.) to the force section of the Guidelines to provide for consideration of these types of weapons as built-in aggravating factors
- Eliminating references to "objectively reasonable mistake of fact or law" as a mitigating factor
- Clarifying the language with respect to settlement agreements to specify that pleas are not agreed to merely out of expediency and that the weight of the evidence, while a factor in negotiating a settlement, is not grounds to reach a different conclusion from the finder of fact
- Clarifying that each separate act of misconduct is punishable and that multiple violations should generally result in multiple, consecutive penalties
- Clarifying that written memoranda will accompany any deviations from the presumptive penalties or departures from the Guidelines and such memoranda will explain the factors considered and how they were applied in reaching a determination as to the appropriate penalty
- Adding a definition of "Hate Speech" to distinguish it from "Offensive Language"
- Clarifying that discipline is a means to redress acts with respect to a person's status as an employee. Discipline does not replace the criminal and civil justice systems, which may also have jurisdiction in a given matter
- Deleting the list of prohibited uses of force culled from the Patrol Guide. The list included actions that do not involve use of force against a person and fostered an expectation that each act would be individually addressed in the penalty chart
- Adding definitions of "deadly weapon" and "dangerous instrument" to the force section and incorporating these definitions into the penalty table in the category of use of deadly force
- Increasing the penalties for Force, Abuse of Authority, Discourtesy, and Offensive Language (known collectively as FADO) offenses from recent precedent to ensure that penalties for public contact offenses are commensurate with the penalties for internal rule violations
- Increasing the penalty for application of a chokehold to a presumption of termination
- Establishing refusal to submit to a breathalyzer as a stand-alone offense, rather than an aggravating factor, which offense may result in the same penalty as DWI itself, with a wide range for aggravation or mitigation
- Reorganizing the sections for a more logical flow

The following summarizes some of the significant changes discussed above and the decision-making process to arrive at these changes.

Progressive Discipline

The NYPD received comments and responses that raised questions about what are perceived as conflicting messages about progressive discipline. Comments on this subject included:

- The Guidelines state that discipline is progressive but it also references a "minimal" disciplinary history and whether the prior misconduct was "minor" as mitigating factors
- Every presumptive penalty in the Guidelines should be determined by both the category of misconduct at issue and the subject officer's disciplinary history, so that for each misconduct category, there is a presumptive penalty for a first-time offense, a higher presumptive penalty for a second offense in the same category within a specified number of years, and the highest presumptive penalty when the officer has committed the same type of offense three or more times within a specified number of years. This is a core characteristic of progressive discipline
- While the draft Guidelines purport to achieve progressive discipline in that "penalties are increased for subsequent violations of the same or similar misconduct or when a pattern of misconduct is demonstrated," the draft states that prior misconduct *may* increase the disciplinary penalty for current violations, not that

it *will* increase the penalty, and fails to provide any guidance on how penalties are to escalate with each subsequent repeat violation. It also fails to clearly establish escalated penalties for repeated misconduct committed within defined timeframes

- The NYPD should model its progressive discipline more on the Denver Police Department’s disciplinary guidelines model

The working group discussed all of these responses and comments and agreed with the substance of the criticism. The discussion centered on whether progressive discipline should apply to additional offenses of the same type or whether progressive discipline should apply to any additional offenses, regardless of type. The working group prioritized the need to provide clarity and proper notice to officers of how additional misconduct will affect discipline and agreed that the aggravating factors delineated in the draft did not provide the necessary level of clarity and proper notice. Therefore, the Department added a section on progressive discipline. The Guidelines now specify the impact of repeated violations and define the escalation of penalties for multiple offenses within a certain time period. Prior disciplinary history that is not covered by the progressive discipline rubric can still be considered as an aggravating factor and increase the penalty accordingly.

Aggravating and Mitigating Factors

In the draft posted for public comment, the Guidelines delineated only a presumptive penalty for each act of misconduct and a list of aggravating and mitigating factors that could be applied. Feedback from the public and organizations reflected both the misconception that the presumptive penalty was a “mandatory minimum” penalty and a concern that the application of aggravating or mitigating factors could result in *any* outcome, thus rendering the presumptive penalty meaningless. Therefore, the working group revised the Guidelines to include aggravated and mitigated penalty outer limits for each presumptive penalty, creating a penalty range for each act of misconduct. These ranges limit the degree to which mitigating and aggravating factors may result in deviations from the presumptive penalties. There are universal factors that could serve to mitigate or aggravate a penalty as well as factors specific to each category of misconduct to help inform the decision-making process as to how, when, and to what degree such factors should be applied. Importantly, whenever deviations from the presumptive penalty are made, the Police Commissioner will explain which mitigating or aggravating factors were considered and how they were applied in a written memorandum.

The working group also made revisions to the aggravating and mitigating penalties in order to eliminate ambiguity; removed irrelevant factors relating to the characteristics of the subject/complainant; removed officer’s prior disciplinary history as a mitigating factor, already accounted for in the presumptive penalties; and removed references to an “objectively reasonable mistake of fact or law” as a mitigating factor. Finally, the working group added language clarifying that the presumptive penalty/penalty range is also applicable to settlement negotiations.

Force, Abuse of Authority, Discourtesy and Offensive Language

Most acts of misconduct that arise from public contact fall into one of the FADO categories. After reviewing past case precedent for FADO cases, the Department acknowledged the need to increase the penalties for FADO offenses to ensure that penalties for public contact offenses are commensurate with the penalties for internal rule violations. The working group increased penalties were increased, particularly in the areas of use of excessive force, and in all categories, reflecting a significant upward departure from the recommendations received from CCRB over the past several years.

Use of excessive force generated some of the most passionate and critical feedback from the public, and understandably so, as the public has the right to demand the highest level of professional conduct from members of the service and accountability from the Department when police actions constitute misconduct. The two main criticisms of this section were that the presumptive penalty for all uses of excessive force should be termination and that basing the penalty on the outcome of the misconduct, versus the nature of the misconduct, is the incorrect approach. The Department does not consider termination to be the appropriate presumptive penalty for all misconduct involving use of force. However, the presumptive penalty is the starting point for analysis in all cases and given the serious nature of cases involving use of force, the working group revised the Guidelines to include termination in the penalty range for *all* uses of excessive force. The most serious uses of excessive force do result in a presumption of termination. These include cases that involve the use of deadly force, result in death or serious physical injury, or involve the application of a chokehold. Further, the Department has endeavored to delineate force misconduct by both conduct (i.e. the level of force: deadly, non-deadly, less lethal, chokeholds) and outcome (i.e. serious physical injury/death, physical injury, no injury). By including the outcomes, the Guidelines build in what would otherwise be aggravating factors (e.g. nature and extent of the injury) to provide more clarity, detail, and guidance. This approach, coupled with additional aggravating and mitigating factors that are specific to use of force misconduct is more comprehensive and robust than any other matrix reviewed in the course of this process and is designed to give notice to members of the service while balancing principles of fairness and proportionality it applying discipline.

Conclusion

The comments received from all participants in this process were valuable in reaching the final version of the Guidelines. The Department considers this document to be reflective of the appropriate presumptive penalties for specified offenses, along with appropriate aggravating and mitigating factors to be considered. The Department believes that the Guidelines will achieve the purpose for which they were intended: to ensure that any discipline imposed will be fair, consistent, and based on reasonable standards. However, the Guidelines are meant to be a living document, open to further improvements as the application of the Guidelines is assessed and as the needs and expectations of the police and the public evolve. Furthermore, the Guidelines do not exist in a vacuum. They are part of a number of reforms to the disciplinary system that includes the publishing of disciplinary records and case outcomes in the coming weeks. Overall, these Guidelines reflect the Department's commitment to continue to build upon the reforms made over the last several years, increase transparency into the disciplinary system, and to hold officers accountable to the highest standards, in furtherance of its mission to serve the community and provide for public safety.