

NOTICE OF PUBLIC HEARING

- Subject:** Opportunity to comment on the Civilian Complaint Review Board ("CCRB")'s adoption of revised rules related to administrative prosecution of certain cases substantiated by the Board
- Date / Time:** November 28, 2012, 11:00 A.M. to 1:00 P.M.
- Location:** 40 Rector Street, 2nd Floor
New York, NY 10006
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Proposed Rule Amendment

In accordance with section 1043(b) of the Charter of the City of New York ("Charter"), the Civilian Complaint Review Board ("CCRB") proposes the adoption of revised rules governing the administrative prosecution of certain cases substantiated by the Board, jurisdiction, filing of complaints, recording of interviews, communications with complainants, mediation and the re-opening of cases.

These rules are proposed pursuant to sections 440(c)(2) and 1043 and of the Charter of the City of New York. These proposed rules were not included in a regulatory agenda for the CCRB for Fiscal Year 2013 because, with the exception of the changes to the rules governing the administrative prosecution of certain cases substantiated by the Board, they were not anticipated when such agenda was under consideration.

Instructions

- Prior to the hearing, you may submit written comments about the proposed amendment to the Civilian Complaint Review Board by mail or electronically through NYC RULES at www.nyc.gov/nycrules by November 26, 2012.
- To request a sign language interpreter or other reasonable accommodation for a disability at the hearing, please contact the Civilian Complaint Review Board by November 20, 2012.

Written comments and a summary of oral comments received at the hearing will be available after the hearing at the offices of the CCRB at 40 Rector Street, 2nd Floor, New York, NY 10006 from 9:00 A.M. through 5:00 P.M. on business days.

Statement of Basis and Purpose of Proposed Rules

Overview

The existing Subchapter E of Title 38-A, the Rules of the CCRB, took effect on June 25, 2001. It was adopted pursuant to a memorandum of understanding ("MOU") made between the then-Chair and Police Commissioner on April 27, 2001 and provided for the administrative prosecution by the Board of civilian complaints substantiated by the Board, before the New York City Office of Administrative Trials and Hearings ("OATH").

The 2001 MOU was not implemented, because a panel of the First Department of the Appellate Division of the New York State Supreme Court held that state law requires that such administrative prosecutions take place before a person employed by the Police Commissioner and OATH judges are not employed by the Police Commissioner.

Because the 2001 MOU could not be implemented, since June 25, 2001, administrative prosecutions of civilian complaints substantiated by the Board have continued to be handled by attorneys employed by the Police Department. They are heard by the Trial Commissioner of the Police Department as required by state law.

A new Subchapter E of the Rules of the CCRB is now proposed pursuant to an MOU made between the current Chair and Police Commissioner on April 2, 2012. The new Subchapter E would replace the existing Subchapter E and implement the terms of the new MOU which provides for the Board to conduct the administrative prosecution of certain of the Board's substantiated cases, before the Trial Commissioner of the Police Department.

In the course of undertaking the necessary rule changes, the Board conducted a review of its other rules. The Board determined that those sections dealing with jurisdiction, filing complaints, recording investigative interviews, letters to complainants, mediation and re-opening closed cases, should be revised to provide greater clarity and consistency.

The New Subchapter E

Rule § 1-41 explains the purpose of Subchapter E and contains a definition of terms.

Rule § 1-42 sets out the procedure to be followed when the Board substantiates an allegation against an officer and recommends that charges and specifications be brought against such officer. In limited cases where, in the view of the Police Commissioner, the interests of justice would not be served by the bringing of

charges against an officer, the Police Commissioner may request in writing that the Board refrain from prosecuting such charges.

Rule § 1-43 sets out the procedure to be followed when a prosecution ought to be expedited.

Rule § 1-44 sets out the procedure to be followed when during the course of a prosecution the Board identifies possible misconduct falling outside its jurisdiction.

Rule § 1-45 restates the principle that the Police Commissioner retains in all respects the authority and discretion to make final disciplinary determinations; and requires that there be co-operation between the Board and the Police Department Advocate.

Rule § 1-46 sets out certain other matters relating to administrative prosecution, including several procedures to be followed.

Other Changes

Rule § 1-02 conforms the jurisdictional language in the Rules with the jurisdictional language in the New York City Charter, which provides that the Board has the power to receive, investigate, hear, make findings and recommend action upon complaints by members of the public against members of the Police Department that allege misconduct involving excessive use of force, abuse of authority, discourtesy, or use of offensive language including, but not limited to, slurs relating to race, ethnicity, religion, gender, sexual orientation and disability. Such change, involving the addition of the words "have the power to" to the language currently contained in Rule §1-02, would bring consistency to the language contained in the Rules and in the City Charter. It would also reflect that under the City Charter the Board is not required to receive, investigate, hear, make findings and recommend action upon all such complaints.

Rule § 1-11 codifies the Board's current practice of accepting complaints received by email or through the Board's website, and makes clear that the Board may decide to accept complaints submitted by other means.

Rule § 1-24(i) codifies the Board's current practice of prohibiting interviewees and others from recording the Board's investigative interviews. To permit the recording of interviews would increase the risk that future evidence might be tailored to conform to statements made in an interview, and so threaten the integrity of the Board's investigations. The reference to recordings' being made either mechanically or by means of stenographer is deleted as it is archaic and redundant.

Rules § 1-46 through 50 are renumbered §1-51 through 56 to accommodate proposed Subchapter E and maintain consistency with the current numbering system. The succeeding paragraphs of this Statement of Basis and Purpose use the proposed new numberings for easier reference.

Rules § 1-53 (b) and (c) are deleted because to write to a complainant after forty-five and ninety days of the receipt of a complaint serves no useful purpose, as few investigations are completed within those periods and those time frames do not correspond to any meaningful stages or benchmarks in the investigative process.

Rule § 1-53 (b) (as renumbered) is split to make it easier to read. The second part of what was in Rule § 1-53 (b) (as renumbered) thus becomes § 1-53 (c).

Rule § 1-53 (c) (as renumbered) is amended to take account of the fact that not all allegations substantiated by the Board will be administratively prosecuted by the Board.

Rule § 1-53 (d) (as renumbered) is amended so that the term "Police Commissioner" is used consistently throughout the Rules and to reflect the new procedures introduced by the new Subchapter E of the Rules.

Rule § 1-53 (f) is deleted as §§ 1-53 (b) and (c) will be deleted and § 1-53 (d) (to be renumbered as § 1-53 (b)) could not apply to a case resolved through mediation.

Rule § 1-54 is amended to correct typographical errors and to reflect the original intent of the respective rules.

Rule § 1-55 is amended to make it easier to read and to permit police officers to request the re-opening of cases closed without a full investigation.

Note: *[Material inside brackets has been deleted]*
Material underlined has been added.

Section 1. The definitions in section 1-01 of Title 38A of the Rules of the City of New York are amended to read as follows:

§ 1-01 **Definitions.**

As used in this chapter:

* * *

Police Commissioner. "Police Commissioner" means the Police Commissioner of the New York City Police Department.

* * *

Section 2. Section 1-02 of Title 38A of the Rules of the City of New York is amended to read as follows:

§ 1-02 **Jurisdiction.**

(a) The Board shall have the power to receive, investigate, hear, make findings and recommend action upon complaints by members of the public against uniformed members of the New York City Police Department that allege misconduct involving excessive use of force, abuse of authority, discourtesy, or use of offensive language, including, but not limited to, slurs relating to race, ethnicity, religion, gender, sexual orientation and disability.

(b) The jurisdiction of the Board shall include the prosecution of certain substantiated civilian complaints pursuant to a Memorandum of Understanding (MOU) executed by the Board and the Police Department on April 2, 2012, (as from time to time amended) during the period that such MOU is applicable.

(c) The findings and recommendations of the Board, and the basis therefor, regarding case investigations and administrative prosecutions shall be submitted to the Police Commissioner.

Section 3. Section 1-11 of Title 38A of the Rules of the City of New York is amended to read as follows:

§ 1-11 **[Written]Filing Complaints.**

Written complaints may be [mailed] sent to the Board's offices by mail or email or may be submitted in person at that office during operating hours. Written complaints may be filed on forms furnished by the Board. The Board will accept written complaints filed at local precincts and forwarded by the Police Department. The Board will also accept complaints submitted through the CCRB's website and by such other methods as the Board may determine.

Section 4. Section 1-24 of Title 38A of the Rules of the City of New York is amended to read as follows:

* * *

§1-24 Conduct of Interviews.

* * *

(i) Interviews shall be recorded [either mechanically or by a stenographer] by the CCRB. No other recordings are permitted.

* * *

Section 5. Subchapter E of Title 38A of the Rules of the City of New York, relating to administrative prosecution, is hereby REPEALED, and a new Subchapter E is added, to read as follows:

Subchapter E - Administrative Prosecution

§1-41 Introduction.

(a) This Subchapter E is adopted pursuant to a Memorandum of Understanding (the "MOU") dated April 2, 2012 and made between the Police Commissioner and the Chair, concerning the administrative prosecution by the Board of cases in which it finds that an allegation falling within its jurisdiction has been substantiated against an officer and recommends that formal charges and specifications be brought against such officer. The MOU takes effect on the date on which this Subchapter E takes effect and applies to allegations substantiated by the Board and in which the Board has recommended that charges and specifications be preferred on or after such date. This Subchapter E shall not create any rights or benefits in any third parties.

(b) In this subchapter:

"Case" means in relation to any Prosecution, the subject matter of such Prosecution.

"Charges" means charges and specifications brought by the Board against an officer in respect of an allegation falling within the jurisdiction of the Board and substantiated by the Board with the recommendation that charges and specifications be preferred.

"Police Department Advocate" means the department advocate, and includes any assistant department advocate, of the Police Department.

"Prosecution" means the administrative prosecution of Charges by the Board before a Trial Commissioner and includes all matters ancillary to or undertaken in anticipation of or in preparation for such prosecution.

"Trial Commissioner" means in relation to any Prosecution, the deputy commissioner of trials or assistant deputy commissioner of trials of the Police Department, having jurisdiction over such Prosecution.

§1-42 Prosecution of Charges.

(a) Where the Board finds an allegation falling within its jurisdiction to have been substantiated against an officer and recommends that Charges be brought against such officer the Board shall promptly notify the Police Commissioner of its finding and recommendation.

(b) In those limited circumstances where the Police Commissioner determines that the Board's prosecution of the Charges would be detrimental to the Police Department's disciplinary process, the Police Commissioner shall so notify the CCRB. Such instances shall be limited to cases in which there are parallel or related criminal investigations, or when, in the case of an officer with no disciplinary history or prior substantiated CCRB complaints, based on such officer's record and disciplinary history the interests of justice would not be served.

(c) Any request by the Police Commissioner for the Board to refrain from prosecution of Charges shall be made in writing to the CCRB and shall include a detailed explanation for such request and a statement detailing what discipline if any the Police Commissioner would pursue on such officer.

(d) The CCRB may reject such request to refrain from prosecution within five business days of receipt of such request. Such rejection shall be made in writing and shall include a statement rebutting the Police Commissioner's explanation for his or her request.

(e) The Police Commissioner may deny such rejection within five business days of receipt of such rejection. Such denial shall be made in writing to the

CCRB and shall include a detailed response to the CCRB's rebuttal. Upon receipt of such denial the Board shall refrain from further prosecution of the case.

(f) In all cases other than those which the Board is to refrain from prosecuting, the CCRB shall promptly draft, and request that the Police Department Advocate serve on behalf of the Board, Charges against the subject officer.

(g) If the CCRB believes that suspension or modified assignment of a subject officer would be prudent while a Prosecution is pending, the CCRB shall make such recommendation to the Police Commissioner, who shall determine whether to suspend or modify the assignment of such officer.

§1-43 Expedited Cases

If the CCRB receives notice from the Police Department, or it becomes clear to the CCRB, that a Case requires expedited prosecution, the CCRB shall make every reasonable effort to conclude such prosecution within the required time frame. If the CCRB determines that it will not be able to conclude such prosecution within such time frame the CCRB shall decline to prosecute such case and shall request that the Police Department Advocate undertake such prosecution.

§1-44 Other Misconduct

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 CCRB shall provide to the Police Department such assistance as may be requested, in the investigation or prosecution by the Police Department of such possible misconduct and shall, if necessary, coordinate its Prosecution with that of the Police Department.

§1-45 Police Department Procedures and Disciplinary Practices

(a) The Police Commissioner shall retain in all respects the authority and discretion to make final disciplinary determinations.

(b) The Board shall establish and maintain a unit of appropriately qualified and experienced attorneys and support staff of sufficient number to undertake in a timely and effective manner the responsibility for the administrative prosecution of substantiated civilian complaints.

(c) The Board's attorneys and support staff shall be trained in all aspects of the Police Department's procedures and policies as they affect the administrative prosecution of its cases.

(d) The Board's attorneys and support staff shall, to the extent practicable and relevant, familiarize themselves with and apply in relation to Prosecutions, Police Department disciplinary policies and standards.

(e) The Police Department shall provide all reasonable assistance requested by the CCRB in the creation and maintenance of this unit, including training and guidance in both legal and administrative matters.

(f) The CCRB may during the course of a Prosecution contact the Police Department Advocate to request the assistance of employees of the Police Department in the evaluation, preparation and prosecution of the Case. In such instances, the Police Department Advocate shall arrange for the Police Department to provide reasonable assistance to the CCRB.

§1-46 Other Matters Relating to Administrative Prosecutions

(a) The Police Department shall upon receipt send to the CCRB a copy of each report and recommendation issued by the Trial Commissioner in respect of a Prosecution. The CCRB may provide to the Trial Commissioner a letter commenting on such report and recommendation, commonly referred to as a "Fogel" letter.

(b) In all cases in which a Prosecution ends without the issuance by the Trial Commissioner of a report and recommendation, the CCRB shall forward to the Police Commissioner a final recommendation of the CCRB reflecting the results of its Prosecution of the Case. The CCRB shall include all relevant forms, memoranda and background information to assist the Police Commissioner in making a final disciplinary determination.

(c) The Police Commissioner may accept, reject, or modify the recommendation presented by the CCRB, or may ask the CCRB for additional investigative or background information in its possession. The Police Commissioner may also request further investigation or development of the record to enable him or her to make a final disciplinary determination. If the CCRB's recommendation is rejected or modified, the CCRB will be responsible for taking any appropriate follow-up action, such as proceeding with the Prosecution, engaging in additional investigation, or further developing the record.

(d) The CCRB may conduct plea negotiations with subject officers and their attorneys, to be heard by a Trial Commissioner and presented to the Police Commissioner for final determination. In all cases in which the Police

Commissioner rejects a negotiated plea, the CCRB shall be responsible for implementing the Police Commissioner's decision, including negotiating the Case in a manner consistent with the Police Commissioner's determination or proceeding with the Prosecution.

(e) The CCRB shall provide to the Police Department status reports on its Prosecutions quarterly and as otherwise requested by the Police Department.

(f) In any case substantiated by the Board in which the Police Commissioner intends to impose discipline that is of a lower level than that recommended by the Board or by the Trial Commissioner, the Police Commissioner shall notify the CCRB, with notice to the subject officer, at least ten business days prior to the imposition of such discipline. Such notification shall be in writing and shall include a detailed explanation of the reasons for deviating from the Board's or, as the case may be, the Trial Commissioner's, recommendation, including but not limited to each factor the Police Commissioner considered in making his or her decision. The CCRB and the subject officer may respond to such notification within five business days of its receipt, after which the Police Commissioner shall make a final determination.

(g) The Police Department Advocate shall ensure that the CCRB is notified of the final disciplinary result and specific penalty in each case prosecuted by the Board within thirty calendar days of the Police Commissioner's final determination.

Section 6. Sections 1-46, 1-47, and 1-51 of Title 38A of the Rules of the City of New York are renumbered sections 1-51, 1-52, and 1-56.

Section 7. Section 1-48 of Title 38A of the Rules of the City of New York is renumbered and amended as follows:

**§1-[48]53 Communications with and Notifications to Complainants
Regarding Status of Complaints.**

* * *

(b)[The Board shall advise a complainant by letter, within forty-five days of the filing of a complaint, of the status of his/her case. If the investigation is not completed within ninety days of the filing of a complaint, the Board shall again advise the complainant of the status of his/her case.

(c) The Board shall advise the complainant within five business days of the completion of the case investigation.

(d)]The Board shall, [notify the Complainant by letter of its] within seven business days of sending to the Police Commissioner its findings and recommendations in a case, write to the Complainant with such findings and recommendations. [regarding the case investigation within seven business days of the Board's submission of the findings and recommendations to the Police Commissioner]

(c) If [the case] an allegation is substantiated and charges are recommended by the Board, the Board shall [include notice to], as soon as it is determined under § 1-42, advise the complainant in writing [that] whether such allegation will be prosecuted and, if it will, whether the Board or the Police Department Advocate will be responsible for [undertaking] prosecuting it.

(e)d) [Following] Where there is an administrative prosecution by the Board, the Board shall within seven business days of the Board's receipt of the Police Commissioner's final determination notify the complainant by letter of the final action taken by the Police Commissioner [within seven business days of the Board's receipt of the Police Commissioner's final decision].

(f) Where the parties have agreed to mediate a case, the provisions of paragraphs (b), (c) and (d) of this section shall not apply.]

Section 8. Section 1-49 of Title 38A of the Rules of the City of New York is renumbered and amended as follows:

§1-[49]54 Mediation.

(a) A complainant may choose to resolve a complaint by means of mediation, provided the subject officer agrees to mediation as provided herein, and unless the Board or a panel thereof determines that the [complainant]complaint is not appropriate for mediation.

* * *

(d) Written notice of the time, date and location of the first mediation session shall be provided to each party. Such notice shall be accompanied by a description of procedures and guidelines for mediation. Subsequent session(s) shall be scheduled by [the mediator] a member of the Board's mediation staff if the mediation is not completed at the first session.

* * *

(i) If [the mediated]a case is not successfully resolved through mediation, the [mediator]complainant or police officer [shall notify Board staff of his or her]may ask for the [intent to pursue a]complaint to be investigated, and the

complaint shall then be referred to Board's [investigatory]investigative staff for investigation.

Section 9. Section 1-50 of Title 38A of the Rules of the City of New York is renumbered and amended as follows:

§1-[50]55 Reconsideration or Reopening of Cases.

(a) The Board may on receipt of a written request from a complainant or victim or police officer re-open any case closed [by a panel or the full board where] following a full investigation, if new evidence or a previously unavailable or uncooperative witness becomes available and in the determination of [such] a panel constituted to consider such request [or full Board] such new evidence or the prospective availability or cooperation of such witness may reasonably lead to a different finding or recommendation.

(b) The Executive Director may on receipt of a written request from a complainant or victim or police officer, re-open any case closed without a full investigation [under §1-34.

(c) Where following receipt of a request to reopen a case closed without a full investigation under §1-34,] If the Executive Director decides not to reopen such case, such request shall (except as from time to time otherwise directed by the Board) be submitted to a panel [or the full Board] for its consideration.

([d]c) Any person considering a request to reopen a case shall have full discretion in making his or her determination, and may properly consider all relevant circumstances, including, but not limited to, any delays on the part of the person requesting that the case be reopened[,] new, material information as to the complainant, the subject officer or any civilian or police witness[,] and the practicability of conducting a full investigation of the allegations contained in the case within any applicable limitation period.

**NEW YORK CITY LAW DEPARTMENT
DIVISION OF LEGAL COUNSEL
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NEW YORK, NY 10007
212-788-1087**

**CERTIFICATION PURSUANT TO
CHARTER §1043(d)**

RULE TITLE: Prosecution of Certain Cases of Alleged Police Misconduct

REFERENCE NUMBER: 2012 RG 059

RULEMAKING AGENCY: Civilian Complaint Review Board

I certify that this office has reviewed the above-referenced proposed rule as required by section 1043(d) of the New York City Charter, and that the above-referenced proposed rule:

- (i) is drafted so as to accomplish the purpose of the authorizing provisions of law;
- (ii) is not in conflict with other applicable rules;
- (iii) to the extent practicable and appropriate, is narrowly drawn to achieve its stated purpose; and
- (iv) to the extent practicable and appropriate, contains a statement of basis and purpose that provides a clear explanation of the rule and the requirements imposed by the rule.

/s/ STEVEN GOULDEN
Acting Corporation Counsel

Date: October 5, 2012

**NEW YORK CITY MAYOR'S OFFICE OF OPERATIONS
253 BROADWAY, 10th FLOOR
NEW YORK, NY 10007
212-788-1400**

**CERTIFICATION / ANALYSIS
PURSUANT TO CHARTER SECTION 1043(d)**

RULE TITLE: Prosecution of Certain Cases of Alleged Police Misconduct

REFERENCE NUMBER: CCRB-1

RULEMAKING AGENCY: Civilian Complaint Review Board

I certify that this office has analyzed the proposed rule referenced above as required by Section 1043(d) of the New York City Charter, and that the proposed rule referenced above:

- (i) Is understandable and written in plain language for the discrete regulated community or communities;
- (ii) Minimizes compliance costs for the discrete regulated community or communities consistent with achieving the stated purpose of the rule; and
- (iii) Does not provide a cure period because it does not establish a violation, modification of a violation, or modification of the penalties associated with a violation.

/s/ Ruby B. Choi
Mayor's Office of Operations

10/5/2012
Date