

*Police
Benevolent
Association*

Of The City Of New York, Inc.



MEMORANDUM IN OPPOSITION TO INT. NO. 2212-2021

The Police Benevolent Association of the City of New York, Inc. (“NYCPBA”) and its over 23,000 members, who patrol New York City’s streets and do the difficult and dangerous work of protecting every resident, visitor and business operating within the five boroughs, oppose the New York City Council’s (“Council”) proposed bill in relation to requiring the New York City Commission Human Rights (“NYCCHR”) to investigate past professional conduct by employees of the New York City Police Department (“NYPD”).¹

As an initial matter, there are ample safeguards in place that prohibit biased acts and provide consequences for those members of the NYPD found to have committed such acts. These include, but are not limited to following:

- Biased-based profiling is prohibited, per Section 14-151 of the N.Y.C. Administrative Code;
- NYPD’s policy prohibits racial profiling and biased-based policing, per Patrol Guide Procedure No. 203-25;
- NYPD’s policy prohibits discourteous and similar remarks based on another person’s ethnicity, race, religion, gender, gender identity/expression, sexual orientation, or disability and knowingly associating with prohibited persons or organization, per Patrol Guide Procedure No. 203-10;
- NYPD’s social media policy provides guidance on prohibited conduct as outlined in Patrol Guide Procedure No. 203-32.

In addition, the Civilian Complaint Review Board investigates allegations of offensive language, including the use of slurs and derogatory language related to someone’s actual or perceived protected status. Finally, the NYC Commission on Human Rights (“NYCCHR”) has had the legal authority to investigate complaints of biased policing since the 2013 amendment to Section 14-151 of the NYC Administrative Code, which states that “[a]n individual subject to bias-based profiling ... may file a complaint with the [NYCCHR].”

Despite the existence of a comprehensive scheme that prohibits and punishes such conduct, the Council has proposed this bill without citing any evidence that suggests a problem exists that is not being addressed. The lone example cited in the Council’s Committee Report on the proposed bill evidences that

¹ The specific bill referenced here is Int. No. 2212-2021.

<https://legistar.council.nyc.gov/LegislationDetail.aspx?ID=4770945&GUID=B5D55B19-D0FD-440C-999F-1708BF09F374&Options=&Search=> (the “Bill”).

the individual was held accountable promptly.² Absent evidence of the existence of a problem, and in light of the existence of a comprehensive scheme addressing the same subject matter, there is no reason for the legislature to further act in the area.

Second, the law itself is defective in a number of significant respects, as set forth in detail below, which should foreclose moving forward with this bill.

Broadly, the bill authorizes the NYCCHR and its Chairperson to initiate its own investigations into any current or former employee of the NYPD when such person is found by the NYCCHR or any referring entities³ “to have engaged in an act exhibiting prejudice, intolerance or bigotry, or of unlawful discrimination against any person or group of persons, regardless of whether such employee was on or off duty when engaging in such act.” None of those critical terms is defined, which is particularly troubling given First Amendment rights that will undoubtedly be implicated in the event the standards do not comport with existing law.

Instead, the bill vests in the Chairperson the power to “determine what constitutes an act exhibiting prejudice, intolerance or bigotry, or of unlawful discrimination, for purposes of initiating such investigation.” The bill amplifies the ambiguity by proposing that “[s]uch acts include but are not limited to any conduct motivated by or based on animus against any protected class of person under this title, such as participation in any capacity in an online forum where racist, biased or hateful speech or racist, biased or hateful ideology is supported or promoted; any use of hate symbols on one’s person, in the workplace or otherwise in public; or threatening or harassing another person verbally or in writing on the basis of such animus.” For example, what is “conduct motivated by”, as used here? How is “based on animus” defined?

In addition to the lack of any meaningful definition of the prohibited conduct that could form the basis of an investigation by the NYCCHR, the bill establishes no standard as to what level of proof is needed by the identified referring agencies in order to refer a matter and to trigger the NYCCHR’s investigatory authority under the bill.

Moreover, the bill affords no process to the police officer subject to a referral to contest the finding prior to any such finding being referred to the NYCCHR.

All this is critical because once referred to the NYCCHR, the bill authorizes a fishing expedition into any past conduct of the police officer from his or her date of hire, including any past arrest, detainment, response to 911 call or any other emergency, any investigation conducted by such member, any past testimony, regardless of whether such activity is related to the conduct that formed the basis of the referral. The bill ignores the harm inflicted on police officers in the event a single referral is made which then opens to scrutiny all past police conduct regardless of its connection to the underlying conduct at issue, as well as the harm inflicted on the NYPD as an agency, as a result of every action of every police officer being questioned in like circumstances. No analog exists for this type of inquisition in the public or private sector.

It is particularly insidious as it relates to law enforcement where many allegations made against NYPD officers are false, made in bad faith or unproven. In fact, for example, a large majority of CCRB complaints are not substantiated, but the mere fact that they were investigated even on unsubstantiated

² Moreover, a NYPD representative testified that they are in the process of engaging an outside vendor to investigate work performed by a division where this individual worked and committed to making this report available to the Council. *See* Testimony of NYPD Representative at February 8, 2021 Hearing (available at <https://legistar.council.nyc.gov/MeetingDetail.aspx?ID=837161&GUID=7DCEE1ED-88BC-49EA-B0CD-27B797A29DE5&Options=&Search=>).

³ The bill lists as potential referring agencies to include the NYPD, Civilian Complaint Review Board, the Commission to Combat Police Corruption, Department of Investigation, the Attorney General of the State, District Attorney for a county within the City, a court of competent jurisdiction, or any other officer or body designated by the commission.

claims causes reputational harm and may cause adverse career consequences. Here too, proceeding upon an allegation not subject to challenge by an officer and authorizing overreaching investigations into all past conduct of an officer based on a single referral is unprecedented, subjecting police officers and their families to harassment and unwarranted retaliation. This concern is exacerbated even further as the investigations conducted under the bill are to be included in a centralized database under Section 14-190 of the N.Y.C. Administrative Code.

Also troubling is NYCCHR's mandate under the bill to investigate past conduct in the course of performance of official duties by current and former employees, an invitation for a fishing expedition of almost limitless scope when there has been no allegation that the past actions were in any way infected by bias. In fact, the NYCCHR, the entity tasked with enforcing the mandate, has testified that it has "serious concerns" about taking on this responsibility. The NYCCHR testified that the mandate here is "quite burdensome." See Testimony of NYCCHR Representative at February 8, 2021 Hearing (available at <https://legistar.council.nyc.gov/MeetingDetail.aspx?ID=837161&GUID=7DCEE1ED-88BC-49EA-B0CD-27B797A29DE5&Options=&Search=>).

The inquisition regime imposed by this bill will serve to discourage police officers from engaging in enforcement activities. In the current environment, law enforcement activities are already subject to heightened review and second guessing at the time they are taken. To create a regime that would now allow second guessing well into the future, even into the retirement of the officer, raising concerns associated with stale or unavailable evidence and statutes of limitations and repose, will through design or default have the effect of chilling law enforcement activity. This bill will add to the "transaction costs", including civil liabilities,⁴ criminal and disciplinary consequences, physical assaults and reputational harm, of policing arising out of the onslaught of public demonization and laws and regulations imposed over the past decade. Those circumstances have already chilled law enforcement activities in this city; this bill, if enacted, will serve to further diminish the public safety of all New Yorkers.

⁴ The bill also proposes that the NYCCHR may file administrative complaint under Section 905(d)(2) of the Charter or refer matter to the Corporation Counsel to commence a civil action under Section 905(d)(3) of the Charter, actions that may run afoul of existing law.