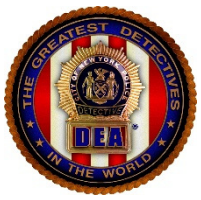

January 11, 2021

VIA FACSIMILE & ELECTRONIC MAIL
Heather Cook, Esq.
Assistant General Counsel
Civilian Complaint Review Board
100 Church Street, 10th Floor
New York, NY 10007

Re: Civilian Complaint Review Board's Proposed Rule Changes

Dear Ms. Cook:

The Police Benevolent Association of the City of New York, Inc., Detectives' Endowment Association, Sergeants Benevolent Association, Lieutenants Benevolent Association, and Captains Endowment Association (collectively, the "Unions") submit this letter on behalf of their more than 35,000 members, who do the difficult and dangerous work of protecting every resident, visitor, and business operating within New York City. We present our concerns and objections with respect to certain of the Civilian Complaint Review Board's ("CCRB" or the "Board") proposed changes to its Rules published in December 2020.

The Board's Flawed Process

At the outset, we note our concern that the Board devised these proposed changes without any discussion of the proposals during the Board's public meetings. Neither the Unions nor the public has had an opportunity to observe or review, let alone participate in, the Board's deliberations leading to the proposed changes. The Board's process with respect to these proposed Rule changes is in stark contrast to the changes CCRB proposed in 2016 and ultimately adopted in 2017 (the "2017 Rule Changes"), where the proposed changes were discussed at numerous public meetings before CCRB published the proposals. It is unclear why the Board changed its process by deliberating over the current proposed Rule changes behind closed doors, and thereby concealed the Board's deliberations from the public.

The Board's secrecy over its process and reasoning in devising these proposed Rule changes is a violation of Public Officers Law §103(a) (the "Open Meetings Law"),[1] and

[1] *See* N.Y. Comm. Open Gov. Advisory Opinion 2986 (1999) ("[A] series of communications between individual members or telephone calls among the members which results in a collective decision . . .

particularly troubling because, as discussed further below, many of the proposed changes are defectively vague and ambiguous, and the Statement of Basis and Purpose fails to explain, and provide a rational basis for, the proposed changes as required by the New York City Administrative Procedure Act ("CAPA") §1043 and New York Civil Practice Law and Rules ("CPLR") Article 78.[2]

We request that the Board make public the record of its deliberations over these proposed Rule changes, and that the date to respond to these proposals be extended until a reasonable time after those deliberations are made public. In addition, these comments and all other comments the Board receives should be made public as required, together with the Board's further deliberations of the proposed Rules.

Specific Comments

In addition to the general deficiencies with CCRB's process, the Unions also object to the following specific proposed Rule changes for the reasons set forth below.[3]

I. The Proposed New Definition Of "Abuse of Authority" Exceeds CCRB's Jurisdiction In Multiple Respects, And The Board Offers No Rational Basis For The Policy Changes And Expansions Of CCRB Powers Reflected Therein

The Charter limits CCRB's jurisdiction to complaints by members of the public against members of the police department ("Police Officers") alleging "misconduct involving excessive use of force, abuse of authority, discourtesy, or use of offensive language" (commonly referred to as "FADO").[4] Because these FADO categories are statutory terms and predicates for CCRB's jurisdiction, CCRB is required to strictly adhere to legislative intent, and it is not entitled to discretion or deference in purporting to define or apply these terms.[5]

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would in my opinion be inconsistent with law. . . . [T]he Open Meetings Law is intended to provide the public with the right to observe the performance of public officials in their deliberations.") (*available at* https://docs.dos.ny.gov/coog/otext/o2986.htm).

[2] *See St. Vendor Project v. City of N.Y.*, 10 Misc.3d 978, 985 (Sup. Ct. N.Y. Cty. 2005), *aff'd*, 43 A.D.3d 345 (1st Dep't 2007) ("The City's public policy, as set forth in CAPA, requires that city agencies may not adopt a rule without explaining the legal basis upon which the agency is acting and the purpose that the rule is intended to further. This policy serves, on a local level, to inform the public generally, and any reviewing court, that the agency conducted a legal process and had a rational basis for adopting the rule change.").

[3] The Unions provide these comments based on their understanding of the proposed changes from the scant information CCRB has provided. The discussion of specific Rule changes should not be viewed as the Unions agreeing to the validity of, or acquiescing to, the Rule changes not specifically discussed. The Unions expressly reserve any and all rights to challenge any of the proposed Rule changes in any appropriate forum(s).

[4] Charter §440(c)(1).

[5] *See DaimlerChrysler Corp. v. Spitzer*, 7 N.Y.3d 653, 660 (2006); *Teachers Ins. & Annuity Assoc. of Am. v. City of N.Y.*, 82 N.Y.2d 35, 42 (1993).

In the proposed Rule changes, however, CCRB for the first time in its history, and without any explanation of its reasoning in the Statement of Basis and Purpose or otherwise, purports to create a definition for the statutory term "abuse of authority" as "misusing police powers." The proposed definition further states, "[t]his conduct includes, but is not limited to, improper searches, entries, seizures, property damage, refusals to provide identifying information, intentionally untruthful testimony and written statements made against members of the public in the performance of official police functions, and sexual misconduct." This proposal must be rejected because it exceeds CCRB's jurisdiction and fails to comply with the rule-making requirements of CAPA and CPLR Article 78 in at least four respects.

A. "Misusing Police Powers" Is Overbroad

The Board's new proposed definition – "misusing police powers" – is clearly overbroad, as it would encompass matters that are indisputably outside CCRB's jurisdiction. In enacting Charter §440, the City Council demonstrated its intent to impose limits on the "abuse of authority" prong of CCRB's FADO jurisdiction, providing examples of matters that are outside its jurisdiction, including corruption and criminal matters.[6] By way of further example, complaints of racial, gender, or other protected-class profiling have also long been recognized as being outside CCRB's jurisdiction.[7] And as discussed specifically below, "sexual misconduct" and "intentionally untruthful testimony and written statements" are also outside CCRB's jurisdiction.

All of these examples, however, would impermissibly fall within CCRB's overbroad phrase "misusing police powers." In fact, the proposed definition is so broad that it would effectively eliminate all limitations on CCRB's jurisdiction, in clear violation of the City Council's intent to create CCRB as an agency of limited jurisdiction while expressly recognizing that other categories of complaints against Police Officers remain in the jurisdiction of other bodies.

B. CCRB Provides No Reason For The Definition Or Changes Effected Thereby

As discussed further below, the Board does not identify any need or intended use of this new proposed definition, nor has the Board made clear to the public its view of the meaning of the phrase "misusing police powers." The Board has not identified any issue that this proposal is intended to address, or the purported basis for this overbroad new definition; indeed, CCRB has operated since its inception without such a definition in the Rules.

The proposed definition does not provide clarity to the public or Police Officers. To the contrary, it is highly misleading and confusing and invites the filing of complaints with the wrong agency and of matters outside CCRB's jurisdiction. Such a result does not serve the

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[6] *See* Bill Jacket, 1993 Local Law #1 ("Bill Jacket"), *City Council Report of the Legal Division*, at 2.

[7] *See* NYPD, *Response to June 2019 Report of Office of Inspector General for NYPD* (Aug. 16, 2019), at 7, 8-9 (*available at* https://www1.nyc.gov/assets/doi/oignypd/response/FinalResponse_to_IG_v2_81619.pdf).

public or Police Officers, as it will lead not only to the potential for jurisdictional over-stepping, but also inefficiencies and delays in the processing of complaints. Indeed, CCRB's data shows that even prior to this proposed Rule change, 55% of complaints filed with CCRB in 2019 were outside its jurisdiction.[8] CCRB's proposed overbroad definition of "abuse of authority" will exacerbate this problem.

C. CCRB Has No Jurisdiction Over, And Has Stated No Rational Reason For It Now To Handle, Sexual Misconduct Complaints

Sexual misconduct, whether in the workplace, by law enforcement, or anywhere else, is an abhorrent and serious matter that cannot be tolerated and must be properly addressed when it occurs. However, CCRB's unilateral effort to assume power over this issue through an internal Rule change exceeds the jurisdiction that the City Council granted to CCRB under the Charter, and violates numerous precepts of agency rule-making that are designed to prevent such dramatic changes to agency practices without appropriate research, studies, and analysis and a reasoned basis for the change, all of which are lacking here.

Without any explanation in the Statement of Basis and Purpose, CCRB proposes to include "sexual misconduct" within the proposed new definition of "abuse of authority," defined as "misconduct of a sexual nature alleged by a civilian against a member of the Police Department" which "includes, but is not limited to, the following examples of misconduct: verbal sexual harassment; sexual harassment using physical gestures; sexual humiliation; sexually motivated police actions such as stops, summonses, searches, or arrests; sexual or romantic propositions; and any intentional bodily contact of a sexual nature, including but not limited to, inappropriate touching, sexual assault, rape, and on-duty sexual activity." The proposed Rule changes would also create a new defined term "sexual humiliation," defined as: "incidents in which an officer gratuitously shames or degrades a civilian in relation to their sexual organs or sexual behavior."

For 25 years since its inception, CCRB appropriately recognized that sexual misconduct complaints are outside its FADO jurisdiction, referring these complaints to other agencies, including the Internal Affairs Bureau ("IAB") and/or the District Attorneys' Offices. In 2018, without advance notice and without any opportunity for public comment, CCRB adopted a purported "Resolution" by which CCRB announced that it would begin handling certain types of sexual misconduct complaints. In the Resolution, CCRB admitted that "[m]eeting the needs of sexual trauma survivors requires resources the Agency currently lacks."[9] Nevertheless, CCRB announced that it would immediately begin investigating what it deemed "Phase 1" allegations, which included alleged sexual harassment without physical contact. CCRB further announced that once it determined that it had completed sufficient preparations, it would begin investigating

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[8] CCRB, *2019 Annual Report*, at 12-13 (*available at* https://www1.nyc.gov/assets/ccrb/downloads/pdf/policy_pdf/annual_bi-annual/2019CCRB_AnnualReport.pdf).

[9] *See* CCRB, *Memorandum Accompanying Public Vote* (Feb. 14, 2018), at 4 (*available at* https://www1.nyc.gov/assets/ccrb/downloads/pdf/policy_pdf/20181402_boardmtg_sexualmisconduct_memo.pdf).

"Phase 2" allegations, which included alleged physical contact, including sexual assault and rape. CCRB stated that before commencing Phase 2, it would need to designate a select group of senior investigators who would "receive specialized training in trauma-informed care and the Agency should seek to appropriate the necessary funding for such training," and that at least one specialized prosecutor in the Administrative Prosecution Unit with experience prosecuting sex crimes or working with victims of sexual violence would be designated to prosecute these complaints.[10] The Resolution further provided that "[u]ntil CCRB can effectively and responsibly serve sexual assault survivors," it would continue to refer these complaints to IAB and/or the District Attorneys' Offices.[11]

In *Lynch v. New York City Civilian Complaint Review Board* ("*Lynch v. CCRB*"), the New York Appellate Division, First Department, struck down the Resolution in its entirety as a "nullity," holding that that "the resolution announced a sweeping policy change that materially affected the rights of all alleged victims of sexual misconduct and allegedly offending police officers," but "CCRB undisputedly did not follow the public vetting process required by CAPA for adopting a new rule."[12] Because the Resolution was stricken on this procedural ground, the Court did not address the other challenges to its validity.

CCRB's attempt through the proposed Rule changes to expand its power to cover sexual misconduct complaints unquestionably exceeds well-established limits on CCRB's jurisdiction. This conclusion is readily apparent by an obvious defect with the proposed definition of "sexual misconduct": it expressly includes criminal sexual misconduct, such as sexual assault and rape. The City Council made clear in establishing CCRB, and the Appellate Division confirmed, that criminal matters are outside CCRB's jurisdiction.[13] CCRB's effort to grant itself authority over alleged criminal conduct violates a clear limitation on its jurisdiction.

More broadly, the City Council did not grant CCRB jurisdiction over sexual misconduct complaints, as confirmed by the Charter's text, legislative history, and CCRB's 25 years of past practice of referring these complaints to other bodies. The City Council made clear that the Charter "shall not be construed to hinder the investigation or prosecution of [Police Officers] for violations of law" by other appropriate bodies.[14] Yet, the proposed Rule change would impermissibly expand CCRB's jurisdiction into an area already covered by other bodies, including the IAB and the District Attorneys' Offices, thereby subjecting Police Officers to parallel investigations and the prospect of inconsistent determinations. Moreover, CCRB conceded in *Lynch v. CCRB* that no other civilian agency in the country investigates sexual misconduct complaints against police officers, which undermines the notion that the Council intended to grant such novel and broad power to CCRB through silence. In fact, when the

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[10] *Id.* at 5.

[11] *Id.*

[12] *Lynch v. CCRB*, 183 A.D.3d 512, 518 (1st Dep't 2020).

[13] *See* Bill Jacket, *City Council Report of the Legal Division*, at 2; *Lynch v. CCRB*, 183 A.D.3d at 515 (holding that criminal conduct "is outside of the CCRB's jurisdiction").

[14] Charter §440(f).

Council has addressed sexual misconduct in this City, it has done so expressly. In 1991, just two years prior to the creation of the CCRB, the Council passed a comprehensive set of amendments to the New York City Human Rights Law.[15] That statute specifically deals with sexual harassment, and creates a Commission on Human Rights as the agency charged with enforcement.[16] The Council gave the Commission on Human Rights broad powers to address complaints and study issues of discrimination and harassment in the City, powers it did not grant in CCRB's narrow Charter.[17] Had the Council intended CCRB to handle sexual misconduct complaints, it knew how to grant such authority in the Charter, but did not do so.

CCRB's attempt to empower itself to address sexual misconduct complaints through the inclusion of a definition in the proposed Rule changes is also defective because it contains absolutely no explanation of CCRB's reasoning for proposing this change or how it will be implemented. Notably, in seeking public comment on this new definition, the Board fails to advise the public of the extent to which it is seeking to extend its powers. It does not explain why it believes CCRB has the jurisdiction to address "sexual misconduct" and "sexual humiliation," including criminal levels of such conduct. It does not advise the public of the change this rule implements: of decades-long handling of such complaints by other agencies rather than CCRB, and why it believes this change, now, is necessary and appropriate. It does not advise the public that no other civilian agency in the country investigates such matters or the reason therefor, or why it believes CCRB nonetheless should be the first. And after CCRB admitted in the Resolution struck down by the Appellate Division that it did not have experience to handle such complaints, it does not explain why it believes it is now trained and well-positioned for the task it seeks to assume for itself. The Appellate Division already admonished CCRB for undertaking such a "sweeping policy change" without an appropriate "public vetting process," yet CCRB is repeating that error.

In fact, CCRB's unilateral determination to grab for itself power over sexual misconduct complaints creates serious public policy concerns for both the public and Police Officers. First, CCRB admits that it does not have the training, staffing, or funding to handle these complaints, and thus its assumption of authority over these complaints creates the risk of flaws and mistakes in its investigations and conclusions, delays in resolving these complaints, as well as the risk of trauma that an improperly handled CCRB investigation may impart upon the complainant. Second, given its track record, CCRB clearly is not the proper agency to handle such stigmatizing allegations against Police Officers. Simply the filing of a complaint with CCRB – even unsubstantiated or entirely false complaints – has immediate and permanent effects on Police Officers' reputations and careers. Yet, it is well-established that CCRB has an enormous problem of meritless complaints against Police Officers being filed. CCRB's data shows that well more than 90% of complaints filed with CCRB that CCRB deems to be within its

[15] N.Y. City Local Law 39 of 1991.

[16] N.Y. City Admin. Code §8-103.

[17] *See* N.Y. City Admin. Code §§8-104, 8-105.

jurisdiction are not substantiated year after year.[18] These results are unquestionably due in part to the civilian nature of CCRB and CCRB's failure to impose any consequences for the filing of false complaints.[19] CCRB's attempt to expand its power to sexual misconduct complaints will only exacerbate this problem.

CCRB's significant internal turmoil – including internal sexual misconduct allegations against Board members and senior staff – also underscores the impropriety of shifting sexual misconduct complaints to CCRB. For example, CCRB's female Executive Director in 2016 reportedly resigned and filed a lawsuit accusing CCRB's then-Chair of making inappropriate comments toward women and retaliating against her when she complained.[20] Her female predecessor also sued, claiming that she was terminated for complaining about sexual harassment by another Board member. The City reportedly paid $275,000 to settle that claim.[21] In 2017, the Board appointed a male Executive Director, who reportedly had complaints against him involving, among other things, inappropriate comments of a sexual nature while he was a CCRB employee, and the Board apparently promoted him with knowledge of these complaints.[22] CCRB's apparent belief that complainants will be more willing to report legitimate complaints to the strife-ridden CCRB and that its civilian members and staff are more qualified than experienced, trained IAB investigators and District Attorneys to handle sexual misconduct complaints is baseless.

In sum, the seriousness of a sexual misconduct complaint only underscores why CCRB, a civilian City agency with a narrowly defined jurisdiction, cannot unilaterally endow itself with authority over this issue. The matter is beyond its jurisdiction, and its assertion of authority violates well-established principles of agency rule-making and creates serious public policy concerns.

D. The Inclusion Of "Intentionally Untruthful Testimony and Written Statements" In The Proposed New Definition Is Overbroad And Improper

The inclusion of "intentionally untruthful testimony and written statements made against members of the public in the performance of official police functions" in the definition of "abuse

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[18] *See* CCRB, *2018 Annual Report Statistical Appendix*, at 61 (*available at* https://www1.nyc.gov/assets/ccrb/downloads/pdf/policy_pdf/annual_bi-annual/2018_annual-appendix.pdf). This is the most recent Statistical Appendix CCRB has published.

[19] *See* Shawn Cohen and Bob Fredericks, *CCRB Considering Perjury Charges For False Police Complaints*, N.Y. Post (Mar. 13, 2015) (quoting CCRB's then-Chair as acknowledging that CCRB "has failed to do its job" with respect to the problem of false complaints) (*available at* https://nypost.com/2015/03/13/ccrb-considering-perjury-charges-for-false-police-complaints/).

[20] Richard Calder and Joe Tacopino, *CCRB Director Quits After Accusing Ex-Chairman of Sexism*, N.Y. Post (Nov. 25, 2016) (*available at* https://nypost.com/2016/11/25/ccrb-director-quits-after-accusing-ex-chairman-of-sexism/).

[21] *Id.*

[22] *See* Jake Pearson, *NYC Police Watchdog Was Rebuked for Work Jokes*, AP News (May 25, 2017) (*available at* https://apnews.com/article/15e7d0b2b49f4e79a53421b5d3bb153c).

of authority" is also improper. Although CCRB's power was narrowly expanded as part of the recent Charter revisions, the proposed Rule goes beyond those revisions in violation of CCRB's jurisdiction and makes yet another dramatic change to decades of past practice, and without explaining what CCRB is doing or why.

It has long been recognized that alleged false statements were outside CCRB's jurisdiction. Over the last decade, CCRB has issued annual reports identifying categories it deemed to fall within "abuse of authority." CCRB has never identified alleged false statements as an "abuse of authority" category (nor as part of any other prong of FADO jurisdiction).[23] In fact, as recently as 2018, CCRB expressly acknowledged that alleged false statements constitute a matter outside its jurisdiction that CCRB refers to the New York City Police Department ("NYPD").[24]

The Charter was revised as part of the November 2019 ballot to grant CCRB a narrow additional power to investigate only "the truthfulness of any material official statement made by a member of the police department who is the subject of a complaint received by the board, if such statement was made during the course of and in relation to the board's resolution of such complaint."[25] CCRB acknowledged the narrow scope of the Charter revision relating to alleged false statements when it was lobbying for the passage of the ballot initiative, stating that the initiative "would provide the CCRB with just **one** new power: the authority to investigate and prosecute when a member of the NYPD has made a false claim before CCRB staff about the incident under investigation during a CCRB investigation."[26] Thus, CCRB's authority to investigate alleged false statements is limited and the proposed Rule changes already address this narrow new power in Rule 1-02(a).

The false statements language in the proposed new definition of "abuse of authority," however, is far broader than what is permitted in the Charter revision. CCRB does not have jurisdiction to investigate alleged false statements except those allegedly made by the subject of a CCRB complaint to CCRB in the course of the Board's work on that complaint. The proposed definition is overbroad, exceeds CCRB's jurisdiction, and must be rejected.

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[23] *See* CCRB, *Annual & Bi-Annual Reports* (*available at* https://www1.nyc.gov/site/ccrb/policy/annual-bi-annual-reports.page). Nor did the Reports include sexual misconduct as within CCRB's jurisdiction prior to the unlawful Resolution.

[24] CCRB, *2018 Semi-Annual Report* (Jan.-June 2018), at 74 (*available at* https://www1.nyc.gov/assets/ccrb/downloads/pdf/policy_pdf/annual_bi-annual/20181221_Semi-Annual%20Report.pdf).

[25] Charter §440(c)(1). The changes to the Charter pursuant to the November 2019 ballot initiative are the subject of pending litigation to declare those changes invalid. To the extent the changes to the Charter are declared invalid in whole or in part, CCRB's corresponding proposed Rule changes must also be stricken. The Unions reserve all of their rights with respect to the pending litigation and the proposed Rule changes made pursuant to the Charter revisions.

[26] CCRB, *What's True On Question 2?: Myth v. Fact* (emphasis in original) (*available at* https://www1.nyc.gov/site/ccrb/about/outreach/charter2019.page).

CCRB has also failed to provide any rational basis, and there is none, for this dramatic policy change to suddenly assume broad authority over alleged false statements, including those made outside the context of CCRB investigations. CCRB has never previously taken this position and in fact has acknowledged that such matters must be referred to the NYPD. It is highly troubling that even after the Appellate Division's decision in *Lynch v. CCRB* admonishing that such significant policy changes must be publicly vetted, CCRB is attempting to effectuate this significant power grab in a clandestine manner through the use of a purported definition without any explanation.

For all of the foregoing reasons, the proposed new definition of "abuse of authority" in the Rules must be rejected.

II. The Proposed Definition Of "Complaint" And The Proposed Change To Rule 1-23(e) Pertaining To Obtaining Records From The NYPD Improperly Exceed The Limitation On CCRB's Jurisdiction To Act Upon Sworn Complaints From Members Of The Public

The proposed new defined term "Complaint," and the proposed change to Rule 1-23(e) pertaining to when CCRB may obtain records from the NYPD, both violate CCRB's jurisdiction because they fail to comply with the Charter's limitation on CCRB's power to act upon sworn complaints received from "members of the public."

Charter §440(c)(1) limits CCRB's power to receiving, investigating, hearing, making findings, and recommending action "upon complaints by members of the public" against Police Officers that allege FADO misconduct. Thus, in *Lynch v. CCRB*, the New York Supreme Court held that CCRB cannot take action without a complaint from a member of the public, and the Court struck down CCRB's proposed Rule that would have allowed CCRB to initiate contact with potentially aggrieved parties or gather evidence without such a complaint.[27] Charter §440(c)(1) further requires that a complaint be sworn.

CCRB proposes to include in the Rules a new defined term for "Complaint" as "a report of alleged police misconduct received by the Board." To comply with Charter §440(c)(1) and the case law applying that provision, the proposed definition must be amended to clarify that the "report of alleged police misconduct" must be received by the Board from *a member of the public*. Additionally, the definition should clarify that for a report to constitute a "Complaint" upon which CCRB may act pursuant to Charter §440(c)(1), it must be sworn.[28]

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[27] *Lynch v. CCRB*, 2019 WL 978479, at *13-*14 (Sup. Ct. N.Y. Cty. Feb. 28, 2019). These holdings were not appealed, and are binding on CCRB.

[28] The Statement of Basis and Purpose for the proposed Rule changes makes no mention of the new defined term "Complaint," but lists "Complainant" among the proposed amended definitions. This appears to be an error, because no change to the definition of "Complainant" is indicated in the body of the proposed Rule changes. CCRB has failed to explain its reasoning for the new defined term "Complaint," which in itself renders it defective.

CCRB also proposes to revise Rule 1-23(e), which currently states that "[t]he Board may obtain records and other materials from the Police Department which are necessary for the investigation of complaints submitted to the Board," to instead state that "[t]he Board may obtain records and other materials from the Police Department which are necessary for investigations undertaken by the Board." By removing the reference to "complaints submitted to the Board," CCRB appears to be suggesting that the Board may undertake investigations that are not based on complaints. However, as discussed above, CCRB has no jurisdiction to commence an investigation, or request records or other materials from the NYPD, absent a sworn FADO complaint submitted to CCRB by a member of the public. As such, there is no authority for the proposed change to Rule 1-23(e). Moreover, the Board has provided no explanation for this proposed change, as it is not even listed in the Statement of Basis and Purpose.

For the foregoing reasons, the proposed definition of "Complaint" must be clarified to reflect that the report must be received from a member of the public and be sworn, and the proposed change to Rule 1-23(e) must be abandoned in its entirety.

III. The Proposed New Case Disposition Categories In Rule 1-33(e) For "Other Misconduct Noted" And "Closed—Pending Litigation" Must Be Amended To Comply With The Limitations On CCRB's Referral Authority And To Avoid Creating Misleading Case Dispositions

Proposed Rule 1-33(e)(15) would create "Other Misconduct Noted" as a new case disposition category for CCRB reports to the Police Commissioner. It is defined as: "the Board found evidence during its investigation that an officer committed misconduct not traditionally investigated by the Board, but about which the Police Department should be aware." This proposal must be amended to comply with CCRB's limited FADO jurisdiction and the Appellate Division's ruling in *Lynch v. CCRB*.

With its change to Rule 1-44 as part of the 2017 Rule Changes, CCRB announced that it will note possible non-FADO misconduct of which it becomes aware during the course of an investigation of a FADO complaint in case dispositions for referral to the NYPD. This change to Rule 1-44 was a subject of *Lynch v. CCRB*. The Appellate Division upheld the change to Rule 1-44, but only based on certain limitations on this referral authority. The Court confirmed that in referring possible "other misconduct," CCRB is not permitted to "mak[e] any findings or recommendations with respect thereto," because to do so would violate CCRB's limited FADO jurisdiction.[29] Thus, Rule 1-44 expressly states that "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." Moreover, the Court upheld the change to Rule 1-44 only because "the amended rule specifies that potential non-FADO misconduct is to be 'noted' as 'possible misconduct.'"[30]

[29] *Lynch v. CCRB*, 183 A.D.3d at 517.

[30] *Id.*

The proposed new case disposition category in Rule 1-33(e)(15) is inconsistent with Rule 1-44 and fails to comply with *Lynch v. CCRB* in three respects. First, the current language would provide for a case disposition category of "Other Misconduct Noted" without any indication that this is only a notation of *possible* misconduct. Both the case disposition category and its definition must be amended to state that the notation is only of "possible misconduct."

Second, the definition also must be amended to make clear that CCRB is not making any findings or recommendations with respect to the possible other misconduct, because the language as currently drafted implies otherwise.

Third, the proposed definition is inconsistent with Rule 1-44, and therefore vague and confusing. While the language of Rule 1-44 that the Court upheld refers to "possible misconduct falling outside [CCRB's] jurisdiction," the proposed new definition uses different language – "committed misconduct not traditionally investigated by the Board." Because Rule 1-44 is the only source of authority for this new case disposition category, the definition should be amended to be consistent with Rule 1-44 as pertaining only to "possible misconduct falling outside [CCRB's] jurisdiction."

A failure to make these amendments would not only violate applicable law, but would seriously prejudice Police Officers by tainting their case dispositions with misleading information. The notation of "other misconduct" refers only to *possible* misconduct that has not been investigated or vetted by any appropriate agency, and this should be made clear in this case disposition category in the Rules. Accordingly, to address each of these issues, we propose that Rule 1-33(e)(15) be amended to read as follows: "Other Possible Misconduct Noted: during the course of its investigation of a FADO complaint, the Board became aware of possible misconduct falling outside its jurisdiction, as to which it has not made any findings or recommendations, but which it referred to the Police Department."

The new proposed case disposition category in Rule 1-33(e)(11) labeled "Closed—Pending Litigation" is also misleading to the prejudice of Police Officers. The label of this category gives the impression that litigation has been commenced against the subject Police Officer. However, the proposed definition of this new category – "the Complainant or Victim chose not to cooperate with the investigation on the advice of counsel" – indicates that this category is not limited to circumstances where there is litigation pending against the Police Officer, but rather covers a broader category of cases where, for whatever reason, the complainant's or alleged victim's counsel advised them not to cooperate in the CCRB investigation. Indeed, a complainant's or victim's counsel could provide this advice where the *complainant or alleged victim* is a defendant in a criminal proceeding. To make the label of this proposed new category consistent with its meaning and thereby avoid creating a misleading record in the Police Officer's case disposition, the label in Rule 1-33(e)(11) should be amended to be "Closed—On Advice of Complainant/Victim Counsel."

IV. The Proposed Changes To Rule 1-36(d) Unnecessarily Impair The Fundamental Right Of Police Officers To Have The Reconsideration Of Closed Cases Conducted By The Previously Deciding Panel

The proposed changes to Rules 1-36(d)(1) and (2) unfairly and unnecessarily prejudice Police Officers by diminishing their long-standing and fundamental right to have the reconsideration of a closed case conducted by the previously deciding panel.

Rules 1-36(d)(1) and (2) currently reflect Police Officers' right to have a reconsideration of a closed case conducted by the previously deciding panel. They provide that a different Board member may be added to the panel only in the limited circumstance where a member of the previous panel is no longer a member of the Board. The proposed changes to subparts (1) and (2) dramatically expand the circumstances by which a new panel may be convened to reconsider a closed case by adding language stating that the previously deciding panel members will be reconvened only if they are "available to meet," and that the Chair may designate a replacement if any member from the prior panel is "unavailable to meet."

These proposed changes violate the well-established principle of New York law in the courts – which applies equally to CCRB proceedings where significant Police Officer rights are involved – that "a Justice should not modify or overrule an order of a fellow Justice."[31] In other words, where a panel makes a decision to close a case and those panel members remain members of the Board, another panel cannot modify or overrule the previously deciding panel's decision.

Neither the Rules nor the Statement of Basis and Purpose provides any reason for this change. Nor do they provide a definition or explanation of what "available to meet" means, creating a vague and ambiguous standard without any objective parameters to limit its application or prevent uneven enforcement against Police Officers. If a member from the previously deciding panel is "unavailable," reconsideration of the closed case can wait until that member becomes "available."

V. The Proposed Change to Rule 1-51(b) To Reduce The Number Of Board Meetings Will Needlessly Create Further Delays In The CCRB Process, To The Prejudice Of Police Officers

The current Rules require the Board to meet at least monthly (*i.e.*, 12 times per year), but the proposed change to Rule 1-51(b) would reduce the minimum number of Board meetings each year to 10 by providing that the Board is not required to meet in the months of August and December. Reducing the number of times the Board meets each year will only contribute to the already inordinate delays in CCRB's handling of complaints, with concomitant prejudice to Police Officers whose careers may be effectively put on hold while a complaint is pending. Moreover, there is no reason for this proposed change, and the Board has not even attempted to provide a rational basis for it.

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[31] *Bansi v. Flushing Hosp. Med. Ctr.*, 15 Misc.3d 215, 219 (Sup. Ct. Queens Cty. 2007); *see also Prudential Lines, Inc. v. Firemen's Ins. Co. of Newark, N.J.*, 109 Misc.2d 281, 283 (Sup. Ct. N.Y. Cty. 1981).

While August and December are popular vacation times, vacations can be accommodated without the need for the Board to take these *entire* two months off. Alternatively, the proposal should be amended to continue the long-standing requirement of conducting at least 12 meetings per year, which can be accomplished during the other 10 months.

VI. The Proposed Changes To Rule 1-52(b) To Permit The Board To Conduct Meetings In Secret And Arbitrarily Limit When Board Members May Abstain From Voting Violate The Law And Public Policy

The proposed changes to Rule 1-52(b) – which would delete the current requirement that Board members be present in person or by videoconference to register their votes, and replace it with an entirely different Rule purporting to limit when a Board member may abstain from voting – violate state statutes and the Charter and are contrary to public policy.

First, the proposal would delete the current language in Rule 1-52(b) requiring that "Board members must be present at a meeting of the Board or a panel in person or, subject to such limitations as the Board may by resolution from time to time determine, by videoconference in order to register their votes." CCRB previously proposed deleting Rule 1-52(b) in the 2017 Rule Changes, but, after receiving objections to this proposal, did not make this change. CCRB has provided no explanation for why, after previously abandoning this change, it is proposing it again.

If the current language of Rule 1-52(b) is deleted, there would be no Rule requiring Board members to attend monthly Board meetings at all. These meetings are the only opportunities for members of the public to monitor and provide input on the Board's activities. The Board's trend toward increasing secrecy, such as with its deliberations over the proposed Rule changes at issue and with this proposed Rule change that would allow Board members to cast their votes behind closed doors, is not only seriously troubling from an accountability standpoint, but violates state law. The Open Meetings Law requires that the Board's meetings be open to the public (including, when videoconferencing is used, that the public have an opportunity to attend the videoconference session). The deletion of Rule 1-52(b) violates this statute by purporting to authorize the Board to hold meetings closed to the public, and/or without all members present.

Additionally, General Construction Law §41, which is applicable to both Board and panel meetings (*i.e.*, whenever "three or more persons are charged with any public duty"), requires that voting take place "in the presence of each other or through the use of videoconferencing." This statute does not permit the Board or a panel to vote by any other means.[32] The current language of Rule 1-52(b) reflects the requirements of the Open Meetings Law and the General Construction Law, and must not be removed from the Rules.

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[32] *See Town of Eastchester v. N.Y. State Bd. of Real Prop. Servs.*, 23 A.D.3d 484, 485 (2d Dep't 2005) ("Because General Construction Law §41 contains no provision authorizing participation by telephone conference call, only the votes cast by the members actually present at the meeting can be counted towards a majority vote.")

Second, CCRB proposes, also without explanation, to replace Rule 1-52(b) with language providing that "[a] Board member may not abstain from voting unless the member is subject to subdivision (a) of this section" – *i.e.*, the Board member "has a personal, business or other relationship or association with a party to or a witness in a Case before a panel to which such member has been assigned." There is no reason to impose this narrow limitation on when a Board member may abstain from voting, and this proposal violates the Charter.

The Charter requires that CCRB's activities be "impartial" and "conducted fairly and independently, and in a manner in which the public and the police department have confidence."[33] Board members also have fiduciary obligations in this regard. If there is any reason that a Board member believes he or she cannot be fair and impartial, or that would even give the appearance that a Board member cannot be fair and impartial, he or she should be permitted, and is required, to abstain, regardless of whether he or she falls within the limitations of subdivision (a). For example, a Board member may not have a personal, business, or other relationship or association with a party to or a witness in a case, but he or she may have an interest in property such as a vehicle or business involved in a case, which would render the member unable to be impartial and/or create the appearance of partiality. Any issue of abstention should be evaluated on a case by case basis, not subject to arbitrary and overly-narrow limitations.

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[33] Charter §440(a).

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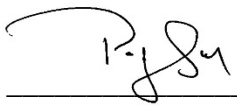
We urge the Board to amend the proposed Rules in a manner consistent with the concerns outlined above. If you would like to discuss any of our comments, please let us know. If you disagree with any of our comments, we request that the Board provide an explanation of the reasons for its disagreement.

Very truly yours,

Police Benevolent Association of the City of New York, Inc.



By: Patrick J. Lynch, President

Detectives' Endowment Association

By: Paul DiGiacomo, President

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By: Ed Mullins, President

Lieutenants Benevolent Association

By: Louis Turco, President

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