SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

PATRICK J. LYNCH, as President of the Patrolmen's Benevolent Association of the City of New York, Inc., on behalf of himself and all police officers employed by the City of New York, and THE PATROLMEN'S BENEVOLENT ASSOCIATION OF THE CITY OF NEW YORK, INC.,

Plaintiffs-Petitioners,

-against-

THE NEW YORK CITY CIVILIAN COMPLAINT REVIEW BOARD and FREDERICK DAVIE, in his Official Capacity as Acting Chair of the New York City Civilian Complaint Review Board,

Defendants-Respondents,

-and-

JAMES P. O'NEILL, in his Official Capacity as Commissioner of the New York City Police Department,

Nominal Defendant-Respondent.

Index. No. _____

PLAINTIFFS-PETITIONERS' MEMORANDUM OF LAW IN SUPPORT OF VERIFIED ARTICLE 78 & DECLARATORY JUDGMENT PETITION

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Plaintiffs-Petitioners, Patrick J. Lynch, as President of the Patrolmen's Benevolent Association of the City of New York, Inc. (the "PBA"), on behalf of himself and all police officers employed by the City of New York, and the PBA (collectively, "Petitioners") respectfully submit this Memorandum of Law in support of their Verified Article 78 & Declaratory Judgment Petition against defendants-respondents the New York City Civilian Complaint Review Board ("CCRB") and its Acting Chair, Frederick Davie (collectively, "Respondents"), for an order and judgment striking certain revisions to the CCRB's rules, published on January 2, 2018 (the "Revised Rules"), and a resolution, adopted by the CCRB on February 14, 2018 (the "Resolution"), enjoining and restraining Respondents and any of their agents, officers, and employees, from implementing or enforcing such Rules and Resolution, and declaring such Rules and Resolution invalid.

PRELIMINARY STATEMENT

Through the guise of an extensive revision to its rules and the enactment of an unprecedented Resolution, the CCRB has unilaterally sought to dramatically expand its jurisdiction and authority, and is now an agency that the framers of its Charter would not recognize and certainly never authorized. The CCRB's latest power grabs come in two forms: (i) a vast overhaul of its rules that concluded with the publication of the Revised Rules in January 2018, and (ii) a February 2018 Resolution by which the CCRB granted itself authority to investigate sexual misconduct allegations against police officers.

The Revised Rules and the Resolution cavalierly disregard the limited jurisdiction and authority imposed on the CCRB by its Charter and other legislative mandates, and usurp powers granted instead to the Police Commissioner, the New York Police Department ("NYPD"), and other bodies. The Revised Rules at issue further lack any rational basis (often by the CCRB's own admission) or objective standards that could be used to reasonably address any legitimate

concerns. The result is gross overreaching by the CCRB, in a manner that undermines its legislative purpose: to be a fair, impartial, and independent body to receive and investigate a limited sub-set of civilian complaints against Police Officers in a manner in which the public and the police department can have confidence.

The CCRB's jurisdiction is limited to receiving, investigating, and making findings and recommendations on complaints from the public of police misconduct that involve *only* four limited categories of jurisdiction: excessive use of force, abuse of authority, discourtesy, or use of offensive language (commonly referred to as "FADO" jurisdiction). With the Revised Rules, however, the CCRB has exceeded its limited jurisdiction and authority in all directions. The CCRB has given itself the power, for example, to receive and investigate complaints filed *after the statute of limitations has expired*; ignored its limited FADO jurisdiction and purported to authorize itself to investigate all forms of "other misconduct"; changed the very nature of the agency by empowering itself to commence investigations even when no civilian complaint has been filed; and more. With these changes, the CCRB even grabs for itself powers expressly vested in the Police Commissioner under the pertinent statutory authority, ignores statutory procedures designed to minimize the filing of unreliable complaints (which can have lasting and serious effects on the targeted police officers), and deviates from its own procedures that were designed to create a fair playing field in the make-up of CCRB panels. The result is a series of Revised Rules that violate statutory mandates, lack any rational justification, unfairly prejudice Police Officers, and threaten to undermine public confidence in the CCRB.

Not satisfied with the dramatic expansion of its powers under the Revised Rules, a month later the CCRB also expanded its jurisdiction by means of a "Resolution" that grants the CCRB a fifth category of jurisdiction: the CCRB bestows upon itself the power to investigate complaints

of sexual misconduct, rather than allowing the bodies that have historically handled these types of complaints to continue to do so. The CCRB passed the Resolution without complying with the statutory public notice and hearing requirements, and without any stated or rational basis for the change. With this change, the CCRB is treading in waters in which it has no legislative authority and no experience. The Resolution should be stricken.

The Revised Rules at issue and the Resolution should be declared invalid and stricken, and the CCRB enjoined and restrained from taking the actions described therein.[1]

STATEMENT OF FACTS

Below is a brief summary of the facts pertinent to this application. Petitioners respectfully refer to their Verified Petition for a more detailed recitation of the facts.

The Parties

The PBA is the designated collective bargaining agent for the more than 23,000 police officers employed by the NYPD ("Police Officers"). The core function of the PBA is to advocate for, and protect and advance the rights and interests of, Police Officers. Patrick Lynch, a New York City Police Officer, is the duly elected President of the PBA. Petition ¶¶ 11-12.

The CCRB was established in its current form in 1993 as an all-civilian body to investigate complaints from the public against police officers involving excessive use of force, abuse of authority, discourtesy, or use of offensive language. *See* N.Y. City Charter, ch. 18-A (the "Charter"), § 440. The CCRB's purpose is set forth in the 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. These inquiries must be conducted fairly and independently, and in a manner in which the public and the police department have confidence. An

[1] Copies of the Revised Rules (redlined against the prior Rules) and the Resolution are attached as Exhibits 1 and 2 to the Affirmation of Jacqueline G. Veit ("Veit Affirmation"), submitted herewith. Exhibit numbers throughout this memorandum of law refer to the Exhibits to the Veit Affirmation.

> independent civilian complaint review board is hereby established as a body comprised solely of members of the public with the authority to investigate allegations of police misconduct as provided in this section.

Id. § 440(a).

The CCRB consists of 13 members: the City Council designates five members; the Police Commissioner designates three members; and the Mayor designates five members. *Id.* § 440(b)(1). No member of the CCRB may have a law enforcement background, except those designated by the Police Commissioner. *Id.* § 440(b)(2). The CCRB also has an Executive Director and 180 employees. Petition ¶ 23.

Nominal Defendant-Respondent James P. O'Neill is the Commissioner of the NYPD.

The CCRB's Limited Jurisdiction and the Police Commissioner's Authority Over Police Discipline

The Charter confers upon the CCRB the following limited "FADO" jurisdiction:

> The board shall have the power to receive, investigate, hear, make findings and recommend action upon complaints by members of the public against members of the police department that allege misconduct involving excessive use of **f**orce, abuse of **a**uthority, **d**iscourtesy, or use of **o**ffensive language, including, but not limited to, slurs relating to race, ethnicity, religion, gender, sexual orientation and disability.

Charter § 440(c)(1) (boldface added).

The findings and recommendations of the CCRB are submitted to the Police Commissioner for final determination. *Id.* The Charter vests the Police Commissioner with authority in matters of police discipline. Specifically, Charter Section 434 states that "[t]he commissioner shall have cognizance and control of the government, administration, disposition and discipline of the department, and of the police force of the department." Similarly, the Administrative Code states: "Members of the force, except as elsewhere provided herein, shall be fined, reprimanded, removed, suspended or dismissed from the force only on written charges made or preferred against them, after such charges have been *examined, heard and investigated*

by the commissioner or one of his deputies . . . ." N.Y. City Admin. Code § 14-115(b) (emphasis added).

In creating the CCRB, the City Council made clear that it was not otherwise limiting or impairing the Police Commissioner's statutory authority. Charter Section 440(e) states: "The provisions of this section shall not be construed to limit or impair the authority of the police commissioner to discipline members of the department." It further provides, "[n]or shall the provisions of this section be construed to limit the rights of members of the department with respect to disciplinary action . . . ."

The CCRB is also prohibited from interfering in matters that are being handled by other authorized agencies or bodies, including, but not limited to, criminal matters. Charter Section 440(f) provides: "The provisions of this section shall not be construed to prevent or hinder the investigation or prosecution of members of the department for violations of law by any court of competent jurisdiction, a grand jury, district attorney, or other authorized officer, agency or body."[2]

The Substantial Impact of a CCRB Complaint on a Police Officer

The CCRB's own data shows that thousands of Police Officers are being adversely impacted by meritless complaints. For example, according to the CCRB's most recent report, in the first half of 2017, out of 1,972 filed complaints, only 131 complaints (6.6%) were substantiated. *See* CCRB 2017 Semi-Annual Report, at 19, 23, Ex. 15. On the other hand, 317 complaints were deemed unsubstantiated, 116 were deemed exonerated, 42 were deemed unfounded, and 1,117 were dismissed (referred to as "truncated") due to, among other things,

[2] An "other authorized officer, agency or body" may include, for example, the NYPD's Internal Affairs Bureau, the New York City Commission on Human Rights, or a court (*e.g.*, a civil action under 42 U.S.C. § 1983).

witness unavailable or uncooperative, complaint withdrawn, or victim unidentified.[3] *See id.* at 20, 23. The CCRB data further shows that, for the five-year period between 2012 and 2016, there were 26,395 complaints filed, and of those only 1,664 complaints (6.3%) were substantiated. *See* CCRB 2016 Statistical Appendix, at 60, Ex. 16.

Nonetheless, even as to complaints that are ultimately unsubstantiated or entirely false to begin with, the mere filing of a CCRB complaint has deleterious effects on a Police Officer's career. Petition ¶ 30. As set forth on the CCRB's website, "[a]ll complaints, regardless of outcome, remain on an officer's CCRB history which is part of their personnel record at the police department." CCRB, *Frequently Asked Questions*, available at https://www1.nyc.gov/site/ccrb/about/frequently-asked-questions-faq.page, Ex. 18. According to the CCRB, CCRB complaints "can affect assignments and promotions." CCRB, *Police Discipline*, available at https://www1.nyc.gov/site/ccrb/prosecution/police-discipline.page, Ex. 19. Among other things, a Police Officer will be placed on performance monitoring simply due to the number of complaints filed, regardless of the ultimate disposition of those complaints. Performance monitoring has negative employment consequences, including, among other things, being subject to unnecessary and unwarranted training and increased scrutiny, and impairing an Officer's ability to be promoted, transferred, or receive certain assignments. Petition ¶ 32.

The CCRB Complaint Procedure

After a complaint within its jurisdiction is filed, a CCRB investigator interviews the complainant and any witnesses, collects evidence, and identifies the Police Officer(s) involved in the encounter. *Id.* ¶ 33. The Charter requires certain cooperation in the investigation by the

[3] The small remainder were resolved through mediation, miscellaneous closure, or officer unidentified. *See* Ex. 15 at 19.

NYPD, and Police Officers are required to appear before the CCRB and respond to its inquiries. *See* Charter § 440(d).

Once the investigative team completes its investigation, it makes a recommendation to the Board. A panel of three Board members then votes on the investigators' recommendations. Until the introduction of the Revised Rules, the panels consisted of a designee from each of the Mayor, the City Council, and the Police Commissioner. Petition ¶ 36.

After a complaint is fully investigated, if the CCRB finds by a preponderance of the evidence that the alleged conduct occurred and was improper, the allegation is deemed to be "substantiated." When the CCRB "substantiates" an allegation of misconduct, it makes a recommendation of the type of discipline to be imposed. The Police Commissioner makes the final determination of any discipline imposed. *Id.* ¶¶ 37-38.

The Memorandum of Understanding Between the NYPD and the CCRB

In 2012, the CCRB and NYPD entered into a memorandum of understanding with respect to substantiated complaints. *See* Memorandum of Understanding Between the CCRB and the NYPD Concerning the Processing of Substantiated Complaints, dated April 2, 2012 ("MOU"), Ex. 5. Of note for purposes of this proceeding, the MOU established an administrative prosecution unit ("APU") within the CCRB. When the CCRB recommends more serious discipline, the CCRB's APU "prosecutes" the substantiated allegations before the NYPD Trial Commissioner.[4] The MOU is clear that "[t]he Police Commissioner shall retain in all respects the authority and discretion to make final disciplinary determinations." *Id.* § 8. In this regard,

[4] In 2003, the First Department held that a prior MOU between the NYPD and the CCRB entered into in 2001 was invalid, in part, because it provided for the administrative prosecution of substantiated complaints to be conducted outside the NYPD. *See In re Lynch v. Giuliani*, 301 A.D.2d 351, 359-60 (1st Dep't 2003). The Court held that the MOU cannot "grant[] the CCRB any new substantive rights, nor . . . diminish[] the Police Commissioner's authority to make the final determination as to appropriate disciplinary sanctions." *Id.* at 358.

the MOU provides that the NYPD need only report back to the CCRB *after* the Police Commissioner has made a final determination whether to accept, reject, or modify the CCRB's recommendation. It states that the NYPD "shall ensure that the CCRB is notified of the *final disciplinary result* and specific penalty in each case within thirty calendar days of the Police Commissioner's *final determination*." *Id.* § 24 (emphasis added).

The MOU permits the CCRB to conduct plea negotiations with subject Officers, but similarly requires that such pleas be "presented to the Police Commissioner for final determination." *Id.* § 21. Indeed, the MOU expressly contemplates that the Police Commissioner may reject a plea and sets forth specific procedures to govern this occurrence:

> In all instances where the Police Commissioner rejects a negotiated plea, CCRB shall be responsible for implementing the Police Commissioner's decision, including negotiating the case consistent with the Police Commissioner's determination or proceeding with the prosecution of the subject officer.

Id. § 22.

The Revised Rules at Issue in This Proceeding

The Charter provides the CCRB with limited rule-making authority. Specifically, the CCRB can promulgate certain rules of procedure provided that the CCRB complies with the rule-making procedures in the Administrative Procedure Act. *See* Charter § 440(c)(2). The CCRB rules are found in the Rules of the City of New York, Title 38-A, Chapter 1.

On January 2, 2018, the CCRB published the Revised Rules in the City Record. *See* The City Record Online, available at https://a856-cityrecord.nyc.gov/RequestDetail/20171211110, Ex. 13. In the Notice of Adoption, the CCRB stated its rationales for the Revised Rules. The "Statement of Basis and Purpose" states:

> The purpose of these revised rules is to simplify the language in the rules of the CCRB to make them easier for the public to understand, to accelerate investigations and make them more transparent to the public, and to codify certain Board resolutions that were previously voted on and adopted.

CCRB Notice of Adoption ("Notice of Adoption"), at 2, Ex. 1.

Not only does the CCRB lack jurisdiction to adopt many of the Revised Rules, but they are also inimical to the CCRB's stated purposes. The Revised Rules at issue, discussed further below, are:

- **The Late Complaint Rule (Revised Rule 1-15(a))** -- The CCRB has improperly authorized itself to investigate and make findings and recommendations on complaints filed *after* the expiration of the applicable statute of limitations.

- **Handling of Non-FADO Matters Rule (Revised Rule 1-44)** -- The CCRB has improperly authorized itself to investigate and make findings about undefined "other misconduct" that, by definition, is outside the CCRB's limited FADO jurisdiction.

- **Lack of Civilian Oath Rule (Revised Rules 1-24(d) & (l))** – The CCRB has breached the Charter and created a gross inequity in the interview process by not requiring complainants or witnesses to make their allegations under oath and without warning them of the repercussions of false statements, while requiring Police Officers to be warned of substantial consequences for false statements.

- ***Sua Sponte* Investigations Rule (Revised Rule 1-11(c))** -- The CCRB has improperly authorized itself *sua sponte* to commence investigations and make findings and recommendations without any complaint having been filed by a member of the public.

- **YouTube Complaints Rule (Revised Rules 1-11(a) & (b))** -- The CCRB has expanded the category of individuals with standing to file a CCRB complaint beyond persons who were allegedly harmed, and with a reach so broad that it includes persons who merely viewed unauthenticated videos on the Internet.

- **Reliance on Prior Meritless Complaints Rule (Revised Rule 1-33(a))** -- The CCRB has improperly authorized itself to consider prior unsubstantiated, unfounded, or withdrawn complaints as the basis for its findings and recommendations.

- **Undermine Plea Authority Rule (1-46(d))** – The CCRB has undermined the Police Commissioner's authority to have final say over plea agreements.

- **Unauthorized Reconsiderations Rule (Revised Rule 1-36(b)) –** The CCRB has undermined the Police Commissioner's authority to deviate from the CCRB's recommendations by requiring "reconsideration" from the CCRB.

- **Excessive APU Power Rule (Revised Rule 1-42(h))** – The CCRB has improperly imbued its prosecutorial arm with powers reserved for the Police Commissioner.

- **Panels Without Police Commissioner Reps Rule (Revised Rule 1-31(b))** – The CCRB has improperly and unfairly altered the balance of the CCRB panels hearing charges against Police Officers by eliminating the required presence of a NYPD designee.

- **Undermine Settlements Rule (Revised Rule 1-47(h))** -- The CCRB has improperly eliminated the execution requirement for settlements of complaints.

- **Executive Director Delegation Rule (Revised Rule 1-53(a))** – The CCRB has improperly eliminated restrictions on the power of the Executive Director to delegate responsibilities.[5]

Procedural History of the Revised Rules

In early 2015, the CCRB began a process to revise its Rules. Petition ¶ 48. A year later, the CCRB published a "Notice of Public Hearing and Opportunity to Comment on Proposed Rules," which set a deadline for public comment of June 10, 2016, and scheduled a public hearing for June 13, 2016.[6] Ex. 10 ("Notice of Hearing"). On June 10, 2016, the PBA timely submitted written comments on the proposed Rules, objecting on the grounds, among others, that they would violate the City Charter, the Civil Service Law, the MOU, and/or public policy. *See*

[5] In the Notice of Adoption for the Revised Rules, the CCRB indicated that it deleted in its entirety subsection (b) of Rule 1-52 that required Board members to be present at meetings and panels in person or by videoconference to vote. *See* Notice of Adoption, at 25-26, Ex. 1. However, the version of the Revised Rules on the website of the City's official rule publisher includes Rule 1-52(b). *See* Ex. 14 at 12. To the extent the CCRB's position is that Rule 1-52(b) has been eliminated, that position should be declared invalid. The deletion of Rule 1-52(b) would constitute a violation of Section 1043(b) of the Administrative Procedure Act, because the CCRB never publicly proposed the complete deletion of Rule 1-52(b) prior to the public hearing. *Compare* Notice of Hearing, at 26-27, *with* Notice of Adoption, at 25-26. Additionally, the CCRB lacks jurisdiction and authority to delete Rule 1-52(b) because it would violate N.Y. Pub. Officers Law § 103(a) and General Construction Law § 41.

[6] While the CCRB posts other minutes on its website, as of the date of this Petition the minutes from the June 13, 2016, hearing are not posted. The public comments to the Revised Rules also are not posted as of the date of this Petition, notwithstanding that Section 1043(e) of the Administrative Procedure Act states: "All written comments and a summary of oral comments concerning a proposed rule received from the public or any agency shall be placed in a public record and be made readily available to the public as soon as practicable . . . ." Additionally, an agency is required to "establish a system for maintaining and making available for public inspection all written comments received in response to each notice of rulemaking." *Id.* § 1043(h). The CCRB appears to have failed to comply with these requirements.

Letter, dated June 10, 2016, from the PBA (Patrick Lynch, President) to Richard D. Emery, Esq. of the CCRB, Ex. 12. The CCRB rejected all but one of the PBA's comments.

On October 11, 2017, the CCRB voted to adopt the Revised Rules. On January 2, 2018, the CCRB published the revisions to the Revised Rules in the City Record, and the Revised Rules went into effect on February 1, 2018. *See* Exs. 13, 14.

The Resolution

At its monthly Board meeting on February 14, 2018, the CCRB adopted the Resolution without complying with the requirements of the Administrative Procedure Act to provide prior notice and an opportunity to comment. *See* CCRB "Board Resolution" and "Memorandum Accompanying Public Vote," dated February 14, 2018, Ex. 2. The Resolution dramatically changes more than two decades of how the CCRB has interpreted its own jurisdiction in this area and confers on the CCRB new power that it has never held before. Since its inception, the CCRB has referred complaints of sexual misconduct against Police Officers to the NYPD's Internal Affairs Bureau (the "IAB"). *See id.* at 1, 3. With the Resolution, the CCRB is taking on for itself the investigation and administrative prosecution of sexual misconduct complaints against Police Officers, asserting for the first time that it falls within a broad interpretation of the "abuse of authority" prong of FADO jurisdiction. The CCRB admits that it has no experience or training in this area, and has provided no reason for the change. *See id*. at 4-6.

The Resolution provides for implementation in two "Phases." The CCRB will begin investigating "Phase One" sexual misconduct allegations immediately. "Phase One" allegations include: verbal sexual harassment; sexual harassment using physical gestures; taking unwarranted photographs or videos; sexual humiliation; sexually motivated stops, summonses, or arrests; and sexual or romantic propositions. Following an unspecified period of purported

training, staffing, and addressing of budgetary needs, the CCRB will begin investigating "Phase Two" sexual misconduct allegations, which include more severe and possibly even criminal conduct: over-the-clothing groping during frisks; sexual assault; forcible rape; on-duty sexual activity; and penetrative sexual contact. *See id*. at 4-5.

ARGUMENT

The Revised Rules and Resolution are invalid because the CCRB "is proceeding or is about to proceed without or in excess of jurisdiction" and because they are "arbitrary and capricious." CPLR §§ 7803(2) & (3). In addition, the Resolution was passed without the statutorily required public notice and comment period. *See* N.Y. City Admin. Proc. Ac. § 1043(b).

Because "[i]t would be pragmatically impossible, as well as jurisprudentially unsound, for [the Court] to attempt to identify and excise particular provisions while leaving the remainder of the [Revised Rules or Resolution] intact," the Revised Rules discussed herein and the Resolution must be declared invalid in their entireties. *Boreali v. Axelrod*, 71 N.Y.2d 1, 14 (1987); *see also N.Y. Statewide Coalition of Hispanic Chambers of Commerce v. N.Y. City Dep't of Health & Mental Hygiene*, No. 653584/12, 2013 WL 1343607, at *19 (Sup. Ct. N.Y. Cty. Mar. 11, 2013) ("There is no room for a court to impose its own version of a more adequate measure or proper determination."), *aff'd*, 110 A.D.3d 1 (1st Dep't 2013), *aff'd*, 23 N.Y.3d 681 (2014).

I. THE REVISED RULES EXCEED THE CCRB'S JURISDICTION AND LEGISLATIVE AUTHORITY

The Revised Rules exceed the CCRB's authority under the Charter, violate a state statute applicable to the CCRB, and exceed the limited authority provided to the CCRB under the MOU. They should therefore be stricken for a lack of jurisdiction.

The CCRB's "rule-making authority, which is derived from the delegation of legislative power, must be exercised within the parameters of the agency's enabling statutes." *In re Law Enforcement Officers Union, Dist. Council 82, AFSCME, AFL-CIO*, 229 A.D.2d 286, 292 (3d Dep't 1997). "Administrative agencies, as creatures of the Legislature within the executive branch, can act only to implement their charter as it is written and given to them." *In re Tze Chun Liao v. N.Y. State Banking Dep't*, 74 N.Y.2d 505, 510 (1989). The CCRB "cannot create rules, through its own interstitial declaration, that were not contemplated or authorized by the Legislature and thus, in effect, empower [itself] to rewrite or add substantially to the administrative charter itself." *Id.* at 510.

In addition to being confined to its enabling statute, an agency rule is also invalid where it: (i) conflicts with the provisions of another applicable statute; or (ii) is inconsistent with that statute's design and purpose. *See In re Adams v. Gov't Employees Ins. Co.*, 52 A.D.2d 118, 121 (1st Dep't 1976) (citing *Connolly v. O'Malley*, 17 A.D.2d 411, 417 (1st Dep't 1962)); *see also In re Hines v. LaGuardia*, 293 N.Y. 207, 216 (1944) (agency determination violated Civil Service Law; "Administrative practice may not thwart a statute the purposes of which are as clear as those here involved.").

A. The Late Complaint Rule Violates The Civil Service Law (Revised Rule 1-15(a))

The CCRB lacks jurisdiction to investigate complaints under the Late Complaint Rule because such complaints are untimely under the applicable statute of limitations.

With subsection (a) of Revised Rule 1-15, the CCRB expressly grants itself the power to investigate time-barred claims:

> When a complaint is filed with the Board after the 18-month statute of limitations has expired pursuant to Civil Service Law §75(4), the Chair in consultation with the Executive Director will determine whether to investigate the complaint.

Subsection (b) sets the same rule for delayed but not statutorily expired complaints (those filed "more than one year after the incident"), and subsection (c) lists non-exclusive factors to consider in deciding whether to pursue claims in (a) or (b).

Nowhere in the Notice of Adoption or in the record of the Revised Rules does the CCRB indicate how it could possibly have the authority to circumvent an admittedly applicable statute of limitations, and the reason is clear: the CCRB has no such authority. Civil Service Law § 75(4) imposes a statute of limitations for disciplinary proceedings such as CCRB investigations: "Notwithstanding any other provision of law, no removal or disciplinary proceeding shall be commenced more than eighteen months after the occurrence of the alleged incompetency complained of and described in the charges . . . ." Here, the CCRB purports to grant itself the authority to commence an investigation after the applicable statute of limitations has expired, an action clearly barred by this statute.

In considering the Revised Rule, members of the CCRB questioned the futility of investigating stale claims where they were time barred from doing anything with the results of their investigation. *See* discussion *infra* at II.D. This discussion, however, misses the point: any investigation or recommendation by the CCRB with respect to a complaint is a disciplinary proceeding subject to Civil Service Law § 75(4), and cannot be started more than 18 months after the incident. Indeed, the only purpose of the CCRB is to investigate complaints of alleged FADO misconduct for purposes of determining what, if any, discipline should be recommended to the Police Commissioner. The CCRB itself has stated that it will treat investigations commenced after the statute of limitations has expired "like any other case," which means a full investigation and CCRB panel recommendation. Tr. of CCRB Public Meeting, Mar. 11, 2015 ("Mar. 2015 Tr."), at 14:18-15:6, Ex. 7.

Martin v. City of Columbus, No. 2:03CV161, 2005 WL 2671372, at *4 (S.D. Ohio Oct. 19, 2005), is instructive. There, the collective bargaining agreement between the City of Columbus and the police union provided that a complaint must be received by the City within sixty days of the alleged event giving rise to the complaint, with certain exceptions. The District Court for the Southern District of Ohio interpreted this provision as "preclud[ing] *investigation* of complaints which are brought outside the 60-day time period and do not meet one of the listed exceptions." *Id.* at *5 (emphasis added). Similarly, here the CCRB is precluded from investigating complaints after the statute of limitations has expired.

The Late Complaint Rule not only violates the express terms of Civil Service Law § 75(4), but also violates the "design and purpose" of that statute. *See In re Adams*, 52 A.D.2d at 121. It is well-settled that the purpose of a statute of limitations "is to force a plaintiff to bring his claim within a reasonable time, set out by the Legislature, so that a defendant will have timely notice of a claim against him, and so that stale claims, and the uncertainty they produce, will be prevented." *N.Y. Pub. Interest Research Groups, Inc. v. Levitt*, 62 A.D.2d 1074, 1075 (3d Dep't 1978) (internal quotes omitted). In civil service matters, such as matters of police discipline, the policies behind a statute of limitations are "as great as any" because the statute of limitations promotes "the smooth operation of the public services." *Mundy v. Nassau County Civil Serv. Comm'n*, 44 N.Y.2d 352, 359 (1978) (dissent, cited with approval in *Solnick v. Whalen*, 49 N.Y.2d 224, 232 (1980)); *see also Aristizibal v. City of Atlantic City*, 882 A.2d 436, 450-51 (N.J. Super. Ct. Law Div. 2005) (holding that purpose of New Jersey statute imposing 45-day limitations period for complaint against police officer "is to protect law enforcement officers from an appointing authority unduly and prejudicially delaying the imposition of disciplinary action").

Revised Rule 1-15(a) entirely undermines the certainty and repose that the statute of limitations is intended to promote, to dire adverse consequences to Police Officers. Police Officers are entitled to the closure that the statute of limitations provides. Not only is the investigation invasive, but even the pendency of a complaint and an investigation has a tremendous impact on the Officer's day to day life and entire career, even if it is found to be unsubstantiated. *See* Petition ¶¶ 30-33. Accordingly, Revised Rule 1-15(a) must be stricken.

B. The CCRB Handling Of Non-FADO Matters Violates The Charter And The MOU (Revised Rule 1-44)

Revised Rule 1-44 explicitly violates the CCRB's limited FADO jurisdiction by purporting to allow the CCRB to extend its jurisdiction to investigating and opining on *non-FADO matters*. This Rule also violates the MOU, which requires the CCRB to immediately refer non-FADO matters to the NYPD.

Rule 1-44, at its outset, acknowledges the CCRB's limited jurisdiction, and its obligation to refer any "other misconduct" to the Police Department for investigation:

> If during the course of a Prosecution, the [CCRB] becomes aware of possible misconduct falling outside its jurisdiction, such as the making of a false statement by an officer, the Board shall not itself prosecute such possible misconduct but shall instead immediately refer such possible misconduct to the Police Department for investigation and possible prosecution by the Police Department.

Similarly, the MOU requires that, if the CCRB becomes aware of possible other misconduct outside its FADO jurisdiction, the "CCRB shall immediately refer the allegation of other misconduct to the NYPD for investigation and shall not itself undertake the prosecution of such allegation." MOU § 7, Ex. 5.

In the face of this clear language, the CCRB's Revised Rule adds a new sentence at the end of Rule 1-44 that is directly contrary to its acknowledged limited jurisdiction: "Other

misconduct will be noted in case dispositions by categories describing the possible misconduct and the evidence of such misconduct."

This new sentence should be stricken because it: (i) results in allegations and evidence of conduct outside the jurisdiction of the CCRB to appear in case dispositions of matters within its jurisdiction, and thus improperly tainting those reports and appearing in the permanent record of the Police Officer; and (ii) necessarily places the CCRB in the improper position of gathering "evidence" of alleged non-FADO misconduct, and making a case for such alleged misconduct, where any such investigation and determination is solely within the jurisdiction of the NYPD.

The CCRB made no attempt to justify the extension of its power in this manner. The Charter and MOU are clear that the CCRB's authority is limited solely to investigating and making findings on FADO allegations. Indeed, the prior version of Rule 1-44 properly required that, when the CCRB becomes aware of potential misconduct outside of its jurisdiction, it must solely and immediately refer that possible misconduct to the NYPD, and do no more with respect to it. The revision to Rule 1-44 purporting to expand the CCRB's powers relating to non-FADO allegations should be stricken.

C. The Lack Of Civilian Oath Rule Violates The Express Requirement In The Charter That Complaints And Witness Statements Be Sworn (Revised Rule 1-24(l))

The Lack of Civilian Oath Rule violates the express requirement in Charter Section 440(c) that "[n]o finding or recommendation [of the CCRB] shall be based solely upon an unsworn complaint or statement" by creating an *ultra vires* procedure that does not require any swearing of complaints or witness statements.

Subpart (l) was added to Rule 1-24 to address the conduct of complainant and witness interviews and provides, among other things, that witnesses "will be asked to sign a verification statement at the conclusion of th[e] interview verifying that all of the statements you have

provided in connection with this investigation are true to your knowledge." Requiring complainants and witnesses merely to sign a so-called "verification" stating that the statements are true violates the legislative mandate that complaints and witness statements be sworn. The required "verification" does not say that the statement is given under oath, and it does not say that it is under penalty of perjury. As such, it is not a verification at all, and it is certainly not a "sworn" statement as required by the Charter. In fact, CPLR § 3020 defines a verification as "a statement *under oath* that the pleading is true to the knowledge of the deponent . . . ." (Emphasis added.) Similarly, the federal rule for verifications, declarations, and certifications, 28 U.S.C. § 1746, requires a declaration that the statement is made "under penalty of perjury." The CCRB "verification" does not require either of these things; it is essentially just a signature.

The intentional omission of this requirement stands in stark contrast to the new language added to subpart (d), which addresses interviews of Police Officers. There, a sentence was added stating that Police Officers will be informed that "absent exceptional circumstances, an officer will be dismissed from the Police Department for intentionally making a false official statement that is material to the pending investigation." Yet complainants and witnesses are not required to testify under oath, and the Rules do not require a warning to them of the consequences of making false statements to investigators. *See infra* at II.C.

The distinction not only violates the Charter, but has practical significance. As discussed above, the empirical data demonstrates that an enormous number of false complaints are made against Police Officers, which nonetheless remain in their permanent records, can subject them to performance monitoring, and can have long-standing impacts on their careers. The City Council addressed this concern by requiring complaints and statements be "sworn," which the Revised Rules undermine.

D. The CCRB Does Not Have Jurisdiction To Commence Investigations *Sua Sponte* (Revised Rule 1-11(c))

The CCRB's grant of authority to itself to *sua sponte* commence investigations without a complaint is a clear violation of the Charter.

Revised Rule 1-11 is an entirely new rule called "Filing Complaints." Subparts (a) and (b) – discussed below – address complaints filed by "Alleged Victims," individuals with "Personal Knowledge," or "Reporting Non-Witnesses." With subpart (c), however, the CCRB created a catch-all provision, granting itself the authority to commence a proceeding in the absence of the filing of any complaint at all. It reads: "The Board has the power to review incidents involving members of the [NYPD] and investigate Cases arising therefrom within the Board's jurisdiction under the New York City Charter."[7]

The CCRB's stated purpose of Revised Rule 1-11(c) is to give itself authority to commence an investigation *without a complaint*. The examples the CCRB gave are commencing an investigation based on video or news reports. *See* CCRB Tr. of Public Meeting, Apr. 8, 2015 ("Apr. 2015 Tr."), at 38:6-24, Ex. 8; *see also* Mar. 2015 Tr., at 6:3-7, Ex. 7.

The Charter, however, clearly states that the CCRB's jurisdiction is limited to acting upon "complaints by members of the public." It states, "The board shall have the power to receive, investigate, hear, make findings and recommend action *upon complaints by members of the public* against members of the police department that allege misconduct involving excessive use of force, abuse of authority, discourtesy, or use of offensive language . . . ." Charter § 440(c)(1) (emphasis added).

The legislature's intent to limit the CCRB's authority to reviewing complaints from the public is clear not only from the agency's very name, but also from the title of Charter Section

[7] The term "Case" is defined in Section 1.01 as "an investigation undertaken by the [CCRB]."

440, its statement of purpose, and the Bill Jacket. The title is "*Public complaints* against members of the police department." (Emphasis added.) And the statement of purpose provides that: "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." Charter § 440(a) (emphasis added). The Bill Jacket for Section 440 is also replete with references to the purpose of the CCRB to investigate *complaints*; it contains no indication whatsoever that the City Council intended the CCRB to have authority to commence investigations on its own initiative. *See generally* Bill Jacket, N.Y. City Local Law 1 of 1993 ("Bill Jacket"), Ex. 4.

In contrast, the City Council has shown an ability to grant an agency the power to commence investigations *sua sponte* where desired. For example, in the New York City Human Rights Law ("NYCHRL"), the City Council empowered the New York City Commission on Human Rights "[t]o receive, investigate and pass upon complaints *and to initiate its own investigations* . . . ." N.Y. City Admin. Code § 8-105(4) (emphasis added). By contrast, the City Council did not vest such authority in the CCRB.

Revised Rule 1-11(c) is an invalid expansion of the CCRB's jurisdiction and should be stricken.

E. The CCRB Does Not Have Jurisdiction To Receive And Investigate Complaints From Persons Who Were Not Allegedly Harmed (Revised Rules 1-11(a) & (b))

In addition to improperly granting itself authority to commence investigations without any complaint at all, the CCRB adopted a new Rule that dramatically expands the categories of persons who may file a complaint far beyond persons allegedly harmed. Worse yet, the CCRB even allows complaints by persons with *no personal knowledge whatsoever* of the incident, such

as a complaint by a viewer of an unauthenticated video posted on the Internet. Such complaints are barred by the Charter, and these Revised Rules should be stricken.

New Rules 1-11(a) and (b) grant standing to file a complaint not only to the person allegedly harmed, but also to: (i) any individual with knowledge gained through firsthand observation or experience; *or* (ii) "Reporting Non-Witnesses," defined as "person(s) *without* personal knowledge of the alleged police misconduct filing a complaint on behalf of another person." Here, as with Revised Rule 1-11(c), the CCRB admits its over-broad objective: "to include anybody who believes they want to complain about something that they are aware of." Mar. 2015 Tr., at 9:16-10:25, Ex. 7; *see also id.* at 14:1-10, 56:1-7; Tr. of CCRB Public Meeting, May 13, 2015 ("May 2015 Tr."), at 11:12-25, Ex. 9. The CCRB used a complaint based on a YouTube video as its prototypical example. Mar. 2015 Tr., at 9:16-10:25, Ex. 7.

The YouTube Complaints Rule is inimical to the black-letter notion that a complainant should have standing to bring a proceeding. The universal requirement of standing is designed to allow only persons who suffered some harm to bring a complaint. *See Silver v. Pataki*, 96 N.Y.2d 532, 539 (2001). The standing rules seek to "ensure[] that the party seeking review has some concrete interest" in the matter. *Id.* (internal quotes omitted).

The Charter's legislative history demonstrates that the City Council intended the CCRB to receive and investigate complaints only from persons who were allegedly harmed. During the public hearing on the bill for the current version of Charter Section 440, one Council member stated that the bill addressed his constituents who "have not felt that their voice could be heard when they felt that they were *mistreated by a member of the police force.*" Bill Jacket, Public Hearing on Local Laws, Jan. 5, 1993, at 27:19-23, Ex. 4 (emphasis added). Another stated that the bill aided "people who have been *victimized* by police brutality, yet were not satisfied." *Id.* at

30:16-22 (emphasis added). A third added that the bill aids "people who have *had incidents with the police* who never hit the papers." *Id.* at 31:21-23 (emphasis added). Thus, the City Council's intent was to empower the CCRB to receive complaints from persons allegedly harmed. Nothing in the Charter or its legislative history indicates that the City Council intended to disregard standing requirements and allow any person anywhere to file a complaint with the CCRB, even absent the alleged suffering of any harm.

The Charter itself is inconsistent with the concept of accepting complaints from persons who were not allegedly harmed. For example, Section 440(c)(4) provides that "[t]he board shall establish a mediation program pursuant to which a *complainant* may voluntarily choose to resolve a *complaint* by means of informal conciliation." (Emphasis added.) A person who was not harmed could not possibly "resolve" an investigation through mediation given that such person would not have been the one harmed by the alleged police conduct. Moreover, Charter Section 440(c)(1) requires that complaints and witness statements be sworn. A person who merely viewed a YouTube video (without any knowledge of its authenticity) cannot give a sworn complaint or statement.

The YouTube Complaints Rule is also inconsistent with the Charter's mandate that CCRB investigations are to be "conducted fairly and independently, and in a manner in which the public and the police department have confidence." Charter § 440(a); *see In re Mary Chamberlain Trust v. Litke*, 135 A.D.2d 714, 715 (2d Dep't 1987) (interpretation of statute "should be avoided which would be inimical to the public policy underlying the statute"). The Rule opens the floodgates by exposing Police Officers to frivolous complaints and investigations. The example sanctioned by the CCRB -- a complainant who simply views a YouTube video -- highlights the unfairness with the Rule. A YouTube video could be fabricated

or doctored, and neither the complainant nor the CCRB has any knowledge of its authenticity. Yet a single fabricated video could result in frivolous complaints against a Police Officer, a permanent blemish in his or her file. And a Police Officer properly doing his or her job could easily be a target for retaliation through an altered video. The public and the NYPD cannot have "confidence" in such a system. Charter § 440(a).

F. The Charter Prohibits The CCRB From Relying On Prior Meritless Allegations (Rule 1-33(a))

The CCRB's grant of authority to itself in Rule 1-33(a) to use prior unsubstantiated, unfounded, or withdrawn complaints to form the basis for findings against a Police Officer violates a direct prohibition of this practice in the Charter.

In Revised Rule 1-33(a), the CCRB amended the statutory language and its scope by the insertion of a single word. Revised Rule 1-33(a) states "nor shall prior unsubstantiated, unfounded or withdrawn complaints be the *sole* basis for any . . . finding or recommendation" by the CCRB. (Emphasis added). By adding the word "sole," Revised Rule 1-33(a) purports to allow the CCRB to use prior unsubstantiated, unfounded, or withdrawn complaints to constitute part of the basis for a finding or recommendation against a Police Officer. Revised Rule 1-33(a) runs afoul of the Charter and the clear policy underlying the Charter, and it is therefore invalid. *See In re Kasper v. O'Connell*, 38 Misc. 2d 3, 5 (Sup. Ct. N.Y. Cty. 1963) (agency rule annulled because it did not conform to legislative mandate); *Edenwald Contracting Co. v. City of N.Y.*, 86 Misc.2d 711, 720 (Sup. Ct. N.Y. Cty. 1974) ("[T]here is no lawful means by which the heads of the Transportation Administration or the Municipal Services Administration can, by self-determined administrative action, step beyond the powers conferred on them by statute."), *aff'd*, 47 A.D.2d 610 (1st Dep't 1975).

Section 440(c)(1) of the Charter expressly prohibits this practice. It states: "nor shall prior unsubstantiated, unfounded or withdrawn complaints be the basis for any . . . finding or recommendation" by the CCRB. The Charter embodies the double jeopardy concept that a prior complaint that has been resolved in the Police Officer's favor or otherwise withdrawn or dismissed should not be somehow re-opened and used against the Police Officer in a subsequent proceeding. *See In re Frank K.*, 87 A.D.2d 1003, 1003 (4th Dep't 1982). The proposed Rule also violates statute of limitation rules, allowing such rejected or withdrawn complaints essentially to be reinvestigated or reinstated at unlimited times in the future, when evidence may no longer be available.

Revised Rule 1-33(a) is prohibited by the Charter, and should be stricken.

G. The CCRB Cannot Undermine The Police Commissioner's Rights Of Final Approval Of Pleas (Revised Rule 1-46(d))

The Undermine Plea Authority Rule purports to: (i) re-write the procedures in the MOU for plea negotiations, which the CCRB has no authority to do unilaterally; and (ii) do so in a manner that impedes the Police Commissioner's final disciplinary authority, and thus exceeds the CCRB's power under the Charter.

Prior Rule 1-46(d) made it clear that any plea deal is subject to the Police Commissioner's final determination. It stated: "The CCRB may conduct plea negotiations with subject officers and their attorneys, to be heard by a Trial Commissioner and presented to the Police Commissioner for final determination. In all cases in which the Police Commissioner rejects a negotiated plea, the CCRB shall be responsible for implementing the Police Commissioner's decision. . . ." The Revised Rule changes 1-46(d) by removing the requirement that any plea deal be "presented to the Police Commissioner for final determination," and instead injects a new and improper procedure: "The Police Commissioner will be informed of any

proposed plea and said plea will be held in abeyance until approved by the Police Commissioner."

The original language tracked the CCRB's authority under the MOU, and the new language contradicts it. The MOU expressly requires pleas conducted by the CCRB to be "presented to the Police Commissioner *for final determination.*" MOU § 21, Ex. 5 (emphasis added). The MOU further expressly contemplates that the Police Commissioner may reject a plea and sets forth specific procedures to govern this occurrence:

> In all instances where the Police Commissioner rejects a negotiated plea, CCRB shall be responsible for implementing the Police Commissioner's decision, including negotiating the case consistent with the Police Commissioner's determination or proceeding with the prosecution of the subject officer.

Id. § 22.

The Charter provides that the Police Commissioner's disciplinary authority may not be "limit[ed] or impair[ed]" by the CCRB. *See* Charter §§ 434(a) & 440(e). Indeed, the MOU was negotiated in light of the First Department's determination that the NYPD and the CCRB could not "grant[] the CCRB any new substantive rights, nor [could] they diminish[] the Police Commissioner's authority to make the *final* determination as to appropriate disciplinary sanctions." *In re Lynch*, 301 A.D.2d at 358 (emphasis added) (*see* footnote 4 *supra*).

Revised Rule 1-46(d), however, turns the Charter and MOU on their heads, now giving the CCRB final say on plea deals, and allowing the Police Commissioner only interim involvement at the stage when there is only a "proposed" plea. Indeed, the CCRB admitted that the purpose of Revised Rule 1-46(d) is to give the CCRB, rather than the Police Commissioner, final approval over a plea: "[W]e're not going to accept pleas in APU [the CCRB's prosecution unit] until after the Police Commissioner agrees so that we're not in the position of making a

plea deal with a representative of a police officer in the APU process and then having the Police Commissioner water down the agreement." Mar. 2015 Tr., at 57:8-15, Ex. 7.

Additionally, because the Revised Rule purports to provide for only pre-approval, but not final approval, by the Police Commissioner, the Revised Rule would allow the CCRB to back out of, or change the terms of, a plea *after* that plea has been approved by the Police Commissioner.

Revised Rule 1-46(d) thus exceeds the CCRB's statutory authority.

H. The Reconsiderations Rule Undermines The Police Commissioner's Disciplinary Authority (Revised Rule 1-36(b))

The CCRB's attempt to require the Police Commissioner to seek "reconsideration" from the CCRB before deviating from the CCRB's findings and recommendations likewise is invalid because it conflicts with the Police Commissioner's authority over disciplinary matters, and conflicts with other express procedures in the Charter and the MOU.

The CCRB views the Reconsiderations Rule (new Rule 1-36(b)) as imposing a mandatory requirement on the NYPD to send findings and recommendations back to the CCRB for "reconsideration" before the Police Commissioner may deviate from the CCRB's decision. Indeed, the CCRB expressly stated that the purpose of the Rule is to prevent the NYPD from "making unilateral decisions about [the CCRB's] recommendations and [its] findings," and that the Reconsiderations Rule "changes the balance" and "provides the CCRB with more power." CCRB Tr. of Public Meeting, Nov. 12, 2014, at 63:9-18, 65:25-66:21, Ex. 6.

This change expressly violates Charter Section 440(e) prohibiting the CCRB from doing anything to "limit or impair the authority of the police commissioner to discipline members of the department." Under the CCRB's interpretation of the Revised Rule, the Police

Commissioner may only deviate from the CCRB's findings and recommendations if the CCRB subsequently changes them on reconsideration.

Revised Rule 1-36(b) also conflicts with the Charter and the MOU because both provide that the NYPD shall report to the CCRB only *after* the NYPD has made a final determination. Charter Section 440(d)(3) provides that "[t]he police commissioner shall report to the board on any action taken in cases in which the board submitted a finding or recommendation to the police commissioner with respect to a complaint." Similarly, the MOU provides that the NYPD's Department Advocate's Office "shall ensure that CCRB is notified of the *final disciplinary result* and specific penalty in each case within thirty calendar days of the Police Commissioner's *final determination*." MOU § 24, Ex. 5 (emphasis added). Thus, both the Charter and the MOU, to which the CCRB is bound, provide for reporting back to the CCRB only *after* the Police Commissioner has made a final determination on the CCRB's recommendations. Revised Rule 1-36(b) is beyond the CCRB's jurisdiction and is invalid.

I. The CCRB Cannot Unilaterally Expand The Powers That The MOU Provides To The APU (Revised Rule 1-42(h))

Revised Rule 1-42(h) is invalid because it improperly expands the power of the CCRB's Administrative Prosecution Unit ("APU"). The APU exists solely by virtue of the MOU, and the CCRB does not have authority unilaterally to expand its power.

The MOU gives the CCRB limited prosecutorial authority when charges against a Police Officer have been substantiated. Pursuant to the MOU, when the CCRB recommends Charges and Specifications, the CCRB's APU "prosecutes" the substantiated allegations before the NYPD Trial Commissioner.

Revised Rule 1-42(h) is an entirely new Rule that grants new powers to the APU to: (1) "request[] that additional allegations be considered against a subject officer in addition to the

allegations previously recommended by the Board"; and (2) "request[] that previously considered allegations against a subject officer that did not previously result in a substantiation by the Board be reconsidered for substantiation." In other words, with this new Rule, after charges have been investigated and the Police Officer faces a hearing on charges that the Board determined were substantiated, the CCRB's prosecutor can at that point seek to expand and change the case against the Officer, or even seek reconsideration of portions of the case that were not substantiated.

Nothing in the MOU gives the APU this power. As set forth in MOU Section 20, the CCRB and NYPD knew how to draft language providing for further investigation or development of the record, but the MOU does not grant such authority to the APU. *See* Ex. 5.

The CCRB's unilateral expansion of the APU's power in Revised Rule 1-42(h) is invalid.

II. THE REVISED RULES AT ISSUE ARE ARBITRARY AND CAPRICIOUS

Not only are the Revised Rules at issue beyond the CCRB's jurisdiction, but they are arbitrary and capricious because they lack any stated purpose or a rational basis, undermine the CCRB's stated purposes, are based on theory and assumption rather than empirical data, and/or grant the CCRB unfettered discretion that will lead to uneven enforcement across Police Officers. For any or all of these reasons, the Revised Rules at issue should be stricken.

Even where an agency has jurisdiction to adopt a rule, "an administrative regulation will be upheld only if it has a rational basis, and is not unreasonable, arbitrary or capricious." *N.Y. State Ass'n of Counties v. Axelrod*, 78 N.Y.2d 158, 166 (1991); *see* CPLR § 7803(3). Courts have identified at least five grounds pursuant to which an agency rule will be deemed invalid as arbitrary and capricious:

1. The agency must identify a rational basis for the rule. *See N.Y. State Ass'n of Counties*, 78 N.Y.2d at 166; *see also N.Y. Statewide Coalition*, 2013 WL 1343607, at *19

("Administrative regulations are scrutinized for reasonableness and rationality in the context in which they were passed."); *see also Metro. Taxicab Bd. of Trade v. N.Y. City Taxi & Limousine Comm'n*, 18 N.Y.3d 329, 333-34 (2011) (taxicab commission's failure to provide justification for rule prohibiting cab owners from charging sales tax in addition to maximum permitted lease rates to drivers rendered the rule arbitrary and capricious).

In this regard, the Court is limited to considering the reasons the CCRB gave in adopting the Revised Rules, which are set forth in the Notice of Adoption. *See Gabriele v. Metro. Suburban Bus Auth.*, 239 A.D.2d 575, 577 (2d Dep't 1997) ("[J]udicial review of an administrative determination is limited to the ground invoked by the agency."). "If those grounds are inadequate or improper, the court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis." *In re Scherbyn v. Wayne-Finger Lakes Bd. of Coop. Educ. Servs.*, 77 N.Y.2d 753, 758 (1991) (internal quotes omitted); *see also N.Y. State Assoc. of Counties*, 78 N.Y.2d at 169 ("The courts should not be relegated to searching for and fashioning justifications for agency actions, based on 'simple process of elimination' at the appellate review stage.").

2. The rule must bear a rational relationship to the agency's stated purpose. *See In re Kelly v. Kaladjian*, 155 Misc. 2d 652, 655 (Sup. Ct. N.Y. Cty. 1992) (Agency rules will be invalidated as arbitrary unless they "bear some rational relationship to the goals sought to be achieved, and [are] otherwise [] factually based."). Where the rule "undermines [the agency's] own stated goals," it is arbitrary and capricious. *In re Kelly v. Bane*, 192 A.D.2d 236, 242-43 (1st Dep't 1993).

3. The rule must be based on "a rational, documented, empirical determination." *N.Y. State Ass'n of Counties*, 78 N.Y.2d at 168; *see also Kaladjian*, 155 Misc. 2d at 656-67

(declaring agency rule invalid where agency "offered no evidentiary basis for its determination"; "[t]he record contain[ed] no study, analysis or report" that the agency used to arrive at the rule).

4. Even where an agency has identified some documented, rational basis for its rule, "absent any objective standards for implementing the program, the regulation as written is arbitrary and capricious." *In re Law Enforcement Officers Union*, 229 A.D.2d at 292. In other words, "[t]he adoption of a procedure allowing for unfettered discretion in agency decision making is arbitrary and capricious." *D.F. v. Carrion*, 43 Misc. 3d 746, 757 (Sup. Ct. N.Y. Cty. 2014) (agency procedure was arbitrary where it allowed commissioner to "determine what medical or surgical care is 'necessary' without having to justify his or her decision by reference to any specified set of criteria").

5. Finally, where an agency rule allows for uneven enforcement against those to whom it applies, it is arbitrary and capricious. *See N.Y. Statewide Coalition*, 2013 WL 1343607, at *20 (agency rule arbitrary and capricious where, among other things, it led to uneven enforcement); *see also N.Y. State Ass'n of Counties*, 78 N.Y.2d at 168 ("discriminatory and disparate impact" of agency rule rendered it arbitrary and capricious).

The Revised Rules at issue do not satisfy these standards.

A. The CCRB Has Arbitrarily Overturned The Long Standing Practice Of Requiring A Police Commissioner Designee On Every Panel (Revised Rule 1-31(b))

Revised Rule 1-31(b) eliminating the CCRB's consistent practice of requiring a Police Commissioner designee on each panel (i) blatantly prejudices the interests of Police Officers for no rational reason; and/or (ii) lacks any objective standards for its application.

Since the creation of the all-civilian CCRB in 1993, its practice has been to assign complaints to panels consisting of at least one Mayoral, one City Council, and one Police Commissioner designee. This long-standing practice was codified in the former version of the

Rule § 1-31(b). *See* Ex. 1 at 12. This Rule has now been revised to provide that a panel need not consist of an appointee from each body where "such a panel composition would interfere with or unreasonably delay the [CCRB's] operations," and that only representatives of two of the three designee groups need be on a Panel.

The purported aim of this Rule is to avoid "interference" with or "unreasonable delay" of CCRB "operations," but the CCRB has not provided any rational explanation, let alone one supported by any study or data, to suggest that a problem of interference or delay exists.

Even if it had a rational basis, the CCRB has not shown that the perceived expediency outweighs the obvious unfairness caused by omitting a Police Commissioner representative from a Panel, which, as discussed below, is the likely impact of this Rule. To the contrary, CCRB members recognized the importance of having the perspective of a law enforcement representative on each panel. As one member stated:

> [T]he Police Department appointees provide, through my experience, invaluable measure of experience of how to understand -- . . . I mean, I found personally that not having personally been in these kinds of encounters other than getting a speeding ticket, by understanding the Police Department appointees' views and experience has been enormously valuable.

Mar. 2015 Tr., at 30:10-20, Ex. 7. This sentiment was echoed by multiple Board members who expressed their views that having a law enforcement perspective on each panel was essential, and more important than a delay in deciding the case. *See id.* at 31:2-16; *see also id.* at 33:13-19 ("the contribution of someone that's on the job . . . can help fill in some of the pragmatic points that happen in field"); *id.* at 35:11-15 (noting the "value for a Police Department vote" on each panel); Apr. 2015 Tr. at 63:4-10, Ex. 8. The CCRB provided no rational reason to deprive Police Officers of having a Police Commissioner designee on every panel.

In addition to lacking a rational basis, the Rule also lacks any objective standards for its application. The phrase "unless such a panel composition would interfere with or unreasonably

delay the [CCRB's] operations," is so broad as to lack any real meaning. It essentially gives the CCRB unfettered discretion to deviate from a balanced panel. Indeed, the then-Chair of the CCRB recognized the need to integrate some objectivity into the standard, proposing a minimum "delay" of 21 days before the panel composition can be changed, but the CCRB rejected this proposal and purposely adopted a vague standard to give itself "more flexibility." May 2015 Tr., at 23:12-26:11, Ex. 9.

The lack of objective standards for application of the Rule, and the omission of a Police Commissioner representative from some Panels, allows for a disparate impact on Police Officers being investigated. Pursuant to the Charter, the CCRB consists of only three Police Commissioner designees, whereas there are five Mayoral and five City Council designees. Because there are fewer Police Commissioner designees, the CCRB could always argue that having a Police Commissioner designee on the panel would "interfere with or unreasonably delay the [CCRB's] operations." Revised Rule 1-31(b) therefore has "a discriminatory and disparate impact" on Police Officers, despite the importance of having a panel member with a law enforcement perspective. *See N.Y. State Ass'n of Counties*, 78 N.Y.2d at 168.

For any or all of these reasons, Revised Rule 1-31(b) is arbitrary and capricious.

B. The CCRB Has Arbitrarily Undermined The Settlement Process (Revised Rule 1-47(h))

The CCRB's elimination of the signed agreement requirement for successful mediations has no rational basis and undermines public policy favoring the finality of settlements.

Revised Rule 1-47(h) eliminates a requirement that parties to a "successful" CCRB mediation "sign an agreement stating that each believes the issues have been satisfactorily resolved." The CCRB has provided no reason for this change. In fact, during deliberations, the CCRB itself flip-flopped, and its members expressed confusion, about whether the Revised

Rules did or did not contain a signed agreement requirement for successful mediation. *See* Mar. 2015 Tr., at 59:7-60:16, Ex. 7; Apr. 2015 Tr., at 109:9-110:2, Ex. 8; May 2015 Tr., at 44:12-22, Ex. 9. The Notice of Adoption is silent on the issue.

In addition to lacking a rational basis, the elimination of the signed writing requirement undermines public policy to the prejudice of Police Officers. New York recognizes a policy that settlements be put in writing. For example, CPLR § 2104 provides that "[a]n agreement between parties or their attorneys relating to any matter in an action, other than one made between counsel in open court, is not binding upon a party unless it is in writing subscribed by him or his attorney or reduced to the form of an order and entered." The same policy is implicated in mediations of CCRB complaints.

The CCRB's removal of the signed agreement requirement undermines this policy by exposing mediations to ambiguity and lack of finality. Absent a signed agreement, there may be disagreement or misunderstanding as to whether a mediation was successful or unsuccessful, which in turn may lead to misinformation being provided to the CCRB and the Police Commissioner. Complaints that are successfully mediated are not investigated by the CCRB, and thus no finding or penalty recommendation is rendered. However, without a signed agreement -- a document undeniably demonstrating "success" -- a Police Officer may be subject to investigation and penalty when, to his or her understanding, the mediation had been "successful." Additionally, the signed agreement requirement serves the clear purpose of preventing a party to the mediation from later denying or disclaiming what was agreed to at the mediation. No rational basis justifies these unreasonable results.

C. The Lack Of Civilian Oath Rule Creates An Imbalance In The Conduct Of Interviews To The Prejudice Of Police Officers (Revised Rules 1-24(d) & (l))

In addition to failing to comply with the legislative mandate that complainants and witnesses be sworn (*supra* at I.C), the CCRB has tipped the scale against Police Officers by revising Rule 1-24 to require that *Police Officers* be given a warning of potential consequences of false statements while *not* requiring complainants or other witnesses to be provided with any such warning. The CCRB's revisions reek of arbitrariness and discrimination against Police Officers, as the Rule was changed without any stated reason and without any rational basis.

Revised Rule 1-24(l) merely requires complainants and witnesses to sign a so-called "verification," without having to provide statements under oath, or be warned of the consequences for making false allegations against a Police Officer. On the other hand, under Revised Rule 1-24(d), Police Officers, who are required to participate in CCRB interviews, are warned that they will be dismissed by the NYPD for making false statements during the interview.

The CCRB's own data shows the need for witness statements to be made under oath to deter the filing of frivolous complaints, as opposed to the watered down "verification" rule adopted by the Board. *See* Petition ¶ 29. The CCRB has also acknowledged the additional problem that there are some chronic CCRB complainants who repeatedly file frivolous complaints. *See* Mar. 2015 Tr., at 22:12-23, Ex. 7. The then-Chair of the CCRB acknowledged that "raising the level of necessity for telling us the truth is probably healthy." Apr. 2015 Tr., at 50:22-25, Ex. 8. As discussed above, the mere filing of a CCRB complaint, even those that are unsubstantiated or entirely false, may have detrimental consequences to a Police Officer. Petition ¶¶ 30-33.

The imbalance in the pre-interview instructions given to Police Officers versus complainants and witnesses is obvious, and the CCRB has provided no reason for it. To the contrary, the CCRB's discussions surrounding Revised Rule 1-24 *supported* an oath requirement for complainants and witnesses to rectify an inherent imbalance in the system. The CCRB stated that its overall aim was "to create a parallel circumstance for the police officer and the complainant to incentivize truth-telling and deter lying," and to revise the introductions to interviews "so that the warnings include the potential consequences." Mar. 2015 Tr., at 16:17-22, 19:14-16, Ex. 7; *see also* Apr. 2015 Tr., at 45:16-46:2, Ex. 8 ("The goal . . . is to have parallel levels of swearing or oath taking . . . so that neither police officers nor people from the community who come to us to complain about police misconduct are more burdened by the oath than the other."); *id.* at 48:9-14 ("I think our job is to be -- call it right down the middle, to be exactly fair to both police officers and complainants or victims or people who come to us, and not put a heavier burden on either one than the other."). The then-Chair of the CCRB explained that "if complainants come to us and plainly lie, they should be told that there are potential consequences to that."[8] Mar. 2015 Tr., at 20:2-6, Ex. 7.

Another CCRB member also admitted that the need for a warning of consequences to Police Officers is *less* than the need for a warning to complainants/witnesses. Police Officers are compelled to participate in a CCRB interview and if they do not, they could face administrative consequences. This, however, is a "different analysis" from a complainant or witness who faces no consequences from a false statement under the CCRB's current "verification" procedure. *Id.* at 23:14-25.

[8] *See also* Shawn Cohen and Bob Fredericks, *CCRB Considering Perjury Charges for False Police Complaints*, New York Post, Mar. 13, 2015, Ex. 17 (the then-Chair stated with respect to the problem of false complaints to the CCRB that, "This agency has failed to do its job in the past and this is one aspect of that. . . . We want to enhance the integrity of the process. One way to do that is to make clear there may be serious consequences to lying to us, serious consequences.").

Despite the demonstrated and acknowledged need to rectify the rampant problem of false complaints, and no data to suggest a problem in obtaining truthful testimony from Police Officers, Revised Rules 1-24(d) and (l) accomplish just the opposite: they impose a more burdensome statement on Police Officers, warning them that they "will" be dismissed from the NYPD for intentionally making a false statement, whereas complainants and witnesses are not warned of *any* consequences for making a false complaint or statement. Revised Rule 1-24, thus "undermines [the CCRB's] own stated goals" of creating a parallel system and discouraging false complaints, and is therefore arbitrary and capricious. *Bane*, 192 A.D.2d at 242-43 (agency rule that determined eligibility for emergency home relief program based on income level at time of application, instead of at time of emergency, undermined stated purpose of rule to provide assistance to those who did not have the resources to plan for emergencies).

D. The Late Complaint Rule And The Handling Of Non-FADO Matters Rule Have No Rational Basis And Grant The CCRB Unfettered Discretion (Revised Rules 1-15(a) and 1-44)

In addition to violating a state statute and the Charter (*supra* at I.A and I.B), the Late Complaint Rule and the Handling of Non-FADO Matters Rule are arbitrary and capricious because: (i) the CCRB has not provided any rationale for the investigation of and opining on stale complaints or matters outside the CCRB's FADO jurisdiction; and/or (ii) the Rules afford the CCRB unfettered discretion and allow for uneven enforcement across Police Officers.

The CCRB has not provided any rationale for commencing investigations after the statute of limitations has expired. Indeed, the CCRB admitted that its recommendation of any discipline following an investigation after the statute of limitations has expired "would be moot." Mar. 2015 Tr., at 11:4-12:3, Ex. 7 ("What would ultimately be done with that is a good question because I'm not sure it would ever get publicized or the public would ever know about it.").

Not only has the CCRB failed to identify any rational basis for Rule 1-15(a), but the Rule, like other Revised Rules, directly undermines the CCRB's stated purposes: "to accelerate investigations and make them more transparent to the public." Notice of Adoption, at 2, Ex. 1. Rather, Rule 1-15(a): (i) allows investigations to be commenced an indefinite amount of time after the incident occurred; and (ii) does not provide any transparency into what purpose or outcome would be served by an investigation commenced outside the statute of limitations.

Rule 1-15(a) is also arbitrary and capricious because it gives the CCRB unfettered discretion to decide when to commence an investigation after the statute of limitations has expired. While Rule 1-15(c) lists six factors to be considered, those factors are simply "[a]mong the factors to be considered." By giving itself a catchall to consider other undefined factors, the CCRB's authority under this section is subjective and limitless. The lack of objective standards for determining when to commence investigations outside the statute of limitations will lead to uneven application of the Rule across Police Officers.

Similarly, in addition to being a clear affront to the CCRB's limited jurisdiction (*supra* at I.B), the CCRB's attempt to expand its authority with respect to non-FADO matters lacks a rational basis and is not limited by any objective standards. The CCRB has no statutory authority with respect to non-FADO matters, and can only immediately refer those matters to the NYPD, as it was required to do under the prior version of Rule 1-44. The CCRB has not identified any rational basis for the Revised Rule granting the CCRB power to investigate and opine on other misconduct.

Additionally, Revised Rule 1-44 lacks objective standards for its implementation and grants the CCRB unfettered discretion. With this Rule, the CCRB authorizes itself to investigate any and every imaginable sort of "other misconduct," without limit. This unfettered discretion,

and the resulting possibilities for uneven enforcement across Police Officers, is arbitrary and capricious.

E. The *Sua Sponte* Investigations Rule, The YouTube Complaints Rule, And The Prior Meritless Complaints Rule Arbitrarily Exacerbate The Problem Of Meritless Complaints (Rules 1-11 and 1-33(a))

Not only do Revised Rules 1-11 and 1-33(a) exceed the CCRB's statutory authority (*supra* at I.D-I.F), but they have no rational basis, are not based on any empirical data, and/or afford the CCRB unfettered discretion resulting in uneven enforcement across Police Officers.

The CCRB has not provided any reason to expand its powers to commence investigations *sua sponte* or to allow complaints from persons who were not allegedly harmed, let alone any rational basis to which the Rules are reasonably tailored. The CCRB has not attempted to explain why it should have these powers (which are obviously beyond its jurisdiction). Nor are the Rules reasonably tailored to accomplish this (nonexistent) purpose. There is no reasonable justification for allowing complaints based on YouTube videos, which are easily fabricated or doctored, and can be viewed by anyone, anywhere, and no matter how old the video, thereby dramatically expanding the universe of people who can file complaints to virtually anyone, as the CCRB itself acknowledged. *See* Mar. 2015 Tr., at 9:14-23, Ex. 7; *see also id.* at 14:1-10, 56:1-7. Moreover, the CCRB has not identified any study or empirical data to establish that there is any existing problem being remedied by this Revised Rule. To the contrary, the result of this Rule will be an increased number of complaints, and unsubstantiated ones, prejudicing Police Officers and wasting public resources.

Nor has the CCRB identified any rational basis for using prior unsubstantiated, unfounded, or withdrawn complaints as a basis for findings and recommendations in subsequent cases. Indeed, while the CCRB is now inviting complaints to be filed based on unreliable sources, it at the same time is attempting to expand its authority to use such baseless complaints

against Police Officers on *subsequent complaints.* As discussed *supra* at I.F, this Rule is plainly arbitrary and capricious, as it needlessly prolongs a Police Officer's ability to obtain closure on unsubstantiated allegations, and may subject him or her to the unfairness that arises from the pursuit of stale claims.

Revised Rules 1-11 and 1-33(a) are also arbitrary and capricious because they give the CCRB unfettered discretion, allowing for arbitrary and uneven enforcement across Police Officers. Revised Rule 1-11 affords the CCRB unfettered discretion to commence an investigation for any reason at all, without a complaint having been filed, and based on a non-exclusive list of possible considerations. It similarly gives unlimited discretion to pursue complaints brought by individuals with no personal knowledge. Revised Rule 1-33(a) grants the CCRB unfettered discretion whether to consider, and the weight to be given to, prior unsubstantiated, unfounded, or withdrawn complaints. The Police Officer may not even know that the CCRB applied this Rule in the determination of a subsequent complaint. There are no reasons for, or objective standards for the application of, these Rules, and they should be stricken.

F. The Excessive APU Power Rule, The Unauthorized Reconsiderations Rule, And The Undermine Plea Authority Rule Unreasonably Infringe On The Police Commissioner's Powers (Revised Rules 1-42(h), 1-36(b), and 1-46(d))

As discussed *supra* at I.G-I.I, the Charter and the MOU already contain procedures, by which the CCRB is bound, covering the subject matter of each of the Excessive APU Power Rule, the Unauthorized Reconsiderations Rule, and the Undermine Plea Authority Rule. The CCRB lacks authority to unilaterally change these procedures, and it has not identified any rational basis for doing so.

Each of these Revised Rules is unreasonable because they each infringe on power vested in the Police Commissioner. *See In re Law Enforcement Officers Union*, 229 A.D.2d at 291

(agency rule was arbitrary and capricious because "as written, [it was] internally inconsistent with the existing regulations for multiple housing units and, therefore, unreasonable"). Even if the CCRB had authority to infringe on that power, which it does not, it has offered no rationale for attempting to expand the CCRB's (and its prosecution unit's) powers in the ways contemplated by the Excessive APU Power Rule, the Unauthorized Reconsiderations Rule, and the Undermine Plea Authority Rule. None exists.

In fact, the Excessive APU Power Rule and the Unauthorized Reconsiderations Rule directly undermine the CCRB's stated purpose of revising the Rules "to accelerate investigations." Notice of Adoption, at 2, Ex. 1. These Rules in fact *prolong* investigations, to the detriment of Police Officers who face career limbo while the investigation is pending. The Excessive APU Power Rule effectively re-opens what had been concluded by the Board and delays the resolution of the complaint. The Unauthorized Reconsideration Rule also delays the resolution of complaints by purporting to require the Police Commissioner to seek "reconsideration" from the CCRB prior to exercising his statutory right to deviate from the CCRB's findings and recommendations. Moreover, the stated purpose for the Undermine Plea Authority Rule -- to avoid having the Police Commissioner "water down" a plea that the APU reached with a Police Officer -- is expressly precluded by the MOU (*supra* at I.G), and is not reasonable. The CCRB's disfavor to limitations on its authority in the MOU does not constitute a rational basis for the Rule.

The Excessive APU Power Rule, the Unauthorized Reconsiderations Rule, and the Undermine Plea Authority Rule are arbitrary and capricious and should be stricken.

G. The Executive Director Delegation Rule Is Overbroad (Revised Rule 1-53(a))

The Executive Director Delegation Rule is not reasonably related to any rational purpose and in fact undermines the CCRB's stated purpose of making CCRB investigations "more transparent to the public." *See* Notice of Adoption at 2, Ex. 1.

The Executive Director Delegation Rule broadly allows the CCRB's Executive Director to delegate any and all of his or her vast authority to any "Agency Staff," which is defined as any of the 180 employees of the CCRB. Even if the CCRB could articulate some rational purpose for an unlimited delegation of authority by the Executive Director (which it has not done), Revised Rule 1-53(a) is clearly overbroad and therefore unreasonable. The CCRB made no attempt to tailor the Revised Rule to address any perceived need.

In addition, Revised Rule 1-53(a) undermines the CCRB's stated purpose of making CCRB investigations more transparent to the public. By allowing the Executive Director to delegate his or her broad authority, neither Police Officers nor the public will have any predictability or transparency as to who is making decisions that impact a CCRB investigation. The Rule is therefore arbitrary and capricious and should be stricken.

III. THE SEXUAL MISCONDUCT RESOLUTION IS PROCEDURALLY DEFECTIVE, EXCEEDS THE CCRB'S JURISDICTION, AND IS ARBITRARY AND CAPRICIOUS

A. The CCRB Did Not Follow The Publication And Comment Procedures Under The Administrative Procedure Act

The Resolution substantially alters the CCRB's procedures and directly impacts the handling of sexual misconduct complaints. As such, the CCRB was statutorily required to publish the Resolution for public comment and a hearing prior to its adoption, which the CCRB failed to do. The Resolution is therefore invalid.

The Charter expressly requires the CCRB to comply with the Administrative Procedure Act when the CCRB promulgates rules of procedure. *See* Charter § 440(c)(2). There is no question that the CCRB did not comply with the Administrative Procedure Act in connection with the Resolution. The Act requires an agency to, among other things: (i) publish a notice of the proposed rule in the City Record, including a statement of basis and purpose, the statutory authority, the time and place of public hearing, and the final date for receipt of written comments; (ii) obtain certifications from the New York City Law Department and the Mayor's Office that the proposed rule is lawful and appropriate; (iii) provide the public an opportunity to comment on the proposed rule; and (iv) hold a public hearing at least thirty days from the date of publication of the proposed rule in the City Record. *See* N.Y. City Admin. Proc. Act. §§ 1043(b), (d), and (e).

The CCRB cannot avoid compliance with the Administrative Procedure Act simply by labeling this significant change to its procedures as a "resolution" instead of a "rule." The Court must look to the "substantive effect" of the change, not its label. *See Edenwald Contracting Co.*, 86 Misc. 2d at 721, *aff'd*, 47 A.D.2d 610 (1st Dep't 1975). The Appellate Division recently summarized the difference between a rule or regulation -- which are subject to formal rule-making requirements -- with internal interpretative statements or guidelines (which can go by any number of names, such as a "resolution," a "directive," or "policy memorandum"), which are not:

> A "rule or regulation" has long been defined as a fixed, general principle to be applied by an administrative agency without regard to other facts and circumstances relevant to the regulatory scheme of the statute it administers. In contrast, interpretive statements and guidelines assist agency officials in exercising some aspect of their discretionary authority granted by existing statutes and regulations. *The primary difference between a rule or regulation and an interpretive statement or guideline is that the former set standards that substantially alter or, in fact, can determine the result of future agency adjudications while the latter simply provide additional detail and clarification as to how such standards are met by the public and upheld by the agency*.

In re Plainview-Old Bethpage Congress of Teachers v. N.Y. State Health Ins. Plan, 140 A.D.3d 1329, 1331 (3d Dep't 2016) (internal quotes, citations, and brackets omitted; emphasis added); *see also Edenwald Contracting Co.*, 86 Misc. 2d at 721 (exception to publication only applies if the directive "relate[s] to the organization or internal management of any agency and do[es] not affect materially the rights or procedures available to the public" (internal quotes omitted)); *Connell v. Regan*, 114 A.D.2d 273, 275-76 (3d Dep't 1986) (State Employees' Retirement System policy requiring that retirement withdrawal be in writing was a rule or regulation requiring compliance with formal rule-making requirements).[9]

Here, the "Resolution" is, in substance, a rule or regulation. It changes more than two decades of past practice, sets a new standard for the investigation and administrative prosecution of sexual misconduct complaints going forward, and unquestionably affects the rights of and procedures available to the public and Police Officers. Both had a right to advance notice of, and an opportunity to comment on, this sea change in CCRB procedure. The Resolution should be declared invalid for failure to comply with the Administrative Procedure Act.

B. The CCRB Does Not Have Jurisdiction Over Sexual Misconduct Complaints

The Resolution is invalid because it is an improper expansion of the CCRB's jurisdiction. The CCRB asserts, for the first time in its history, that the Charter confers it with jurisdiction over sexual misconduct complaints, arguing that it falls within a broad interpretation of the "abuse of authority" prong of FADO jurisdiction. *See* CCRB Memorandum, at 1, 3, Ex. 2. This

[9] In *Plainview*, the Court held that the Department of Civil Service's ("DCS") "policy memorandum" that limited the circumstances under which a public employee could decline health insurance in exchange for a cash payment was a rule or regulation, and not an interpretive statement or guideline. The Court held that the policy memorandum, like the Resolution here, "broadly and invariably affects that segment of the general public over which the [DCS] ha[s] authority," and "clearly reflects a firm, rigid, unqualified standard or policy that effectively carves out a course of conduct for the future." *Plainview*, 140 A.D.3d at 1331 (internal quotes omitted).

purported "new interpretation" is baseless, and the CCRB is effectively granting itself a fifth category of jurisdiction unilaterally and in violation of the Charter. The Charter, its legislative history, and more than two decades of practice all demonstrate that the City Council did not give the CCRB jurisdiction over sexual misconduct complaints.

In the 229-page legislative history of the CCRB's Charter, there is not a *single* reference to sexual misconduct or any intent to include sexual misconduct in the CCRB's limited jurisdiction. *See* Bill Jacket, Ex. 4. If the City Council had intended the CCRB to address the important and sensitive issue of sexual misconduct, it would have said *something* to that effect in the Charter or its legislative history, but it did not.

Moreover, the CCRB has conceded through more than two decades of practice that "abuse of authority" does not include sexual misconduct. Since the inception of the all-civilian CCRB in 1993, it has referred all sexual misconduct allegations to the IAB, just as it does with all other non-FADO complaints such as corruption and neglect of duty. *See* CCRB Memorandum, at 1, 3, Ex. 2. Twenty-four years of past practice is an overwhelming indicator of the CCRB's own interpretation of its Charter. *See Barrett v. Lubin*, 188 A.D.2d 40, 44 (4th Dep't 1993) (Commissioner of Health's determination that home elevator was not a "medical service" was invalid because home elevators had been approved as medical service for individuals on two prior occasions); *see also In re Charles A. Field Delivery Serv., Inc.*, 66 N.Y.2d 516, 519 (1985) (agency's determination that delivery persons are independent contractors was invalid because it conflicted with two prior determinations that delivery persons were employees).

Additionally, any argument that the City Council intended, through its silence, to include sexual misconduct complaints in the CCRB's jurisdiction is not plausible because the issue was

at the forefront of the City's agenda at the pertinent time, and when the City Council addressed the issue, it did so expressly. Specifically, in 1991, just two years prior to the creation of the all-civilian CCRB, the City Council passed a comprehensive set of amendments to the NYCHRL (Local Law 39 of 1991). *See* N.Y. City Admin. Code § 8-107 *et seq*. That statute specifically deals with sexual harassment, and creates a Commission on Human Rights as the agency charged with enforcing the NYCHRL. *See id.* § 8-103. The City Council gave the Commission on Human Rights broad powers to address complaints and study issues of discrimination and harassment in New York City, in stark contrast to the narrow powers that it granted to the CCRB. *See id.* §§ 8-104, 8-105.

The CCRB's position is also inconsistent with the Charter's mandate that investigations of CCRB complaints are to be conducted "in a manner in which the public and the police department have confidence." Charter § 440(a). Neither the public nor Police Officers can have confidence in the CCRB -- an agency that admittedly lacks the training and experience -- handling sexual misconduct complaints. As the CCRB admitted, "[m]eeting the needs of sexual trauma survivors requires resources the [CCRB] currently lacks." CCRB Memorandum, at 4, Ex. 2. The City Council would not have entrusted an agency that lacks the expertise, training, and experience to handle the important and sensitive issue of sexual misconduct complaints. To the contrary, the Charter provides that the CCRB is not to "hinder the investigation or prosecution of [Police Officers] for violations of law by any court of competent jurisdiction, a grand jury, district attorney, or other authorized officer, agency or body." Charter § 440(f). The CCRB's conduct of its own sexual misconduct investigations will interfere with not only IAB investigations, but potential criminal proceedings or proceedings by other agencies or courts that have jurisdiction over sexual harassment complaints by, among other things, subjecting Officers

to parallel investigations and the prospect of inconsistent determinations. Indeed, the Resolution's Phase Two expressly purports to rope criminal conduct into the CCRB's jurisdiction, in violation of Charter Section 440(f).

The Court should declare the Resolution an invalid expansion of the CCRB's jurisdiction.

C. The Resolution Is Arbitrary And Capricious

The Resolution is also invalid because the CCRB has provided no rational basis to alter over two decades of past practice, nor overcome the clear unreasonableness of funneling sexual misconduct complaints to the inexperienced CCRB.

"'[W]hen an agency determines to alter its prior stated course it must set forth its reasons for doing so. . . . Absent such an explanation, failure to conform to agency precedent will, therefore, require reversal on the law as arbitrary, even though there is in the record substantial evidence to support the determination made.'" *Barrett*, 188 A.D.2d at 45 (brackets in original) (quoting *In re Charles A. Field Delivery Serv.*, 66 N.Y.2d at 520). Here, the CCRB has provided no rational explanation for the deviation from its past practice, let alone provided any evidence to indicate that the Resolution is needed. The CCRB cannot claim that it is filling a void, because sexual misconduct complaints against Police Officers are already being handled by the IAB, a body that has been doing so for decades. Moreover, the CCRB does not claim, nor does it cite any evidence to indicate, that any change is needed in the handling of these claims.

Rather than having a rational basis, the Resolution is patently unreasonable because it purports to shift sexual misconduct complaints against Police Officers to an admittedly inexperienced and unprepared agency. The CCRB's lack of experience is exemplified by the Resolution's arbitrary comments about "Phase One" complaints, claiming "it is a relatively easy undertaking to begin investigating lewd conduct" and that "investigators will not have to ask especially probing questions to ascertain the facts surrounding these allegations." CCRB

Memorandum, at 4, Ex. 2. The CCRB's assumptions do not withstand scrutiny, however, because they minimize without basis the impact that even Phase One sexual misconduct may have had on the complainant, or what trauma an improperly handled investigation may impart.

The CCRB's decision to suddenly start investigating sexual misconduct complaints has serious consequences for the public and Police Officers. The IAB has been investigating these types of complaints for more than two decades. Because of the CCRB's lack of experience with and understanding of issues relating to sexual misconduct, there is a greater risk of flaws and mistakes in its investigations and conclusions. The CCRB has provided no reason to use public funds to educate and train the CCRB to expand its reach into an area that is already covered by another body. Additionally, while the CCRB states that it is going to begin investigating and administratively prosecuting sexual misconduct complaints against Police Officers, the Resolution does not contain any mechanisms to address the potential for overlapping investigations by the IAB or other bodies or agencies. Police Officers thus face the risk of being subject to multiple overlapping investigations and the risk of inconsistent determinations.

CONCLUSION

For the foregoing reasons, the Court should enter an order and judgment striking the Revised Rules discussed herein and the Resolution, enjoining and restraining Respondents and any of their agents, officers, and employees, from implementing or enforcing such Rules and Resolution, and declaring that such Rules and Resolution are invalid and that Respondents may not take any actions as described therein.

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Respectfully submitted,

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