

SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

HON. MELISSA A. CRANE
J.S.C.

PRESENT: _____
Justice

PART 15

Index Number : 152235/2018
LYNCH, PATRICK J.
vs
NEW YORK CITY CIVILIAN
Sequence Number : 002
ARTICLE 78

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is

The motion is decided in accordance with the
~~reasoning on the record of~~
accompanying decision and order

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 2-27-2019


_____, J.S.C.
HON. MELISSA CRANE

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 15

-----X
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,

Index No.: 152235/2018

-against-

Mot. Seq. No. 002

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,

-----X
MELISSA A. CRANE, J.S.C.:

Petitioner, Patrick J. Lynch, as President of the Patrolmen’s Benevolent Association of
the City of New York (the “PBA”), on behalf of himself and all NYPD employed officers, and
the PBA (collectively, the “petitioners”), filed a Petition against the New York City Civilian
Complaint Review Board (the “CCRB”), and its Acting Chair, Frederick Davie (collectively, the
“respondents”), for an Order and Judgment to: (1) declare invalid the twelve Revised Rules, that
the CCRB published on January 2, 2018 (the “Revised Rules”); (2) declare invalid the
Resolution the CCRB adopted on February 14, 2018 (the “Resolution”), where the Board
resolved to investigate sexual misconduct allegations that civilians make against NYPD officers,
rather than referring those allegations to the Internal Affairs Bureau (the “IAB”); (3) restrain

enforcement of the Revised Rules and Resolution; and (4) declare the Revised Rules and Resolution invalid because they exceed CCRB's jurisdiction and legislative authority under its Charter.

BACKGROUND

The PBA is the collective bargaining agency for the 23,000 police officers that the NYPD employs. The PBA advocates for NYPD officers to protect their rights and interests. Patrick Lynch is the President of the PBA (Petition ¶ 11-12).

The CCRB is an independent government agency that investigates allegations of police abuse in New York City. It is the largest civilian police oversight agency in the United States. The CCRB started as a unit within the NYPD in 1953. By 1993, the New York City Council amended Chapter 18-A of the New York City Charter to establish CCRB in its current form – as a civilian agency independent from the NYPD. The CCRB consists of a thirteen-member civilian board (“the Board”). Of the thirteen members, the City Council selects five members, the Mayor selects five members, and the NYPD Commissioner selects three members. Only members that the Police Commissioner designates can have a law enforcement background. The CCRB's Executive Director, that the Board appoints, manages the agency's daily operations and oversees its 180 employees. The agency holds monthly meetings and issues regular reports summarizing its actions.

The CCRB's purpose is to ensure that the investigation of complaints concerning NYPD officer misconduct “be complete, thorough, and impartial” and that “inquiries must be conducted fairly and independently, and in a manner in which the public and the police department have confidence” (*see* NYC Charter, Chapter 18-A, 440 [b][1]). Thus, the City Charter authorizes the CCRB “to receive, investigate, hear, make findings and recommend action upon [civilian]

complaints” against NYPD officers that allege misconduct involving: (i) excessive force; (ii) abuse of authority; (iii) discourtesy; and (iv) use of offensive language¹ (*see* NYC Charter, Chapter 18-A, 440 [c][1]).

The Charter also permits the CCRB to adopt rules in accordance with the City Administrative Procedure Act (the “CAPA”). Agency rulemaking is necessary for the CCRB to carry out the powers and duties that the legislature has mandated to it. The CCRB may promulgate rules of procedure and establish panels to supervise investigations of complaints (*see* Charter 1043[a], 440[c][2]).

In order to initiate an investigation, CCRB must first receive a complaint from a member of the public alleging a NYPD officer’s misconduct. If the complaint alleges conduct that falls within the CCRB’s jurisdiction (i.e., a “FADO” allegation), then the CCRB assigns an investigator to the complaint. The investigator may offer mediation. If a resolution is not reached, or mediation is not appropriate, the Board conducts an investigation. The investigator gathers documentary and video evidence and conducts interviews of relevant persons. At the conclusion of the investigation, the investigator prepares a closing report summarizing her findings. Then, a three-member panel of the CCRB meets to discuss the case. The panel consists of one City Council designee, one mayoral designee, and one Police Commissioner designee. The panel meets on an ongoing basis and rotates regularly. Ultimately, the Board decides whether a case is “substantiated,” “exonerated,” “unfounded,” or “unsubstantiated.” To find a case “substantiated,” the Board must decide, by a preponderance of evidence, that the alleged conduct occurred.

¹ Both parties refer to misconduct involving (i) excessive force; (ii) abuse of authority; (iii) discourtesy; and (iv) use of offensive language as CCRB’s “FADO” jurisdiction.

For “substantiated” cases, the CCRB notifies the Police Commissioner of its findings and recommendations. Regardless of the CCRB’s recommendation, the Police Commissioner makes the final determination as to what discipline the officer receives.

Pursuant to a 2012 Memorandum of Understanding (the “MOU”) between the NYPD and the CCRB, if the Board recommends “Charges and Specifications” for a “substantiated allegation,” an Administrative Prosecution Unit (“APU”) attorney will prosecute the case. To commence an administrative prosecution, the NYPD’s Department Advocate’s Office (“DAO”) serves the officer with the CCRB’s Charges and Specifications, which is a written accusation of misconduct.

Instead of going to trial, an APU attorney may make a plea offer to the officer. The Police Commissioner must approve the plea bargain if accepted. If there is no plea offer, the APU attorney conducts a trial before the NYPD Deputy Commissioner of Trials. The Police Commissioner reviews the APU attorney’s draft decision, and then the Commissioner makes a final disciplinary determination.

The CCRB’s Revised Rules

In early 2015, the CCRB began a process to revise its Rules. On March 11, 2015, the CCRB distributed a draft of the proposed revisions to the rules to the public (*see* Tr. of March 2015 Meeting). Discussions regarding the proposed revisions continued at public CCRB meetings throughout the Spring of 2015.

On May 2, 2016, the CCRB published its “Notice of Public Hearing and Opportunity to Comment on Proposed Rules” (Kadushin Aff ¶ 49, Exh I, Notice of Public Hearing), pursuant to CAPA requirements. In its Notice, CCRB states the purpose of the revisions is “to accelerate investigations and make them more transparent to the public (*id.*)” Subsequently, the

CCRB set the deadline for public comment for June 10, 2016. Petitioners then submitted written comments to the Proposed Rules. It objected on the grounds, *inter alia*, that the revisions would violate the City Charter, the Civil Service Law, the MOU, and public policy. The CCRB scheduled a public hearing for June 13, 2016.

After receiving public comments, the CCRB made minor revisions to the twelve Revised Rules and submitted them to the City of New York, Law Department, who then advised that the revisions were within the CCRB's authority (Kadushin Aff ¶ 52-53, Exh K, July 25, 2017 Letter). The CCRB voted to adopt the Revised Rules on October 11, 2017. Following that, the CCRB published a Notice of Adoption (Kadushin Aff ¶ 54-55, Exh L, Tr of October 2017 Meeting, Exh M, Notice of Adoption). On January 2, 2018, the CCRB published revisions to the Revised Rules in the City Record. The Revised Rules went into effect on February 1, 2018.

The CCRB's Resolution to Investigate Sexual Misconduct Complaints

On February 14, 2018, the CCRB resolved to begin investigating civilian allegations of sexual misconduct against police officers (the "Resolution"). Prior to the Resolution, the CCRB referred all sexual misconduct complaints to the NYPD's Internal Affairs Bureau ("IAB").

According to the CCRB, the decision to investigate sexual misconduct complaints stemmed from years of research (Kadushin Aff ¶ 103-104). This included the CCRB taking a closer look at the 117 sexual misconduct complaints that it received between January 1, 2016 and June 1, 2017, and then referred to the IAB (Kadushin Aff ¶ 107). The CCRB's research also included an interview of Andrea Ritchie – a civil rights attorney – who spoke at monthly CCRB meetings. According to Ms. Ritchie, victims reported feeling intimidated by the NYPD officers working under the IAB who investigated their allegations of sexual misconduct (Kadushin Aff ¶ 106).

Studies showed that sexual interactions between a civilian and police officer are intertwined with law enforcement's authoritative power (Kadushin Aff ¶ 109, Exh R, Resolution Memorandum). Specifically, the CCRB Memorandum Accompanying Public Vote, dated February 14, 2018, Re: Sexual Misconduct Allegations, noted:

Due to the authoritative power inherent in a law enforcement position, these interactions can be implicitly, if not explicitly, coercive to, for example, a complainant seeking the resolution of allegations or to a defendant seeking a favorable conclusion to a criminal case...

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

The CCRB Memorandum also noted:

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

(see the CCRB Memorandum Accompanying Public Vote, Exh R, p. 2)

Accordingly, at its monthly Board Meeting on February 14, 2018, the CCRB adopted the Sexual Misconduct Resolution. The CCRB argues that the power to investigate allegations of sexual misconduct derives from the "abuse of authority" prong of its FADO jurisdiction, and therefore CCRB could adopt a Resolution rather than engaging in a formal rulemaking process.

Following the Resolution's adoption, the CCRB published an accompanying memorandum outlining the Board's rationale and next steps. The CCRB will begin investigating "Phase One" sexual misconduct allegations immediately. Those 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 a period of training, staffing, and addressing budget concerns at a future date, the CCRB will start to investigate "Phase Two" sexual misconduct allegations.

That includes more severe allegations and criminal conduct – over-the clothing groping during frisks, sexual assault, forcible rape, on-duty sexual activity, and penetrative sexual contact. Until the CCRB is appropriately staffed for “Phase Two,” the CCRB will continue to refer serious allegations to the IAB. The CCRB refers all complaints alleging criminal acts to the District Attorney’s Office. Criminal acts are outside CCRB’s jurisdiction.

STANDARD OF REVIEW

Where an agency has jurisdiction to adopt a rule, “an administrative regulation will be upheld only if it has a rational basis, and it is not unreasonable, arbitrary or capricious” (*NY State Ass’n of Counties v Axelrod*, 78 NY2d 158, 166 [1991]); *see* CPLR 7803[3]).

Courts have identified several grounds where a court might deem an agency rule invalid as arbitrary and capricious: (1) the agency fails to identify a rational basis for the rule (*see Metro Taxicab Bd of Trade v NY City Taxi & Limousine Comm’n*, 18 NY3d 329, 333-34 [2011] [taxicab commission’s failure to provide rationale for rule prohibiting cab owners from charging sales tax on top of maximum permitted lease rates deemed arbitrary and capricious]); (2) agency does not establish a rational relationship to agency’s stated purpose; (3) agency does not demonstrate rule is based on a rational, documented, empirical determination; (4) agency fails to identify objective standards for implementing the program (*see DF v Carrion*, 43 Misc.3d 746, 757 [Sup Ct, New York County 2014] [agency procedure arbitrary where Commissioner allowed to determine what medical or surgical care necessary without having to justify decision with set criteria]); and (5) agency allows for uneven enforcement against those whom it applies (*see NY State Ass’n of Counties v Axelrod*, 78 NY2d at 168] [“discriminatory and disparate impact” of agency rule rendered rule arbitrary and capricious]).

Further, the agency or body “can act only to implement their charter as it is written and as given to them” (*Finger Lakes Racing Assn. v New York State Racing & Wagering Bd.*, 45 NY2d 366, 373 [1978]). The agency or body may not act or promulgate rules contrary to the will of the Legislature.

DISCUSSION

The Revised Rules

There are twelve Revised Rules at issue in this Petition:

Revised Rule 1-15(a): The Late Complaint Rule

This Revised Rule allows the CCRB to investigate, and make findings and recommendations, on complaints filed *after* the expiration of the statute of limitations.

Revised Rule 1-15 (a) states:

(a) 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.

Civil Service Law § 75(4) imposes a statute of limitations for disciplinary proceedings:

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...

Petitioners argue that the CCRB lacks jurisdiction to investigate untimely complaints.

Nowhere in the Notice of Adoption does the CCRB indicate its authority to circumvent the statute of limitations. Petitioners assert that a blatant disregard for the statute of limitations defeats the purpose of statute - to encourage the “smooth operation of the public services.”

Further, petitioners argue that the late complaint rule affords the CCRB unfettered discretion to intrude on an officer’s life and career.

To the contrary, Rule 1-15(c) sets guidelines for when the CCRB should investigate an untimely complaint:

(c) Among the factors to be considered [are]...the nature/or severity of the alleged misconduct, the availability of evidence and/or witnesses, the ability to identify officers and civilians involved, the practicability of conducting a full investigation within any applicable limitation period, the reason for the late filing and the numbers of complaints received ... regarding the incident.
(see Rule 1-15[c])

These are concrete criteria. They do not give the CCRB unfettered discretion.

An exception to the statute of limitations exists if an officer allegedly commits misconduct constituting a *crime*. Rule 1-15(a) is rational in that it allows the CCRB to investigate a late complaint to determine whether the alleged misconduct constitutes a crime. It is irrelevant that the CCRB cannot investigate complaints of criminal conduct. The Board can refer the incident to another agency. Notably, the CCRB expresses concern with underreporting.

We [the CCRB] passed this resolution essentially because we had a decades-long practice of referring cases to the IAB for investigation. We [the CCRB] spent years researching the data and the studies and the news articles that were coming up about complaints against NYPD officers regarding sexual misconduct and what this has kind of showed us is there is underreporting of sexual misconduct by NYPD officers. Why? Because they have to go back to the NYPD to complain about it. Of course that would discourage victims from coming forward. That would intimidate civilians from pursuing the investigation or participating in the investigation.
(see Tr p. 41, lines 24-26, p. 42, lines 6-14)

Respondents argue that an alleged victim's reluctance, shame, or fear to come forward stems from having to report to the same agency where the officers, who allegedly committed the abuse, work. Therefore, allowing the CCRB to investigate a complaint after the statute of limitations has run would increase the likelihood of the Board's ability to investigate sexual

misconduct. Finally, the CCRB is an oversight agency that serves the public. It follows that the CCRB should be able to investigate egregious cases, no matter the age of the complaint.

Petitioners' concern that this Rule undermines the statute of limitations is unfounded. The Rule does nothing to deprive the individual police officer closure by the civil service's statute of limitations, unless the alleged misconduct constitutes a crime. In that instance, the civil service statute of limitations would not apply.

Revised Rule 1-44: Handling of Non-FADO Matters Rule

This Revised Rule permits the CCRB to memorialize discovery of non-FADO conduct that CCRB uncovers during the course of a prosecution.

In its original, 1993 form, Rule 1-44 states:

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.

The Revised Rule adds a new sentence:

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

Petitioners argue that the added sentence allows non-FADO conduct to appear in CCRB proceedings. To allow outside conduct in the Board's reports would taint those reports and appear in the permanent record of that officer. Respondent argues that the MOU already requires the Board to report non-FADO conduct to the appropriate party if the Board discovers the misconduct during an investigation.

To permit the CCRB to document the alleged non-FADO conduct is a logical addition to the existing rule. For example, if an APU attorney reasonably believes that an officer made a false statement during the course of an investigation, the attorney would note the false statement and refer the potential misconduct to the IAB. Documentation affords clarity to both the NYPD and CCRB.

Revised Rule 1-24(1) & (d): Civilian Witness Verification Statement Rule

Petitioners dispute that Revised Rule 1-24(1) satisfies the swearing requirement for civilian witnesses. The Rule requires a civilian witness to sign a Form at the end of the interview verifying, under oath before a Commission of Deeds, that the statements he or she made during the interview were true. In contrast, police officers must swear under the penalties of perjury, to tell the truth, at the outset of the interview. Because of the difference in swearing requirements, petitioners also claim that both (l) and (d) of Revised Rule 1-24 treat police officers disparately.

That Charter Section 440(c) requires sworn statements from complainants and witnesses is undisputed: “[n]o finding or recommendation shall be based solely upon an unsworn complaint or statement...”

Revised Rule 1-24(1) states:

- (1) Prior to the commencement of an interview of a Complainant, Alleged Victim, and/or civilian witness, the following statement will be read to such person, in sum and substance:

[...]

Please be advised that you will be asked to sign a verification statement at the conclusion of this interview verifying that all of these statements you have provided in connection with this investigation are true to your knowledge.

[...]

At the conclusion of the interview: [...]

I am now going to present for your signature the verification form I mentioned earlier. This form requires your signature and reflects the fact that you have verified that the statements you have made in connection with this case are true to your knowledge.

Have the witness sign the form.

(Sign the form as a commissioner of deeds or have someone who is a commissioner of deeds present to witness the civilian's signature and sign the form as a commissioner of deeds).

(see Rule 1-24[1]).

The actual Verification Statement reads:

I, _____, being *duly sworn*, depose and say: I am a witness in connection with Civilian Complaint Review Board case number _____; any and all statements I have made in connection therewith are true to my knowledge.

(see Verification Statement attached to Kadushin Aff. ¶ 78, Exh O, emphasis added).

The Verification Form clearly states that the witness's statement is "duly sworn," and includes a signature line. The Form also provides an area for the Commissioner of Deeds to swear the civilian witness's statement in (*id.*). Respondent CCRB compares the function of the Commissioner of Deeds on the Form to that of a notary (see Tr dated August 1, 2018, p. 40, lines 5-9).

The plain language of Revised Rule 1-24(1), together with the Verification Form (Kadushin Aff. ¶ 78, Exh O), satisfies the swearing requirement. While it is true that, as petitioners claim, police officers may face more stringent swearing requirements under the Revised Rule, both police officers and civilian witnesses ultimately "swear to" the truth of the statements they give during interviews.

Respondents argue that civilian witnesses should sign the verification form at the end of the interview, rather than at the outset, to avoid the possibility of discouraging that witness from testifying. The CCRB's concerns of intimidation and underreporting are legitimate and provide a rational basis for the differences in swearing requirements between civilian witnesses and officers.²

Revised Rule 1-11(c): Sua Sponte Investigations Rule

This Revised Rule allows the Board to review incidents without the prerequisite that a civilian file a complaint.

Revised Rule 1-11(c) states

(c) The Board has the power to review incidents involving NYPD officers and investigate cases arising therefrom within the Board's jurisdiction under the New York City Charter.

The purpose of the Rule, respondents state, is to allow respondents to initiate contact with potential victims who may not know of CCRB's existence, who may not know how to file a complaint, or who are fearful of reporting alleged misconduct. The Revised Rule also authorizes CCRB to take pre-investigative steps to gather evidence before it is destroyed.

Petitioners assert that the Revised Rule impermissibly allows the CCRB to commence investigations *sua sponte*. They are correct. The Charter clearly contemplates that the CCRB's jurisdiction is limited to investigations "upon complaint." Charter 440(c)(1) states: "The Board shall have the power to receive, investigate, hear, make findings, and recommend action *upon*

² ACLU / NYCLU cautions that the CCRB's characterization of requiring civilian witnesses to make statements "under oath" could lead civilian interviews to perjury prosecutions, pursuant to NY Penal Law § 210.15 ["A person is guilty of perjury in the first degree when he swears falsely and when his false statement (a) consists of testimony, and (b) is material to the action, proceeding or matter in which it is made"]. However, the ACLU / NYCLU note that the likelihood of a perjury prosecution resulting from a civilian witness providing false testimony and then signing a Verification Form is unlikely. This is especially so because the Commissioner of Deeds does not actually administer any oath (*Amici Curiae* brief, p.24).

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...” (emphasis added).

Respondents rationale for its revision is ultimately a concession that Rule 1-11(c) permits *sua sponte* investigations. To “initiate contact with potential victims” is to seek out instances of alleged misconduct where there is no actual complaint. The court declares invalid Revised Rule 1-11(c). The Rule would allow respondents to expand its Charter to solicit complaints actively, rather than “investigating upon complaint.” The Revised Rule therefore goes beyond CCRB’s jurisdiction.

Revised Rule 1-11(a) & (b): YouTube Complaints Rule³

In these Revised Rules, first CCRB codified its long-standing practice of accepting complaints from individuals other than those that police officers directly harmed. Second, the CCRB expanded the category of individuals that may file a complaint to include individuals who viewed unauthenticated videos on the Internet, but are not actually victims themselves.

Revised Rule 1-11(a) and (b)

- (a) An Alleged Victim, a parent, a legal guardian or legal representative if the Alleged Victim is a minor, or any individual having Personal Knowledge ... of alleged misconduct by a member of the New York City Police Department, each have standing to file a complaint.
- (b) Complaints of alleged police misconduct filed by Reporting Non-Witnesses...may be investigated at the discretion of the Executive Director or Chair of the Board. Among the factors to be considered are: the nature and/or severity of the alleged misconduct, the availability of evidence and/or witnesses, the ability to identify officers and civilians involved, the practicability of conducting a full investigation

³ Petitioners refer to Rule 1-11(a) and (b) as the “YouTube complaints rule” (*see* Petitioner’s Memo of Law, p. 38; *see also*, Tr. P. 23, lines 25-26).

within the time prescribed by the statute of limitations and the numbers of complaints received by the Board regarding the incident.

According to petitioners, more egregious than Rule 1-11(c), that allows the CCRB to review incidents without an official complaint, are these subsections - (a) and (b). 1-11(a) and (b) dramatically expand the categories of persons who may file a complaint. Even individuals with no personal knowledge of the misconduct can file a complaint. Take, for example, a viewer on YouTube. That viewer watches an incident and then makes a complaint of misconduct to the CCRB. That person has no firsthand experience, and no knowledge whether the video is embellished or fabricated.

Thus, subpart (a) and (b), are so broad that there is a serious likelihood that complaints based upon unreliable information will ensue, not to mention the possibility of a mass influx of complaints based on unreliable information. Accordingly, the rule is arbitrary and capricious, and likely to cause more harm than good. The court therefore declares invalid Revised Rule 1-11 (a) and (b).

Revised Rule 1-33(a): Reliance on Prior Meritless Complaints Rule

Revised Rule 1-33(a) adds a single word to the prior rule:

(a) Pursuant to Chapter 18-A 440(c)(1) of the New York City Charter, no finding or recommendation shall be based solely upon an unsworn complaint or statement, nor shall prior unsubstantiated, unfounded or withdrawn complaints be the sole basis for any such finding or recommendation.
(emphasis added)

It is undisputed that the inclusion of the word “*sole*” suggests that the Board may now rely on prior unsubstantiated, unfounded, or withdrawn complaints to constitute, at least some of

its rationale for a finding or recommendation against a Police Officer. The parties dispute whether to consider these complaints at all would violate the Charter.

Respondents claim that the Revised Rule affords the CCRB the opportunity to use prior unsubstantiated, unfounded, or withdrawn complaints for current findings against officers, provided that the probative value of these complaints outweighs the prejudice (*see* Memo of Law in Support of Respondents Verified Answer, p. 25, nyscef doc no 58; *see also*, Federal Rules of Evidence 404[b][2]). If the past complaint has probative value to current allegations, respondents argue, it may be investigating the prior complaint further. The CCRB Revised Rule 1-33 to clarify that the Board may consider prior unsubstantiated, unfounded, and withdrawn complaints involving the same type of conduct alleged in the complaint at issue.

The court declares invalid Revised Rule 1-33(a) irrespective of whether past unsubstantiated complaints may aid an investigation. As the NYCLU and ACLU note in their *Amicus Brief* (NYSCEF edoc 68), the addition of the word “sole” creates a Rule open to too many different interpretations about how to use past complaints. “As a matter of due process, factual matters may be considered as a basis for sentence only if they have some minimal indicium of reliability beyond mere allegation” (*United States v Baylin*, 696 F2d 1030, 1040 3d Cir 1982]). Here, the use of the word “sole” conflates dispositions of differing reliability and thus puts police officers’ due process rights at risk. The construction of the Revised Rule offers the CCRB no guidance on what past complaints to consider and what not to consider. Accordingly, the Rule now lacks the necessary detail to protect a Police Officer’s due process rights.

For example, the Board could properly consider a police officer’s prior false statement in evaluating that same officer’s testimony in an open case. In contrast, the Board could consider

the mere fact that an officer had a past exonerated complaint in the disposition of a case (*see* NYCLU's / ACLU's Brief of *Amici Curiae*, p.25-p.26). Finally, merely because past unsubstantiated complaint could have probative value does not meet due process standards to which police officers are entitled (*id.*). Accordingly, the court declares invalid Revised Rule 1-33(a).

Revised Rule 1-46(d): Undermine Plea Authority Rule

Revised Rule 1-46 (d) states

(d) the Civilian Complaint Review Board may conduct plea negotiations with subject officers and their attorneys, to be heard by a Trial Commissioner. The police commissioner will be informed of any proposed plea and *said plea will be held in abeyance until approved by the Police Commissioner*. In all Prosecutions in which the Police Commissioner rejects a negotiated plea, the Civilian Complaint Review Board will be responsible for implementing the Police Commissioner's decision, including further negotiating the Prosecution in a manner consistent with the Police Commissioner's determination or proceeding with the Prosecution.
(emphasis added)

The prior rule made any plea deal subject to the Police Commissioner's final determination. The Revised Rule 1-46(d) removes language stating that respondents shall present any plea deal "to the Police Commissioner for final determination." According to petitioners, the new language in the Revised Rule, that states "said plea will be held in abeyance until approved by the Police Commissioner," limits and impairs the Police Commissioner's disciplinary authority. Petitioners further assert that the CCRB now has the final say on plea deals, while the Police Commissioner has only minor involvement.

Respondents argue the Revised Rule does not take ultimate decision-making from the Police Commissioner. In the Rule, it states while the CCRB may conduct plea negotiations, the police commissioner will be informed of any proposed plea, and it will be *held in abeyance until*

approved by the Police Commissioner. Thus, the Commissioner still has the final say.

Accordingly, the Revised Rule does not exceed the Charter.

Revised Rule 1-36(b): Unauthorized Reconsiderations Rule

The CCRB has added to Rule 1-36(b) that sets forth procedures when the NYPD requests “reconsideration” of a case.

Revised Rule 1-36(b) states:

- (a) Upon receipt of a written request sent by the [DAO] requesting the reconsideration of a previously fully investigated Case with panel findings and recommendations, a panel, the Chair, or the Full Board may agree to reconsider the penalty and/or disposition of an allegation if:

(1) The penalty recommended for the Case by the deciding panel or Full Board against any subject officer is found by the deciding panel or Full Board to be inappropriate or excessive; or

(2) There exists new facts or evidence that were not previously known by the deciding panel or Full Board which could reasonably lead to a different finding or recommendation in the Case; or

(3) There are matters of fact or law which are found to have been overlooked or misapprehended by the deciding panel or Full Board or if reconsidering the case serves the interests of justice.

.... any such requests must be made within 30 days from receipt of ... the Board’s initial findings.

Petitioners view the Reconsideration Rule as imposing a mandatory requirement on the NYPD to send findings and recommendations back to the CCRB, before the Police Commissioner deviates from the CCRB’s decision. That, they allege, violates Charter 440(e), that prohibits the CCRB from doing anything to “limit or impair the authority of the police commissioner to discipline members of the department.”

Contrary to petitioners' argument, the Revised Rule merely sets reasonable time limits to ensure that, upon reconsideration, the reviewing panel retain some knowledge and memory of the original case. The Rule does not impose a requirement on the Police Commissioner to submit for reconsideration, thus impinging on the Commissioner's final authority regarding what discipline an officer receives. Rather, the Revised Rule just states the procedures *should* the Police Commissioner decide to submit a request for reconsideration.

Revised Rule 1-42(h): Excessive APU Power Rule

It is undisputed that Revised Rule 1-42(h) expands the power of the CCRB's Administrative Prosecution Unit (the "APU"). The Revised Rule allows the APU to: (1) amend Charges and Specifications; and (2) request reconsideration of claims against police officers.

Revised Rule 1-42(h) states

(h) After a Case has been referred to the [APU] for Prosecution, the Chief Prosecutor or Executive Director, or either of their designees, must make a formal request in writing to the deciding panel or, if necessary, the Full Board when:

- (1) The [APU] is requesting that additional allegations be considered against a subject officer in addition to the allegations previously recommended by the Board; or
- (2) The [APU] is requesting that previously considered allegations against a subject officer that did not previously result in a substantiation by the Board be reconsidered for substantiation.

Petitioners argue that the Memorandum of Understanding (the "MOU")⁴ mandates APU's authority, and for this reason, the CCRB cannot unilaterally expand on the power of the APU. Respondents counter that the MOU intended for the APU to assume the role of the DAO⁵

⁴ See the MOU, attached as respondents' Answer, Exh C

⁵ The parties do not dispute that, prior to the APU, the DAO was the unit within the NYPD that prosecuted substantiated CCRB complaints. The DAO's prosecutorial authority is pursuant to 38 RCNY 15-03(a).

(the unit within the NYPD that previously prosecuted substantiated CCRB complaints).

Respondents specifically refer to Paragraph 11 of the MOU, that states: “CCRB personnel shall in their administrative prosecution function familiarize themselves with and apply NYPD disciplinary policies and standards to the extent practicable and relevant,” to demonstrate the MOU’s intent to give the APU the same powers as the DAO (Kadushin Aff ¶ 89).

That specific language fails to demonstrate the Police Commissioner’s intent in the MOU to delineate to the APU the same powers it afforded to the DAO. Respondents argue that the Revised Rule seeks to “[c]odify Board resolutions made in 2014 allowing the APU to request Board reconsideration or dismissal of allegations pending prosecution” (Kadushin Aff, Exh I, Notice of Public Hearing, p.3). Yet, the CCRB cannot codify a resolution that goes beyond its legislative mandate. Under this Revised Rule, all parties agree that the the MOU governs the APU, but respondents fail to show how the MOU gives the APU the same authority as DAO. Contrary to respondents’ arguments, the APU can still prosecute substantiated complaints, without these enhanced powers. Accordingly, the court declares invalid Rule 1-42(h).

Revised Rule 1-31(b): Panels Without Police Commissioner Reps Rule

In rare circumstances causing unreasonable delay, the requirement that a Police Commissioner officer participate on the panel is no longer necessary.

Revised Rule 1-31(b)

- (b) Pursuant to ... the New York City Charter, no panel will consist exclusively of members designated by the Council, Police Commissioner or selected by the Mayor. Panel membership will be determined by the Chair, but each panel will consist of at least one member designated by City Council, at least one designated by the Police Commissioner, and at least one designated by the Mayor; *unless such a panel composition would interfere with or unreasonably delay the Civilian Complaint Review Board’s operations*. Panel membership will be rotated on a regular basis.

Petitioners argues that the rule unjustly provides a scenario where a panel could exclude a Police Commissioner designee. Petitioners states that this prejudices the interests of Police Officers for no rational reason.

Respondent concedes that, since the creation of the CCRB in its current form, in 1993, panels have consisted of at least one Mayoral designee, one City Council designee, and one Police Commissioner designee. However, the revision accounts for the rare situation where “such a panel composition would interfere with or unreasonably delay the CCRB’s operations.” The revision is rational, because if there is an emergency situation, the CCRB needs to proceed rapidly.

Revised Rule 1-47(h): Undermine Settlements Rule

The CCRB codified its practice of permitting parties to mediate a complaint successfully without executing a resolution agreement.

Revised Rule 1-47 (h)

(h) If Mediation is successful, the parties may, but are not required to, sign an agreement stating that each believes the issues have been satisfactorily resolved. The Director of Mediation, or any Agency Staff designee, will advise the Board when a Mediation is concluded and whether such Mediation was successful or unsuccessful. The Board will forward this information to the Police Commissioner.

Petitioners argue that the CCRB’s elimination of the signed agreement requirement for successful mediations undermines public policy favoring the finality of settlements. It also prejudices police officers, because where settlements are final, whether a mediation was successful or not is not necessarily apparent. The investigation might continue, even though, according to the officer at issue, the mediation resolved the matter. Finally, New York law encourages settlements in writing (*see* CPLR 2104).

Petitioners' concerns are unwarranted. First the mediator provides a Statement of Outcome that: (i) the parties sign; or (ii) the parties agree to close the matter without a written agreement. Either way, once a case is mediated, the mediator closes the case and the case cannot be subject to further investigation. A *signed* resolution agreement is not what closes a complaint. Rather, it is the Statement of Outcome that the mediator issues that closes the complaint. That may be unsigned or signed.

Revised Rule 1-53(a): Executive Director Designation Rule

The Revised Rule reasonably authorizes the executive director to delegate duties to members of the Board and members of the Staff.

Revised Rule 1-53(a)

The authority given under these Rules to the Executive Director will: (1) be exercisable either by the Executive Director or by such members of Agency Staff or members of the Board as the Executive Director may designate.

The CCRB's Executive Director manages the agency's day-to-day operations. Under the prior rules, the Executive Director could only delegate to "senior staff of the Board." The Revised Rule permits the Executive Director to delegate to any staff members, at his or her discretion.

Petitioners argue the rule is overbroad. However, under the Charter, the head of an agency already may delegate to employees necessary to exercise its powers and fulfill its duties:

(5) The board is authorized, within appropriations available therefore, to appoint such employees as are necessary to exercise its powers and fulfill its duties. The board shall employ civilian investigators to investigate all complaints.

(see Charter 440 [c][5]).

Petitioners argue that police officers and the public will have no idea who is making decisions if this level of delegation occurs. There will be a lack of transparency argue

petitioners. However, the rule stands to make the CCRB more efficient, and it is within the Executive Director's authority to delegate responsibility in an efficient manner. Thus, there need be no concern about a lack of transparency.

Sexual Misconduct Investigation Resolution

Petitioners ask the court to declare invalid the CCRB's sexual misconduct Resolution in its entirety (hereinafter, the "Resolution"). First petitioners argue that the Resolution is procedurally defective, because the CCRB did not follow required publication and comment procedures under the Administrative Procedure Act. Specifically, the Act requires a City Agency to: (1) publish a notice of the proposed rule to 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 with 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.

Respondents argue that there was no public comment period because investigation of sexual misconduct is within CCRB's charter authority. CCRB further argues that the resolution is (i) an interpretative statement *not* subject to the CAPA rulemaking process, and (ii) born out of several years of research regarding the need to conduct investigations into civilian allegations of police sexual misconduct.

The issue then, is whether CCRB's decision to investigate sexual misconduct complaints is a resolution that falls under existing agency jurisdiction or a new rule. If it is a rule, then the CAPA requires a public hearing and comment process.

CAPA requires City Agencies to provide the public notice of, and an opportunity to comment on, new rules before they are issued (Charter 1043[b]). That only applies, however, to “rules.” Charter 1041(5) defines a rule as “any statement or communication of general applicability that (i) implements or applies law or policy, or (ii) prescribes the procedural requirements of an agency.” For example, when an agency uses its discretion and dictates specific results in particular circumstances, that is agency rulemaking (*cf. Greater New York Taxi Ass’n v NYC Taxi and Limousine Commission*, 121 AD3d 21 at 27 [1st Dept 2014] [public hearing held and the Taxi and Limousine Commission [‘TLC’] went through rulemaking process to pass a rule establishing a specific automobile model as New York City’s official taxicab]).

However, CAPA public notice requirement does not apply to a statement or communication of “general policy, which in itself has no legal effect but is merely explanatory” (*see* Charter 1041[5][b][i]-[ii]). An agency’s interpretation of its enabling legislation falls under this exemption and is not subject to agency rulemaking requirements. “Ultimately, the key to determining whether an agency has exceeded the scope of its authority is not in examining other cases, but in examining the enabling legislation” (*Greater New York Taxi Ass’n v NYC Taxi and Limousine Commission*, 121 AD3d at 31). “Where an agency has been endowed with broad power to regulate in the public interest, we have not hesitated to uphold reasonable acts on its part designed to further the regulatory scheme” (*id.*).

Here, the petitioners argue that the City Charter did not provide the CCRB jurisdiction to investigate sexual misconduct complaints and the CCRB’s Resolution improperly expands CCRB’s jurisdiction. Respondents disagree. The Charter, respondents claim, empowers the CCRB to investigate civilian allegations of police misconduct, as part of the “abuse of authority” prong of FADO jurisdiction.

For example, under FADO jurisdiction - "use of offensive language" - the CCRB has interpreted "offensive language" to encompass not just remarks, but officers' gestures that reference a civilian's race or gender identity. "Abuse of authority" refers to "the abuse of police powers to intimidate or otherwise mistreat a civilian." Under its abuse of authority jurisdiction, the CCRB has investigated improper stop-and-frisks and unwarranted threats of arrest. In recent years, also under abuse of authority jurisdiction, the CCRB has investigated allegations of threats regarding immigration status, and allegations of deletion of information contained on a civilian's electronic device.

The International Association of Chiefs of Police ("IACP") defines sexual misconduct by law enforcement as "any behavior by an officer that takes advantage of the officer's position in law enforcement to misuse authority and power (including force) in order to commit a sexual act with another person, or respond to a perceived sexually motivated cue (from a subtle suggestion to an overt action) from another person" and "any communication or behavior by an officer that would likely be construed as lewd, lascivious, inappropriate, or unbecoming of an officer." Respondent argues that these acts are fundamentally abuses of authority.

Historically, the CCRB referred these claims to the Internal Affairs Bureau. But, as respondent stated on the record:

...we had a decades long practice of referring cases to the IAB for investigation. We spent years researching the data and the studies and news articles that were coming up about complaints against NYPD officers regarding sexual misconduct and what this showed was an underreporting of sexual misconduct by NYPD Officers. Why? Because they have to go back to the NYPD to complain about it. Of course that would discourage victims from coming forward. That would intimidate civilians from pursuing the investigation or participating in the investigation. If they have to go back to the precinct where they allege they were sexually assaulted, it would not encourage a full and thorough and complete investigation, and that was part of the Board resolution.

(Tr. p. 41, lines 24-26, p. 42, lines 2-14, dated August 1, 2018).

The CCRB's interpretation of its "abuse of authority" jurisdiction is entitled to great weight and judicial deference" (*see Toys "R" Us v. Silva*, 89 NY2d 411 [1996]). Courts must uphold an agency's interpretation of its charter authority and mandate "if it has a rational basis and is supported by substantial evidence," and "so long as the interpretation is neither irrational, unreasonable, nor inconsistent with the governing state" (*id.* at 418-419). When 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... *Barrett*, 188 AD2d at 45).

Consequently, the court first finds that the Resolution is not procedurally defective because the CCRB did not hold a public comment period. The Resolution constituted a reasonable interpretation of CCRB's existing enabling legislation to investigate FADO misconduct, as opposed to a new rule under the Administrative Procedure Act.

Petitioners next argue that the Resolution is arbitrary and capricious. They state, that the CCRB has provided no rational basis to alter more than two decades of past practice of referring sexual misconduct complaints to the IAB. Further, petitioners assert that it is unreasonable to funnel sexual misconduct complaints to the "inexperienced" CCRB. The CCRB cannot claim that it is filling a void because sexual misconduct complaints against NYPD officers because the IAB, has, for decades, handled those allegations. Further, petitioners allege CCRB states no evidence to indicate that any change is needed in handling of these claims.

CCRB's Resolution is rational. Respondents have provided ample evidence as to why investigations into sexual misconduct complaints against NYPD officers necessitates a change. As explained in the CCRB's public memorandum and in its motion papers, the CCRB did

extensive research in arriving in its decision to investigate sexual misconduct allegations. One reason the CCRB passed a Resolution to investigate sexual misconduct allegations independently of the NYPD (and IAB), to ensure a complete, thorough, and impartial investigation. Studies demonstrated that, as an internal entity of the NYPD, the IAB's investigation of sexual misconduct complaints severely undermined the public confidence in the NYPD. CCRB's investigation into sexual misconduct claims suggests heightened agency consciousness, not arbitrariness.

The IAB is an offshoot of the NYPD. The NYPD's employees investigate the complaints internally. Allegations of police sexual misconduct are exactly the type of complaint that requires an independent investigation. CCRB's review of the complaints, reports, and studies, in conjunction with Ms. Ritchie's testimony, lead the Board to conclude that the CCRB should investigate sexual misconduct allegations, instead of referring them to the IAB.

Moreover, studies have shown underreporting of police sexual misconduct allegations. It follows logically, that an alleged victim of sexual abuse by an NYPD officer might be intimidated to go back to the very precinct where she or he was abused. The CCRB's Resolution promotes impartial investigations. It downplays the power dynamic between an alleged victim of sexual misconduct and the police officer, or a NYPD employee who investigates the misconduct.

Finally, the carve-outs in the legislative history, that are not within the CCRB's jurisdiction, with respect to police misconduct, are for allegations of corruption and criminal acts. The Board follows these carve-outs. Any complaint alleging sexual misconduct to the CCRB will be immediately referred to the appropriate District Attorney's office.

Thus, the Resolution provides a rational basis to overcome underreporting and intimidation that sexual misconduct victims face.

Accordingly, it is

ORDERED that the court grants the Petition to the extent of declaring invalid the following Revised Rules only: Rule 1-11(c), Rule 1-11(a) and (b), Rule 1-33(a), Rule 1-42(h); and it is further

ORDERED that the court denies the Petition in all other respects.

The clerk is directed to enter judgment accordingly.

Dated: 2-27-2019

ENTER:



HON. MELISSA A. CRANE, J.S.C.
HON. MELISSA A. CRANE
J.S.C.