NYC

COMMISSION TO COMBAT POLICE CORRUPTION

Twenty-First Annual Report

of the Commission

July 2023

ACKNOWLEDGMENTS

The investigations that the Commission to Combat Police Corruption reviewed for this Report were among the last completed by the Internal Affairs Bureau under the guidance of two remarkable public servants: Deputy Commissioner Joseph Reznick and Deputy Chief Alan Cooper. Both men understood and appreciated the mission of this Commission, and while we did not always agree, they always listened and always provided the cooperation and input essential to our ability to fulfill that mission. In particular, they were willing and able teammates in our efforts to effect improvement in IAB investigatory techniques. We thank them for their efforts to identify and root out officers who engaged in corruption or serious misconduct, and for the reception they gave our critiques and recommendations.

For most of calendar year 2022, the Internal Affairs Bureau was led by Chief David Barrere, who announced his retirement in November. Although he was the head of Internal Affairs for less than a year, Chief Barrere considered us his partners in preventing and eliminating corruption, and for that we are grateful. We wish him the best of luck in his next chapter, and look forward to establishing the same kind of collaboration with his successor, Chief Miguel Iglesias.

At the conclusion of 2021, as Mayor DeBlasio was leaving office, two new Commissioners were appointed to the Commission. One, Clifton Stanley Diaz, was appointed for a one-year term, and he stepped down at the end of 2022. We thank him for his service and his contributions to our work.

Also, during the drafting of this Report, a long-time member of the Commission, Deborah E. Landis, resigned. Commissioner Landis, a former Assistant United States Attorney for the Southern District, was Mayor Michael Bloomberg's final appointment to our

Commission, and throughout her tenure, Commissioner Landis contributed not only to the lively discussions and occasional disagreements that arise whenever police policy and discipline is discussed, but also worked tirelessly on the written product required of the Commission. She developed a particular interest in the Department's false statement policy and its application of that policy, work that we will continue moving forward. We thank Commissioner Landis for her many years of service, for her commitment and contribution to the mission of the Commission, and for her friendship. We wish Commissioner Landis and Commissioner Diaz the very best in their future endeavors.

The Commission to Combat Police Corruption

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INTRODUCTION

The Commission to Combat Police Corruption ("the Commission"), created in 1995 by Mayoral Executive Order No. 18, is mandated to monitor the efforts of the New York City Police Department ("NYPD" or "the Department") to gather information, investigate allegations, and implement policies designed to detect, control, and deter corruption among its members.[1] The Commission accomplishes this largely through examining a sample of investigations conducted by the Internal Affairs Bureau ("IAB") and reviewing all closed disciplinary cases involving uniformed members of the service.[2] The Commission reports its findings in its annual reports. From time to time, we issue special reports on specific topics that we have chosen or at the request of the Mayor's Office, and we also provide comments in writing with respect to proposed changes in Department policies of specific importance to us.

This Report, *The Twenty-First Annual Report of the Commission*, covers the work performed by the Commission with respect to IAB investigations reviewed during the 2021 calendar year. The Commission is not reporting here on the disciplinary cases reviewed since January 2021 as we are currently working on an audit of the Department's overall disciplinary system. This audit is being conducted pursuant to a Memorandum of Understanding ("MOU") between the Department and the Commission that was executed in November 2019. This agreement followed a recommendation by an Independent Panel on the Disciplinary System of the New York City Police Department ("the Independent Panel") that the Department retain

[1] The Executive Order specifically withheld authorization from the Commission to conduct its own investigations into allegations of corruption against members of the Department, except in specific, narrowly-defined circumstances. Executive Order No. 18, §3(b) (February 27, 1995). (The Executive Order is attached as Appendix A.)

[2] IAB is the bureau within the Department responsible for investigating allegations of corruption and serious misconduct against members of the service.

external experts to conduct periodic audits of the disciplinary system.[3] We hope to publish our findings from that audit in early 2024.

While the Commission does not include in this Report our analysis of the disciplinary cases adjudicated by the Department during the reporting period, our continuing review of those cases as part of our upcoming audit has revealed categories of misconduct that are not included in the Department's Disciplinary Guidelines ("the Matrix"), or that could benefit from further clarification. There are also some penalty ranges that we believe are inadequate for the specific misconduct addressed. We conclude this Report with both a summary of our 2021 report, *Report on Matrix Penalties for Failure to Take Police Action*, and new recommendations for additions and revisions to the Matrix that we shared in summary form with the Department in a letter dated February 23, 2023. The letter is included in Appendix C to this Annual Report. In the text of this Report, we provide case descriptions to accompany the recommendations when examples of such disciplinary cases illustrate our concerns.

[3] Report of the Independent Panel on the Disciplinary System of the New York City Police Department (January 25, 2019) at p. 60.

MONITORING IAB INVESTIGATIONS

A. Commission Oversight

The Commission's independent, external scrutiny of IAB's investigations provides City officials, Department executives, and the public with a detailed assessment of IAB's investigative competency. Equally important, the Commission's critiques of investigations can and do lead IAB to improve its practices, provide additional training to its investigators, and in particularly serious cases, reexamine its own thoroughness and take additional investigative steps.

The Commission provides its oversight in four main ways. First, the Commission's members and staff attend IAB's monthly briefings to the Police Commissioner and the Commissioner's executive staff. At these briefings, IAB typically presents details of two ongoing investigations chosen by our Executive Director, who selects these investigations because of their overall significance or to highlight corruption issues and trends that have been observed through our other monitoring efforts. During these briefings, we ask questions about the cases presented, make suggestions for further investigative action, and convey any concerns directly to the Police Commissioner.[4]

Second, the Commission's staff attends IAB Steering Committee meetings. The Steering Committee is comprised of the executive staff of IAB. Three times during the year, each IAB group presents brief summaries of its most serious pending investigations.[5] The Steering

[4] The Police Commissioner and other Department executives also pose questions and make investigative or disciplinary recommendations.

[5] IAB is currently comprised of 23 investigative groups. Some of these groups cover a specific geographic area of New York City, while others investigate cases involving specific groups of service members or certain types of misconduct. Four of the groups primarily provide support services for the other investigative groups. Group 9, IAB's overnight call-out group, does not carry its own caseload and therefore does not make presentations to the Steering Committee.

Committee questions the commanding officer and that officer's team regarding investigative steps and results, and recommends future investigative actions. Commanding officers also identify patterns of corruption or serious misconduct within their areas of responsibility and discuss proactive measures to uncover corruption, serious misconduct, or other violations of Department rules. The Commission's presence at IAB Steering Committee meetings provides us with an overview of the most serious cases being investigated by IAB and the progress of those investigations. Commission staff attended 57 Steering Committee meetings in 2021. We found the Steering Committee's oversight to be detailed, reflecting appropriate concern with detecting and proving corruption and wrongdoing by members of the service. Attendance at these meetings also alerted Commission staff to concerns of IAB executives as well as to upcoming investigative changes in IAB. At times, our Executive Director provided her thoughts on the proposed changes.

The third method we use to monitor the work of IAB is attending case reviews, which are held at the individual IAB field offices. During these reviews, usually held once or twice per year per IAB group, each commanding officer presents their entire active caseload to the zone supervisor[6] and Commission staff, who ask questions and provide investigative recommendations.[7] Case reviews enable the Commission to keep abreast of almost the entire IAB caseload. Commission staff attended ten case reviews in 2021 as, due to the pandemic, in-person meetings were avoided during most of that year.

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[6] IAB's investigative groups are divided into three zones: 1) the four investigative groups that cover Manhattan and the Bronx; 2) the six investigative groups that cover Queens, Brooklyn, and Staten Island; and 3) the five investigative groups that cover detectives (two groups divided by geography), traffic agents, school safety agents, and allegations of excessive use of force. Each zone has a zone commander and an executive officer. Together, they comprise the zone supervisors and review most of the investigations prior to their closure.

[7] The Commission staff does not attend case reviews for Groups 2, 7, 9, 52, and 55, as these groups primarily provide support services for other investigative groups. The Commission staff also does not attend case reviews for the Special Investigations Unit and Group 25, as they present their entire caseloads at their specific Steering Committee meetings. Finally, the Commission staff does not attend case reviews for Group 51, which investigates impersonations of members of law enforcement.

While Steering Committee meetings and case reviews provide the Commission with an important understanding of IAB's operations and investigations, these reviews do not always reveal the details of those investigations, some of which the Commission finds significant. Therefore, as discussed in the next section, the Commission conducts more in-depth and independent reviews of IAB's investigations through the fourth method of monitoring: closed case monitoring.

B. The Commission's Review of Closed IAB Investigations

For this Report, the Commission reviewed 46 randomly-selected IAB investigations that were closed in 2021 to evaluate whether they were fair, thorough, accurate, and impartial.[8] We concentrated on whether adequate and appropriate investigative steps were taken, whether the results of those steps were properly analyzed, and whether the ultimate investigative findings were fair and proper based on the evidence obtained. Where an investigation involved multiple allegations of wrongdoing, we evaluated the disposition of each allegation.

We comment below on significant shortcomings that appear in individual cases, as well as more minor deficiencies found in multiple cases. Minor, isolated errors are not highlighted. We also discuss all perceived areas for improvement directly with IAB.

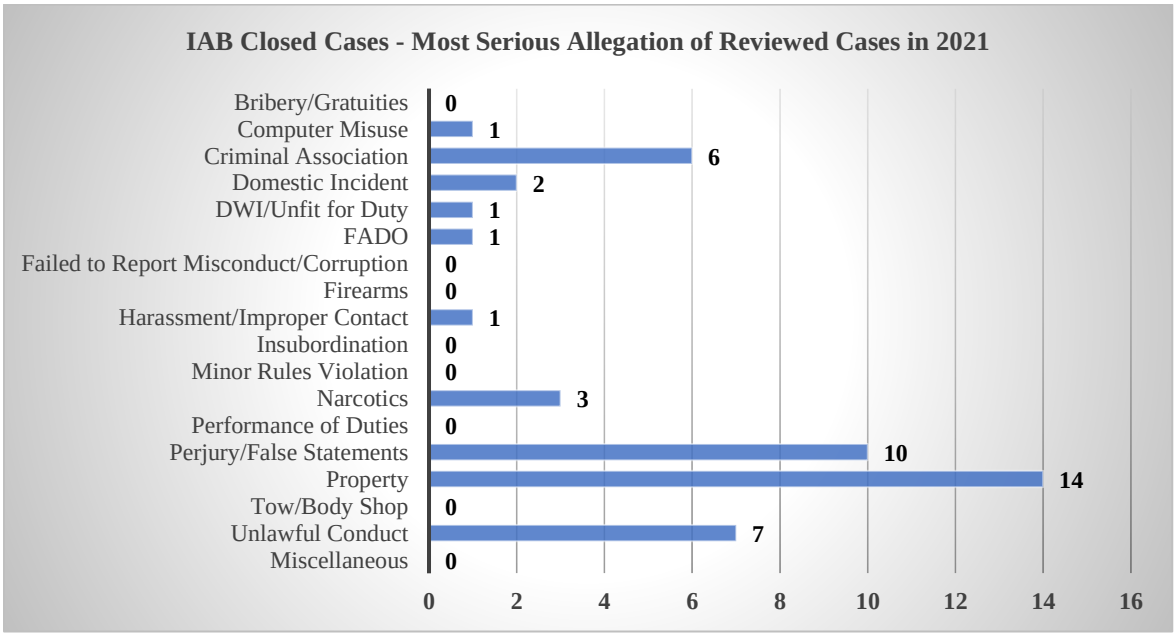
1. General Analysis of Closed Investigations

The Commission randomly chose cases from IAB closed case lists that identified only the case number and investigative group responsible for each case. The Commission reviewed investigations from multiple IAB groups to obtain an overall sense of the adequacy of IAB's operations across commanding officers, investigators, and case allegations.

[8] IAB considers a case closed after the investigation is completed, including reviews by supervisory IAB personnel. If allegations are substantiated and there is a determination that administrative charges are warranted, the case is referred to the Department Advocate's Office, the unit within the Department responsible for prosecution of disciplinary administrative cases, but the IAB investigation will be closed. IAB investigations will also be closed when there is a determination that no further action by IAB is necessary.

A majority of the cases we reviewed involved multiple members of the service and multiple allegations of misconduct. The 46 cases reviewed involved 140 subjects and 466 separate allegations. For each case, we identified one allegation for purposes of case categorization as the most serious allegation.[9]

A breakdown of the most serious allegations for cases reviewed in 2021 appear in the following chart.[10]



Consistent with the Commission's observations in past years, Property allegations represent the most common allegation that IAB investigates. The next two most common allegations continue to be Perjury/False Statements and Unlawful Conduct, a finding consistent with findings from our prior reports.[11]

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9 A complete list of the case categories along with the types of cases included in each category can be found in Appendix B of this Report.

10 Because only one allegation per case was identified as the most serious allegation, an indication of "0" on a chart does not necessarily mean that IAB did not investigate any such allegations. Also, it should be noted that allegations of Domestic Incidents, DWI/Unfit for Duty, Firearms, and Insubordination are not typically investigated by IAB.

11 *Nineteenth Annual Report of the Commission* ("*Nineteenth Annual Report*") (December 2019) at pp. 15-16; *Twentieth Annual Report of the Commission* ("*Twentieth Annual Report*") (June 2022) at pp. 14-15.

a) Investigation Length

Pursuant to state statute, to impose discipline, the NYPD must administratively charge a subject officer within 18 months of the last date that the alleged misconduct took place.[12] If charges are not served upon a member of the service within this statute of limitations ("SOL"), the opportunity to impose discipline for the misconduct is generally lost.[13] Therefore, it is important that investigations be conducted expeditiously to ensure that substantiated misconduct can be addressed in a meaningful manner.[14] Swift investigations are also important for other reasons. For discipline to have the greatest effect, it should be imposed as close in time to the misconduct as possible. In addition, unnecessary investigative delays leave members of the service in limbo, with possible charges and discipline potentially affecting advancement opportunities. As a general matter, prompt investigations should also result in better, more definitive dispositions for most cases, as physical evidence is more likely to be preserved and witnesses' memories are more likely to be accurate.

The Commission analyzed the length of the IAB investigations reviewed during this reporting period from the start of each investigation (when the Department received notification of the allegations) until the conclusion (when the case was closed, each allegation was given a disposition, and the IAB supervisory review process was completed.) As part of its analysis of the investigation length, the Commission examined whether the Department had lost the opportunity to impose discipline for any misconduct due to expiration of the SOL, and assessed whether any investigation remained open longer than necessary based upon the allegations and the investigative steps conducted. Overall, we found that in all instances, IAB investigators

[12] N.Y. Civil Service Law §75(4). This statute of limitations does not apply in cases where the alleged misconduct would constitute a crime if proven in a criminal proceeding.
[13] For less formal command disciplines, the discipline must be fully adjudicated prior to the SOL's expiration.
[14] If the SOL expires prior to the service of charges and specifications or the imposition of other discipline, a letter of instruction can be placed in the individual's personnel file; however, no penalty can be imposed.

closed cases in a timely manner, and when cases exceeded 18 months, there appeared to be justification for the longer periods.

The 2021 investigations reviewed averaged 11.5 months, with the shortest investigation lasting one month, and the longest lasting 28 months. All but six cases (87%) were completed within 18 months. Although the average length of investigation increased by approximately two months as compared to 2020 (9.75 months), and 2019 (9.5 months), the Commission is cognizant that the 2021 investigations were conducted during the pandemic, which complicated investigations from a logistical standpoint. Scheduling and interviewing civilians and members of the service were often delayed during the early months of the pandemic. Those cases that were investigated jointly with District Attorneys' Offices also encountered delays as many of the Assistant District Attorneys were working remotely. Thus, the Commission takes no issue with the overall increase in the average length of investigation for this period. We also note that despite the challenges presented by the pandemic, the average length of these investigations was still shorter than the average length of investigations we reviewed for calendar years 2014 through 2017.[15]

The six investigations that lasted longer than 18 months involved either complex issues, multiple subject officers, numerous allegations of misconduct, ongoing criminal investigations, related criminal prosecutions, the potential for criminal prosecution, or a combination of these factors.[16] The Commission believed that these investigative lengths were reasonable given case

[15] The average length of IAB investigations that were reviewed for each calendar year between 2014 and 2017, respectively, was 13 months, 12 months, 10 months, and 11.8 months.

[16] Often IAB investigative delays are attributable to the relevant District Attorney's Office and the delayed determination whether the office will proceed criminally against a subject officer. In deference to the criminal prosecutors, IAB investigators may delay taking any investigative measures that could jeopardize a potential criminal prosecution. Five of the six investigations that lasted longer than 18 months involved instances of IAB investigators awaiting decisions by the District Attorneys' Offices. In two of the five cases at least one subject officer in the investigation was charged criminally. In the other three cases, the District Attorneys' Offices eventually waived prosecution.

circumstances and the investigative steps conducted. IAB did not lose the opportunity to impose discipline in any of the six investigations due to the SOL; in fact, in five of the six cases, the most serious allegation levied against the subject officers involved criminal acts that were not subject to the 18-month SOL and were ultimately substantiated, resulting in a forced retirement from the Department for three officers.[17] In the sixth case, no allegation was substantiated, so there was no discipline to impose.

Among other factors affecting timeliness, we looked at whether there were lengthy gaps between investigative steps. The longer an investigation continues without meaningful work being performed, the less likely it becomes that a definitive disposition will be reached. Additionally, the longer an investigation is open without significant progress, the more likely it is that the individual investigator's caseload will increase. In past reviews, gaps between investigative steps have been an area of concern and the Commission previously stressed the importance of this issue to IAB. Following the publication of the Commission's last Report, the former Commanding Officer of IAB agreed that these types of gaps in investigations are unacceptable and stressed to his investigators that they should not occur. We are pleased to report that lengthy gaps were not an issue in the investigations we reviewed for this Report.

b) Types of Allegations

Of the 466 individual allegations of misconduct included in the cases the Commission reviewed, the three most prevalent allegations - as opposed to the most serious allegations - involved FADO, Property, and Performance of Duties.[18]

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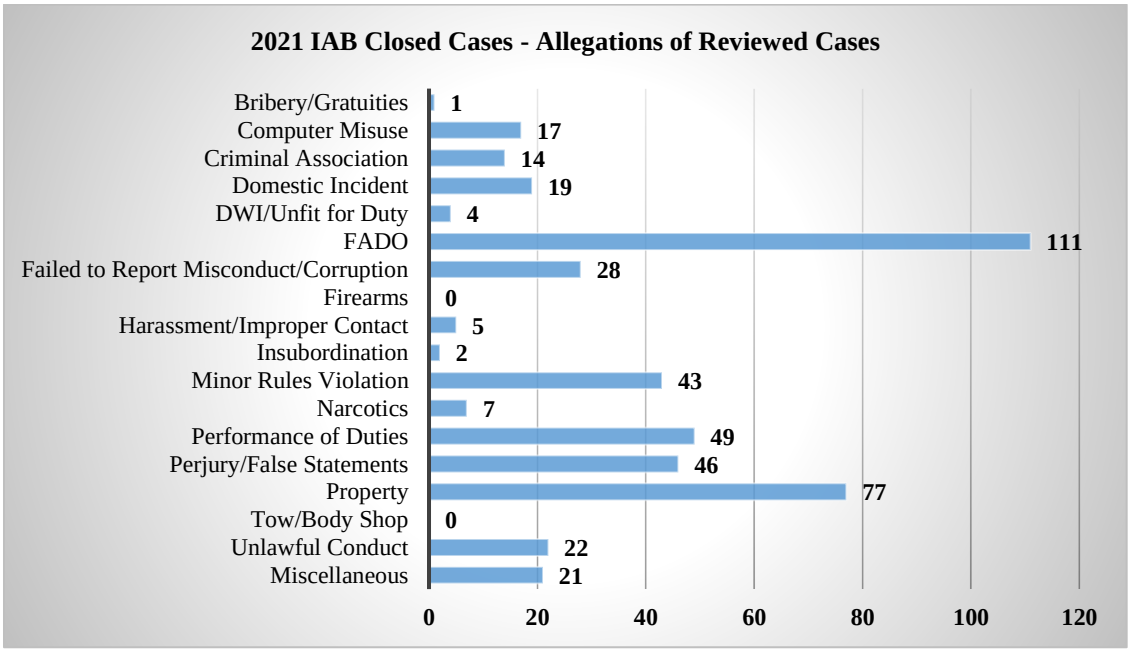
[17] These five substantiated allegations included two Perjury/False Statement cases, Falsifying Official Records, Fraud, and Criminal Association. Regarding the lone investigation that lasted longer than 18 months and resulted in an unsubstantiated finding, the main subject officer was also a subject in another IAB investigation that resulted in criminal charges and his ultimate resignation from the Department.

[18] The Commission has included the failure to properly activate body-worn cameras in the Performance of Duty category. This may partially explain the increase in allegations in the Performance of Duties category that we began to observe in our 2020 review of cases. *See Twentieth Annual Report* at p. 20.

A breakdown of all allegations investigated in the 2021 cases is set forth below.



The number of allegations in each case category differs significantly from year to year because we review a random sample of cases, and these figures do not reflect the total number of each type of allegation made in a given year.

c) Dispositions

At the conclusion of an investigation, IAB typically assigns one of six dispositions to each allegation and another to the overall case.[19] They are:

- ***Substantiated*:** The investigation determined that the subject committed the act of misconduct alleged. As applied to the overall case, the accused member of the service committed all the acts of misconduct alleged.

- ***Partially Substantiated*:** The investigation determined that the subject committed some of the acts of misconduct alleged. A *Partially Substantiated* disposition only applies to the overall disposition of the case, not to individual allegations.

- ***Unsubstantiated*:** The investigation was unable to clearly prove or disprove that the alleged misconduct occurred.

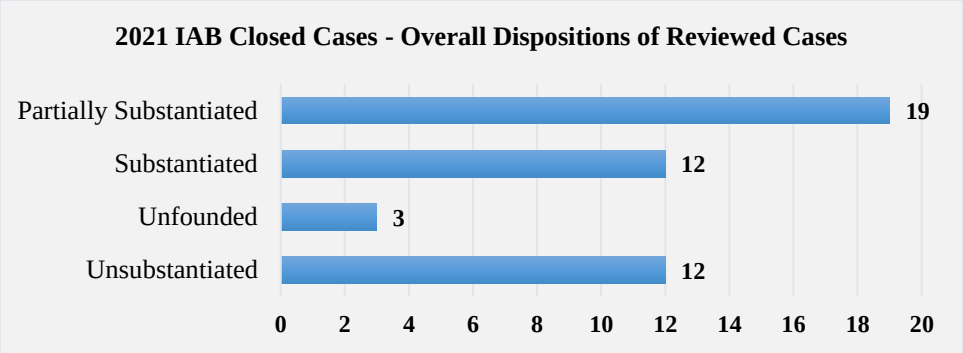
[19] These are the most common dispositions given to allegations, but there are other possible dispositions, such as substantiated-no further discipline, which are used less.

- ***Exonerated*:** The investigation clearly proved that the subject was involved in the incident, but his or her conduct was lawful and proper.

- ***Unfounded*:** The investigation found that the alleged misconduct did not occur, was not committed by the subject of the allegation, or was not committed by members of the NYPD.

- ***Information & Intelligence*:** The investigation found insufficient evidence to substantiate the allegation, but IAB is tracking the conduct alleged for intelligence purposes, or the allegation constituted minor misconduct and the subject's command addressed the misconduct at IAB's request. All allegations investigated by CCRB, which the Commission does not analyze, also receive this disposition.

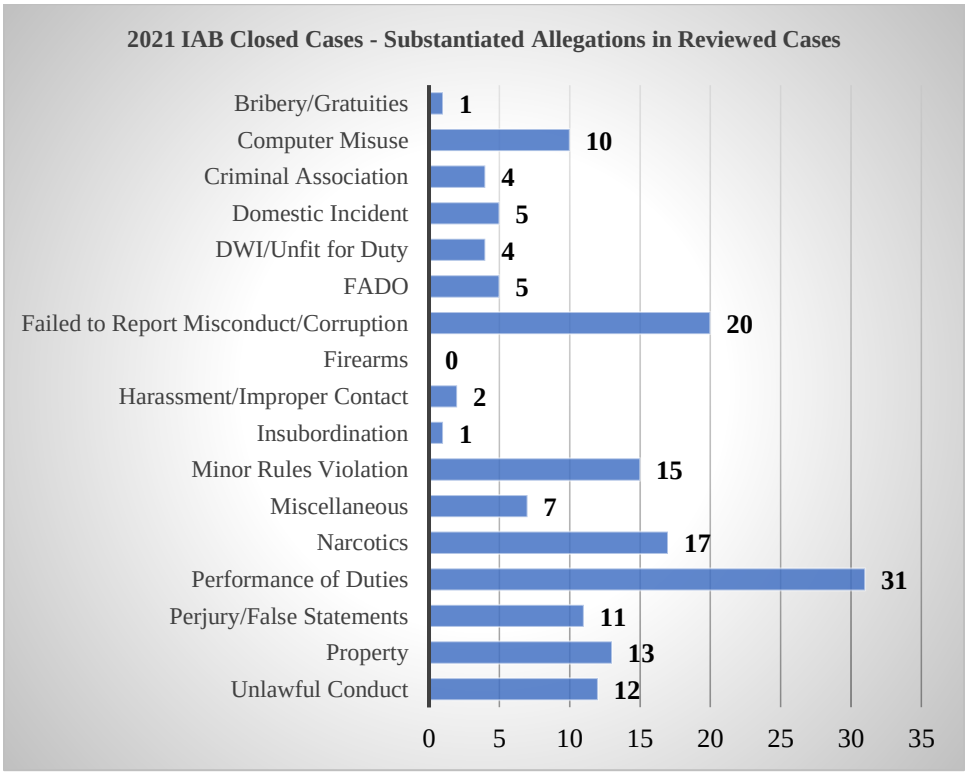
The chart below depicts the overall case dispositions for the cases we reviewed. As there were no cases closed with the overall disposition of Exonerated or Information and Intelligence in 2021, those dispositions are not reflected in the chart below.



d) Substantiated Allegations

IAB closed investigations with at least one substantiated allegation in 31 of the 46 cases reviewed (approximately 67%). This is a significant increase in IAB's substantiation rate for at least one allegation as compared to previous years, when the rates were 35% (2017), 30% (2018), 42% (2019), and 52% (2020). IAB's substantiation rate appears to be in an upward trend, which is clearly positive.

The following chart breaks down by individual allegation type all of the allegations substantiated in the 2021 review group. The total number of substantiated allegations was 158.[20]



For the 2021 review period, 67% of all Perjury/False Statement allegations in the Commission's sample were substantiated by IAB. This substantiation rate is consistent with the 2020 review period, in which 69% of all Perjury/False Statement allegations were substantiated, but below 2019, in which 82% of all Perjury/False Statement allegations were substantiated. Nonetheless, overall, there has been a higher substantiation rate in Perjury/False Statement investigations since 2019 as compared to preceding years. In 2018, only 36% of the Perjury/False Statement allegations in our sample were closed as substantiated, and in 2017, only 50% of these allegations were substantiated. This significant increase tends to reflect well on IAB. However, it is important to observe here that the increase does not necessarily translate

[20] The number of substantiated allegations is greater than the 12 substantiated dispositions and 19 partially substantiated dispositions listed in the chart on p. 11 because each case may have multiple allegations.

into a similar increase in False Official Statement charges brought by the Department Advocate's Office ("DAO"), which would subject an officer to a presumptive penalty of termination. In our upcoming audit of the Department's disciplinary system, one area we will closely examine is whether Department prosecutors are appropriately charging members of the service with making false official statements and terminating their employment, as per the Disciplinary Matrix, or memorializing their reasons for either not charging subjects with making false statements or for not recommending termination for those subjects who are guilty of this misconduct.

Even when some allegations are substantiated, it does not necessarily follow that the original or most serious allegation is substantiated. In fact, as can be seen from the following chart, which sets forth the disposition of the most serious allegations in each of the reviewed cases, the most serious allegation was still likely to be unsubstantiated. This makes sense given that the most prevalent case type involves missing property, which is very difficult to prove as there is usually no evidence to corroborate a claim that a member of the service took the missing property.

2021 Disposition of Most Serious Allegations in the Cases Reviewed[21]						
Case Type	**Exonerated**	**Substantiated**	**Unfounded**	**Unsubstantiated**	**Info & Intel**	**Total**
Computer Misuse	-	1	-	-	-	**1**
Criminal Association	-	2	-	3	1	**6**
Domestic	-	1	-	1	-	**2**
DWI/Unfit for Duty	-	1	-	-	-	**1**
FADO	-	-	-	1	-	**1**
Harassment/ Improper Contact	-	1	-	-	-	**1**
Narcotics	-	3	-	-	-	**3**
Perjury/False Statements	-	8	1	1	-	**10**
Property	-	-	3	11	-	**14**
Unlawful Conduct	-	5	-	2	-	**7**
Total	**0**	**22**	**4**	**19**	**1**	**46**

[21] These were the most serious allegations that were depicted in the table *supra* at p. 6.

The substantiation rate for the most serious allegation was 48% for cases reviewed in 2021. This marks the highest substantiation rate of top allegations since the Commission has been tracking this statistic. Moreover, the substantiation rate for the most serious allegation has increased year-over-year for all but one of the past five years.[22] For cases reviewed in 2017, the substantiation rate of the most serious allegation was 27%; for the cases reviewed in 2018, it was 14%; for 2019, it was 28%; and for 2020, the substantiation rate was 33%. This is yet another favorable trend regarding IAB case investigations.

Conversely, the most serious allegation was closed as unsubstantiated in only 41% of the cases in 2021. In 2020, 52% of the most serious allegations were closed as unsubstantiated; in 2019, 56%; in 2018, 73%; and in 2017, 57% of the most serious allegations were closed as unsubstantiated.[23]

2. CCPC Analysis of Selected Trends

Over the last six years, the Commission has examined seven specific components when evaluating IAB investigations. We have focused on these components either because of their importance (such as our agreement with the overall case disposition), or because we note problems that recur (such as the quality of investigators' interviews of civilians and members of the service). The tables below show the percentage of outcomes and investigative steps that the Commission found satisfactory (the "satisfaction rate") in each of these seven areas for the 2021 reporting period and a comparison of satisfaction rates over the last five years.

We note here that in a small number of cases in the tables below, an indication of our "agreement" or "satisfaction" with a disposition is more an indication that we have no solid basis

[22] The exception was for the cases reviewed in 2018, when the substantiation rate for the most serious allegations was markedly lower than for cases reviewed in other years.

[23] *Twentieth Annual Report* at pp. 26-29; *Nineteenth Annual Report* at pp. 24-25.

on which to disagree with the result than an indication of our affirmative approval of that result. This is because, as discussed below, our review did yield some deficiencies with respect to overall thoroughness, and because we cannot always be confident that such deficiencies did not impact outcomes. If, for example, a delay in identifying a witness and/or a failure to conduct an interview resulted in a lost opportunity to obtain evidence, we could only speculate as to whether the missing evidence would have provided proof to support any disciplinary charges. Therefore, in assessing our statistical satisfaction rate, we necessarily rely on the evidence that was actually gathered during the course of an investigation and we reserve our critiques for the discussion below. Starting with our reviews of investigations during the 2022 calendar year, we have been tracking those investigations in which we believe a missed or inadequately performed investigative step may have affected the ultimate disposition. While this is not a foolproof method for assessing our agreement with the overall disposition, it is our hope that by adding this step to our reviews, we can increase our confidence in our assessment of the dispositions of each allegation. We will report our assessment of these dispositions beginning with the *Twenty-Second Annual Report of the Commission*.

CCPC Satisfaction Rate

Description	2021 Cases	2021 Rate
CCPC Agrees with Disposition	46/46	100%
Interview of Available Witnesses	36/46	78%
Accurate Summaries of Recorded Interviews	46/46	100%
Adequate Interview Quality	31/46	67%
Documentation of Investigative Steps	44/46	96%
Timely Search for Video Evidence	46/46	100%
Presence of Team Leader Reviews	46/46	100%

CCPC Satisfaction Rate – Year-over-Year Comparison

Description	2017	2018	2019	2020	2021
CCPC Agrees with Disposition	97%	98%	100%	99%	100%
Interview of Available Witnesses	78%	82%	83%	77%	78%
Accurate Summaries of Recorded Interviews	88%	82%	92%	95%	100%
Adequate Interview Quality	72%	77%	78%	71%	67%
Documentation of Investigative Steps	84%	91%	89%	95%	96%
Timely Search for Video Evidence	91%	93%	89%	97%	100%
Presence of Team Leader Reviews	76%	89%	94%	90%	100%

As revealed in the above table, the Commission's general satisfaction rate either improved or remained relatively stable in all but one area, interview quality, when compared with the rates reported in our *Nineteenth* and *Twentieth Annual Reports*. Our satisfaction rates increased significantly in four areas: the accuracy of investigator summaries of recorded interviews; the documentation of investigative steps; the timely search for video evidence; and the presence of regular team leader reviews. This may be due to more significant involvement of team leaders and commanding officers, which we have observed in their written corrections and directions on individual worksheets, and which reflect favorably on the increased supervision and guidance in investigations. These are areas in which we have repeatedly urged IAB to show improvement, and we hope these trends will continue. However, the same cannot be said for IAB's interviews of available witnesses or its interview quality, both of which continue to lag behind all other categories and fail to demonstrate consistent improvement. In fact, as the above table reflects, interview quality is at the lowest satisfaction rate since we have been tracking this

category.[24] This deficiency is of particular concern to us. This issue, along with others we view as most critical, are discussed below.

a) Dispositions

The Commission assessed whether the information obtained by the investigator in each case we reviewed supported the overall disposition of the case, as well as the dispositions for each individual allegation when multiple allegations were involved. As indicated above, the Commission agreed with every allegation disposition for the 2021 cases. The Commission's satisfaction rate for this category has been fairly consistent over the years.[25] The Commission continues to monitor this category as faulty dispositions can allow officers to escape discipline and in particularly serious cases, remain employed by the Department when they are not fit to do so. Alternatively, officers who have not committed misconduct should not be wrongfully disciplined or have unsubstantiated allegations in their personnel records. A third concern is that public confidence in the Department's ability to investigate its own members could be eroded when investigations are concluded with inappropriate dispositions.

b) Identifying and Interviewing Subjects and Witnesses

The Commission noted deficiencies related to the failure to interview witnesses in ten of the cases reviewed.

- Seven cases involved the failure to interview available civilians. These cases were categorized as Property (3), Unlawful Conduct (3), and Criminal Association (1).

- Two cases involved the failure to interview members of the service. These cases were categorized as Property and DWI/Unfit for Duty.

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[24] The satisfaction rate for interview quality for years 2013, 2014, 2015, and 2016 were 88%, 91%, 70%, and 78%, respectively. *See Sixteenth Annual Report of the Commission* ("*Sixteenth Annual Report*") (October 2014) at p. 21; *Seventeenth Annual Report of the Commission* ("*Seventeenth Annual Report*") (November 2015) at p. 24; and *Eighteenth Annual Report of the Commission* ("*Eighteenth Annual Report*") (August 2017) at p. 23.

[25] The satisfaction rates from 2013 through 2016 were 99%, 99%, 94%, and 95% respectively. *See Sixteenth Annual Report* at p. 21; *Seventeenth Annual Report* at p. 24; and *Eighteenth Annual Report* at p. 23.

- One case involved the failure to interview both a civilian witness and a member of the service. This case was categorized as Property.

When officers or civilians are not identified or considered subjects (in the case of officers) or witnesses, investigators are unlikely to interview them. It is important that identified officers be labeled as subject officers when appropriate, even if the final disposition is not substantiated, so there is a complete record of past allegations in each officer's personnel file. When IAB receives allegations, one of its first investigative steps is to conduct a background check on the subject officer. If an officer has prior similar allegations, the investigator can look for patterns in cases, or decide to devote more resources to investigating that officer. Moreover, it is important to identify officers as subjects as early as possible in investigations. Not only can the failure to make a timely identification affect the direction of the investigation, it also can allow an undeserving officer to be promoted or given an elite assignment because executives are unaware of allegations that otherwise would have delayed or blocked such a move. Therefore, we also examined issues involving the failure to identify a member of the service, or unnecessary delays in identifying potential subject officers and civilian witnesses.

Another issue we included in this category involved delays in conducting interviews of officers and/or civilians when there was no strategic reason for the delay. These delays are problematic because they can lead to failure to recall important details, especially when the topic of the interview involves a routine encounter that might not be otherwise memorable. Even when the encounter is not routine, the passage of time can allow outside influences or internal beliefs to color the way events are interpreted by the interviewee.

There were three cases from this reporting period in which we identified these types of issues, all involving allegations of missing property. The first case involved the failure to identify all members of the service present during the execution of a search warrant, which might

have identified additional subject officers who had access to the missing property. The second case involved the failure to designate a member of the service as either a subject officer or witness officer. That officer was the operator of the transport vehicle in which the complainant was seated when he handed his personal belongings to another member of the service. When the complainant later claimed property was missing, the operator of the vehicle was not named as a subject or a witness, and therefore, was not interviewed. The last case involved delays in conducting interviews of several members of the service, which resulted in their credible inability to recall important and relevant facts.[26]

c) Interview Quality

As indicated above, the quality of interviews conducted by IAB investigators continues to be an area of concern for the Commission, as we identified interview quality issues in 15 of the 46 cases we reviewed. The two most prevalent issues, as in past reviews, were failing to cover all issues relevant to a particular witness or subject (where the failure to do so was not the result of a deliberate investigative strategy), and failing to ask appropriate follow-up questions based upon evidence gathered either prior to or during the interview.

As we observed previously, investigators should be clear in their questioning, vigilant in identifying evasive, incomplete and ambiguous answers, and persistent in asking all follow-up questions that are necessary to eliminate such problems. Especially in the context of official Department interviews, questioning at times appeared perfunctory, with insufficient effort made to obtain all relevant details. While the Commission has never advocated for unnecessarily

[26] The case arose from a car stop that occurred in March 2019, and involved allegations of missing property, disputed search and arrest, computer misuse, as well as other allegations. IAB began its investigation only two days after the incident. Of the seven subject officers identified in the case, the first officer interview occurred more than seven months into the investigation in October 2019, and the last subject officer interview was conducted nearly one year into the investigation, in February 2020. Not surprisingly, the officers claimed to be unable to recall several details regarding the stop.

prolonging interviews, in many investigations we continued to see questioning that seemed designed merely to elicit a denial, or that failed to follow up on incomplete, vague, and/or ambiguous statements, resulting in interviews that were largely unhelpful to the investigation.

Inadequate follow-up not only fails to further the objectives of the investigation, but also makes disciplining officers for making false or evasive statements more difficult, if not impossible. Officers can and frequently do claim to have misunderstood the investigator's question, and in some cases what appears to be a false answer can be interpreted in a way that is literally true. Careful questioning should effectively prevent such claims. Moreover, the lack of vigorous follow-up questioning aimed at challenging incredible-sounding statements can result in IAB's failure to uncover evidence that would have been revealed through more competent and persistent questioning. Seemingly *pro forma* questioning may also send a message to the subject officer and the union delegate present that IAB places no credence in the allegations, or does not view them as sufficiently serious to merit a probing inquiry.

Similar problems arise with civilian witnesses. When investigators fail to ask all appropriate follow-up questions, credibility determinations are more difficult and allegations that might otherwise be concluded with a finding of substantiated, unfounded, or exonerated are ultimately left unsubstantiated.

One example from this review period involved allegations of missing property following the execution of a search warrant. Among other items, the most valuable property alleged to have been missing was $7,000 in U.S. currency that was reported to have been inside a shoebox in a bedroom. Investigators never established who searched the room where the shoebox was allegedly stored. In the same case, when interviewing the civilian complainant, the complainant stated that the missing funds were proceeds from a check she had cashed the day before the search warrant was executed. However, investigators did not ask where the complainant had

cashed the check, to try to verify the existence of the cash and possibly add or detract from the credibility of the complainant's allegations.

In another case, the officers conducted a vehicle stop, which resulted in the vehicle being removed from the scene and transported to the precinct, at which time an inventory search of the vehicle was conducted.[27] The complainant (operator of the vehicle in question) later alleged that approximately $7,200, along with jewelry and two PBA cards, were missing from the center console of the vehicle. During the interviews of the responding members of the service, (including the officers who provided back-up following the vehicle stop),[28] investigators failed to ask whether or not they searched the vehicle, or whether they witnessed anyone else, including state troopers, search the vehicle prior to transport.

In both instances, a more thorough interview with specific follow-up questions might have led to further relevant information, or could have led to additional subject officers being added to the investigation.[29]

We noted approvingly in our last report that the Deputy Commissioner in charge of DAO has expressed a desire to have DAO lawyers participate in interviews with certain members of the service, particularly in the most serious cases.[30] We will be specifically monitoring DAO's participation in these interviews beginning with our next annual report covering the cases we reviewed in 2022.

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[27] NYPD Patrol Guide §218-13 states that whenever any property comes into the custody of the Department an inventory search of automobiles and other property will be conducted "to protect property, ensure against unwarranted claims of theft, and protect uniformed members of the service and others against dangerous instrumentalities."

[28] The stop was initiated by New York State Troopers and NYPD units responded to provide back-up.

[29] The Commission is not insinuating that a more thorough interview would have necessarily changed the case disposition, as missing property complaints are among the more difficult allegations to substantiate.

[30] *Twentieth Annual Report* at pp. 31-32. The Department Advocate who was serving while this Report was being drafted was appointed in 2020 and is implementing several changes in the prosecution of Department administrative cases. One change the Department Advocate is considering is providing training in interview techniques. Given the Commission's historical comments on many IAB interviews, we fully support such training.

The Commission also found that some interviewers violated best practices for obtaining the most reliable information. For example, in one case involving allegations of missing earrings, a civilian witness was interviewed in the presence of the complainant and the complainant could be heard interrupting the investigator's interview. Whenever possible, interviews should be conducted separately so as to gather the most accurate accounting of events from each individual witness, free of influence from, or conferral with, other witnesses. In this case, the complainant's presence in the area where the witness, who was her son, was being interviewed allowed the complainant to interject and interrupt the course of the interview, possibly undermining the integrity of the witness' answers.

The interview in another missing property case also violated best practices for obtaining the most reliable information. In that case, the complainant, whose primary language was Spanish, was initially interviewed in Spanish by a Spanish-speaking investigator. However, her second interview, which was conducted less than three hours later, was conducted in English. At the end of her second interview the complainant requested that she be interviewed in Spanish in the future. Notwithstanding that request, the complainant's next interview, which was conducted the following day, was conducted entirely in English. Interviews in general can be a stressful experience, and the possibility of misunderstandings always exists, especially when a civilian is interviewed by a person in authority, such as a police officer, who wields a badge and a gun. To minimize the potential for misunderstandings and help alleviate any anxiety associated with the investigative process, whenever possible interviews should be conducted in the preferred language of the interviewee.

Other issues noted by the Commission in this area included the use of leading questions when open-ended questions would have yielded more information, interrupting a witness prior to the witness fully completing their answer, and failing to describe non-verbal responses or

gestures for the recording. Fortunately, deficiencies involving the failure to follow best practices were not too pervasive, as we observed them in only five of the 46 cases we reviewed. We believe that the vast majority of IAB investigators have made efforts to follow best practices following the Commission's previous comments in this area.[31]

When there is a good reason for departing from best practices, the Commission continues to recommend that the reason be documented in the interview worksheet. We also reiterate our previous recommendation that IAB provide training in interview techniques and best practices to new investigators, as well as ongoing interview training to all IAB investigators. Generally, we do see continued improvement when it comes to investigators following best practices. However, since the quality of the questions remains a significant area of concern for the Commission, in addition to regular interview training, we continue to recommend that experienced supervisors sit in on interviews, and assist less-experienced investigators as needed.

C. Body-Worn Cameras

Valuable evidence in IAB investigations often comes from body-worn camera footage. For this Report, the Commission began tracking whether IAB investigators were searching for body-worn camera footage early in investigations, whether that footage provided evidence supporting the final dispositions of the allegations, and whether allegations were added to the investigation for improper activation and/or deactivation of body-worn cameras when applicable.

The NYPD began a body-worn camera initiative in 2017. Phase 1 began in April 2017, and all three phases of the roll-out were completed by August 2019. Currently, all police officers, detectives, sergeants, and lieutenants assigned to perform patrol duties throughout the

[31] *See Eighteenth Annual Report* at p. 29*; Nineteenth Annual Report* at p. 30*;* and *Twentieth Annual Report* at pp. 32-33.

City are equipped with body-worn cameras.[32] The NYPD body-worn camera program is the largest in the United States, involving more than 24,000 members of the Department.

Even when a member of the service is equipped with a body-worn camera, that camera is not always recording. In an attempt to balance the goals of the body-worn camera program with privacy concerns, the NYPD has delineated instances when members of the service are required to activate and/or deactivate their cameras. According to NYPD Patrol Guide §212-123, instances where activation is required include:

- All uses of force;
- All arrests and summonses;
- All interactions with people suspected of criminal activity;
- All searches of persons and property;
- Any call to a crime in progress;
- Some investigative actions;
- Any interaction with emotionally disturbed people.

Pursuant to NYPD policy, officers are prohibited from recording certain sensitive encounters, such as speaking with a confidential informant, interviewing a victim of a sex crime, or conducting a strip search.

Of the 46 cases reviewed this period, 14 cases involved instances where the encounter should have been recorded according to NYPD guidelines.[33] In ten of the 14 cases, body-worn cameras were properly activated, and in all of those cases, the recordings proved to be valuable when determining the overall case disposition. However, in four cases, body-worn cameras were

[32] Not all cases reviewed by the Commission involved instances where body-worn camera footage existed. Cases involving criminal association, computer misuse, failure to appear in court, false statements, misplacement of Department property, failure to make memo book entries, and off-duty conduct, for example, generally would not involve the use of body-worn cameras. Also, as civilian members of the service are not equipped with body-worn cameras, cases involving school safety agents, traffic enforcement agents, and NYPD administrative personnel, among other civilian employees of the Department, generally would not involve the use of body-worn cameras.

[33] The other 32 cases did not involve situations where body-worn camera footage would exist.

not properly activated. Three of the cases involved property and force allegations, while one involved allegations of impeding an investigation. In all four of these cases, officers either failed to activate their body-worn cameras entirely, or failed to timely activate them. Timely activation in these cases would have been helpful to either prove or disprove some allegations that were ultimately closed as unsubstantiated.

In most of the instances where officers failed to properly activate their body-worn cameras, policy confusion regarding when officers were required to activate their cameras was cited as the reason for their failure.[34] Given that the body-worn camera program was implemented relatively recently, it is plausible that policy confusion may have contributed to these activation failures. We are hopeful that as body-worn cameras become part of the everyday norm for officers, policy confusion will dissipate. We will continue to monitor the efficacy of body-worn cameras and track instances where footage from these cameras helped prove and/or disprove allegations of misconduct. We will also track whether IAB investigators documented searches for body-worn camera footage, and whether they fully investigated instances where officers failed to timely activate their body-worn cameras when required to do so, or prematurely discontinued those recordings. In such instances, we also will examine whether any discipline was imposed for these failures and whether the penalties were sufficient.

Overall, the body-worn camera program has proven beneficial to IAB. The existence of body-worn camera footage, in some instances, helped streamline case investigations. At times, investigators were able to close investigations at the call-out phase due to the existence and

[34] The one instance where policy confusion was not cited as the reason for failing to activate his camera involved a detective who stated he was unable to activate his camera because he was holding a bunker shield in one hand and his firearm in the other.

review of body-worn camera footage.[35] Body-worn cameras capture critical moments of investigative and other encounters that otherwise would not have been recorded, and those recordings often play a critical role in assisting IAB investigators in determining the overall case disposition.

D. Recommendations

Throughout this section, we made various recommendations to improve IAB's investigative practices. These recommendations, some of which have been made in prior reports, are summarized below:

- ❖ Investigations should be conducted promptly, without investigative lapses. However, the quality of the investigations should not be sacrificed in an effort to reach a disposition expeditiously.

- ❖ Subject officers should be identified as subjects as early as possible.

- ❖ Interviews with civilian witnesses should be conducted without delay. Similarly, unless there are strategic reasons for a delay, official Department interviews with witness officers should be conducted close in time to the incident that is under investigation.[36]

- ❖ When interviewing witnesses, investigators should interview those witnesses separately, outside of the presence of other witnesses. When this is not possible, the reason for departing from this practice should be documented.

- ❖ Interviews should, when possible, be conducted in the preferred language of the interviewee. Any translators used by the Department should be objective and not someone within the witness' family, circle of friends, or someone who has a personal connection with the investigation.

- ❖ When investigators have a reason for departing from best interview practices, that reason should be documented in the case file, preferably on the worksheet that summarizes the interview.

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[35] The Commission has not reviewed any of the cases in which the investigation was closed after the completion of the preliminary "call-out" investigation. We intend to conduct a review of a sample of these cases at a future time.

[36] Strategic reasons for delaying such interviews could include the possible effects on a criminal prosecution of either a subject officer or a civilian, the desirability to obtain additional evidence prior to an interview so as to avoid multiple interviews, and/or to prevent witness officers from alerting the subject officers to the investigation.

- ❖ Training in interviewing techniques and best practices should be provided to both newly-assigned investigators and in refresher courses on a routine basis to all investigators.

- ❖ Supervisors adept at conducting interviews should assist less-skilled investigators. This should include preparation prior to the interview as well as with questioning during the interview.

E. Conclusion

Although there was a two-month increase in the overall average investigative length from the previous reporting period, the Commission believes that this increase occurred because the majority of the investigations reviewed during this period were conducted, at least in part, during the pandemic, and investigators faced various logistical complications as a result. Notwithstanding the pandemic-related investigative hurdles, the average investigative length for this reporting period was still shorter than those investigations we reviewed for the calendar years of 2014 through 2017.

The Commission's satisfaction rates, when compared to previous years, either improved or remained relatively stable in all but one area. The Commission's satisfaction rate for overall interview quality is at its lowest point in the last five years. Our satisfaction rates increased significantly in four areas: the accuracy of investigator summaries of recorded interviews; the documentation of investigative steps; the timely search for video evidence; and the presence of regular team leader reviews. This may be due to more significant involvement of team leaders and commanding officers and their increased supervision and guidance in investigations. However, we remain particularly concerned that investigators often did not follow-up with additional questions during interviews, when warranted, and that investigators' efforts to obtain information through open-ended, targeted, and when appropriate, confrontational questioning were inadequate. An additional concern for us in this review was that in some investigations,

witnesses and subject officers were not properly or timely identified. Delays in interviewing witnesses possibly impacted the ability of investigators to gather relevant information. To the credit of IAB's leadership, in their discussions with us, they continue to recognize that interviews are an area where improvement is desirable.

In our next annual report, we expect to comment on whether the investigative deficiencies we note appear to impact the disposition of these investigations. We will also be tracking whether DAO participates in official Department interviews with members of the service, and if so, whether this improves the quality of those interviews and has positive effects on the dispositions of IAB's investigations. Additionally, we will continue to monitor the impact of body-worn camera footage on the outcomes of IAB investigations and whether officers' failures to properly activate their cameras are appropriately addressed.

SUMMARY OF *REPORT ON MATRIX PENALTIES FOR FAILURE TO TAKE POLICE ACTION*

In January 2021, pursuant to a recommendation by the Independent Panel[37] and a local law passed by the New York City Council,[38] the NYPD implemented disciplinary guidelines that attached penalty ranges to misconduct for which members of the service commonly are disciplined. Each of these ranges contained a presumptive penalty, which could be lowered to a minimum penalty when mitigating factors were present or raised to a maximum penalty when aggravating factors were present.

After former Governor Cuomo issued an executive order requiring all New York State jurisdictions to develop a plan for police reform, the New York City Council held hearings concerning New York City's reform plan.[39] During these hearings, the City Council expressed concern with the penalty range for misconduct involving the failure to take police action.[40]

At that time, the presumptive penalty in the Matrix for failure to take police action was the forfeiture of 20 penalty days.[41] This penalty could be reduced to as little as ten days or increased to as much as 30 days. In the initial version of the Matrix, more serious penalties, including dismissal probation or termination, were not available unless the Police Commissioner explained in writing the reasons for departing from the specified range. When approving the

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37 Report of the Independent Panel on the Disciplinary System of the New York City Police Department (January 25, 2019) at pp. 51-52.

38 N.Y. Administrative Code §14-186 (effective July 2020).

39 The Governor's order can be found in Executive Order 203.

40 This concern stemmed from an incident where officers responded to a call regarding a fight inside an apartment building. Upon arrival to the incident location, the officers did not leave their vehicle and closed the job as "unnecessary." Later that day, a woman was found dead at the location. She had been strangled by her husband. Both parties had been the subjects of the prior 911 call that was not investigated.

41 A penalty day refers to either a forfeited vacation day or a day served on suspension. When a member of the service is suspended, they not only forfeit their pay during the suspension period (unless the suspension exceeds 30 days and is with pay), but also all employment benefits during that period. Also, the time period for which the member of the service is suspended is excluded from calculations to determine the member of the service's tenure with the Department.

police reform package, the City Council included a requirement that an outside agency explore the adequacy of the penalties for failure to take police action. CCPC was selected as that outside agency. We sent a comment to the Mayor's Office in August 2021, which was later published as a report, *Report on Matrix Penalties for Failure to Take Police Action* (October 2021). A summary of our findings and recommendations follows.

To determine whether the penalty range was adequate to address the failure to take police action, we reviewed all disciplinary cases involving uniformed members of the service that were adjudicated between October 2016 and February 2021.[42] During this review, we identified 86 disciplinary cases that addressed misconduct that we either characterized as "failure to take police action" or that specifically charged the subject with "failure to take police action." Next, we analyzed the basic facts of each case to ascertain whether the 10- to 30-day penalty range was appropriate and sufficient to promote the stated objectives of the Matrix, which include correcting inappropriate behavior and rehabilitating the member of the service; providing notice of the standards by which conduct would be judged and the likely consequences of the failure to adhere to Department policies; resolving disciplinary matters impartially and in a prompt and efficient manner while imposing penalties that are fair; and addressing the harm or risk of harm arising from the misconduct.[43]

When analyzing the penalty range, we focused on the conduct of the officers involved, and whether those officers held supervisory authority, a factor which in our view generally warranted an increased penalty.[44] Moreover, we tried to consider only the misconduct that

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[42] In our examination of disciplinary cases, we only examined those cases that were addressed through charges and specifications. We did not use command disciplines in our analysis.

[43] These are some of the Department's stated goals of the disciplinary system. *See* www1.nyc.gov/site/nypd/about/about-nypd/policy/nypd-discipline-Matrix.page, "Goals of the Disciplinary System" at p. 3.

[44] The Matrix also treats the supervisory status of a member of the service as an aggravating factor. *Id.* "The Effect of Rank on Discipline" at p. 10.

constituted a failure to take police action, disregarding, to the extent practical, other misconduct that may also have been charged as part of the same case. At times, however, other misconduct was so intertwined with the failure to take police action that we evaluated the adequacy of the penalty range based on the totality of the wrongdoing.

We did not consider the individual disciplinary histories of the officers in performing this analysis. Instead, we assumed that if the top of the range was inadequate as a penalty for an officer with no disciplinary history, it would be equally, if not more, inadequate for an officer who had previously been disciplined.

Of the 86 cases we identified and analyzed, we concluded in 48 cases (55.8%) that the presumptive penalty range would have been sufficient to promote the Matrix' objectives and address the misconduct. However, we identified 36 cases[45] for which even the maximum 30-day penalty would have been inadequate given the circumstances of these cases, which revealed misconduct so serious that, in our view, greater penalties than those available in the Matrix should have been applied.[46] These cases involved officers' failure to protect vulnerable persons, such as children or the elderly; significant potential or actual consequences created by the individual officer's dereliction of duty; and/or the complete abdication of the officer's responsibilities.

The Commission found that either dismissal probation or termination was more appropriate in cases involving:

- ❖ The officer's failure to take action to protect vulnerable individuals who lack the ability to protect themselves;

[45] There were two additional cases for which the Commission could not make a determination because there was insufficient information about the incident in the paperwork as these officers were summarily terminated.

[46] In fact, in many of these cases, which were decided before implementation of the Matrix, greater penalties were imposed.

- The officer's failure to take even minimal investigative steps such as interviewing victims, conducting canvasses, recording witnesses' pedigree information, reporting a potential crime to the officer's supervisor, or even exiting the officer's vehicle;

- The officer's failures that potentially contributed to the loss of life or other serious harm;

- The officer's failure to take necessary investigative steps on multiple occasions;

- The officer's failure to arrest a person who was in their presence when the officer had probable cause to believe the person committed a violent crime; or

- The officer's failure to take custody of a firearm or other weapon that could be used to cause harm to other members of the public.

After our review, we made the following seven recommendations:

- While the maximum presumptive penalty is adequate in most situations, the aggravated penalty for a failure to take police action should be increased to termination. This will allow DAO and the Trial Commissioners who preside over Department trials and recommend dispositions to the Police Commissioner to recommend higher penalties when very serious misconduct or neglect of duty occurs. Officers who have displayed an unwillingness or inability to perform the most fundamental and important duties of police officers should be separated from the force, and when the consequences of a duty failure contribute to serious physical harm or death, and where the failure to take action was reckless or intentional (rather than due to mistake, lack of knowledge, or lack of training), termination is almost always appropriate.

- The Department should identify in the Matrix a non-exhaustive list of factors that might warrant an aggravated penalty that includes either dismissal probation or termination for failing to take police action. This list could include whether the duty failure resulted in the injury or death of a person; whether the failure had the potential to result in injury or death; whether the incident involved an individual who was particularly vulnerable, such as a child, elderly person, or an individual with a disability; whether the crime that was not fully investigated was a violent one, or part of a pattern; whether there were repeated duty failures; whether the incident involved a supervisor who failed to carry out responsibilities; and whether the failure to take action involved an officer's effort to hide their own misconduct, or the misconduct of another officer. Other circumstances could be identified as mitigating factors, including whether the officer's failure to act was approved or directed by a supervisor.

- The resolution of these cases should be expedited whenever possible, especially in those cases warranting dismissal probation or termination. Typically, once charges are brought, the prosecution of these cases takes approximately 18-24 months, sometimes longer, which may not include the investigation period. These should not

be especially complicated investigations, nor would we expect the prosecutions to be overly complex. Substantial delays in the imposition of discipline decrease the deterrent power of that discipline and in the most serious cases -- where an officer should be terminated or closely monitored -- expose the public to ongoing danger.

- ❖ If a case cannot be expedited, the officer's integrity control officer and commanding officer should be responsible for monitoring the officer's performance and compliance with Department rules. Reports of improved performance could indicate that an officer has learned from past experience and should remain employed by the Department. Conversely, for those officers who continue to fail in their job responsibilities, a stronger case is made for termination.

- ❖ The Matrix should have specific presumptive penalties added for failing to request the response of a supervisor when required and failing to notify a supervisor of an incident when required, to emphasize the importance of these requirements. These appeared to be common duty failures among the cases we reviewed.

- ❖ While not specifically related to the failure to take police action, there should also be designated presumptive penalties for failing to report allegations of misconduct or corruption to IAB. Members of the service often have knowledge about their colleagues that supervisors do not. The failure to pass this information to IAB for investigation, which can be done anonymously, serves to keep possible misconduct and/or corruption hidden and enables it to grow.

- ❖ When an officer is separated from the Department due to misconduct, information regarding the misconduct should be disseminated to other members of the force so they are on notice that the Department takes that particular type of misconduct seriously and that similar misconduct will end an officer's career.

In February 2022, the Department published amended disciplinary guidelines. In the amended guidelines, the maximum penalty for officers found guilty of failing to take police action was increased to termination. None of our other recommendations have been adopted yet.[47]

The following section of this Report contains recommendations for further changes to the Disciplinary Matrix. For the reasons discussed below, these recommendations include an

[47] During the final drafting of this Report, the Department submitted proposed changes to the Matrix for public comment. One proposed amendment was the inclusion of a category for the failure to report misconduct to IAB. The proposed presumptive penalty was 10 penalty days which can be decreased to five penalty days when there are mitigating factors and increased to 20 penalty days when there are aggravating factors.

amendment to the second recommendation, above, to add the failure to take proper police action in domestic incidents as an aggravating factor.[48]

[48] *Infra* at pp. 47-52.

MATRIX RECOMMENDATIONS

As noted in the Introduction to this Report, we are currently conducting a multi-year review of the Department's disciplinary system pursuant to a 2019 MOU.[49] A substantial part of this review involves determining whether the Department consistently applied the penalties set forth in the Matrix, whether it utilized mitigating and aggravating factors in appropriate ways, and in those instances when the penalties were not in line with the penalty ranges, whether the Department provided adequate justification for the departure from these penalty guidelines.

We have previously made numerous recommendations for changes to the Matrix.[50] However, while conducting our current review, we have noticed that there are some common categories of misconduct that are either not addressed in the Matrix, require further clarification, or should be addressed with greater penalties than those currently provided. As the Department conducts annual reviews of the Matrix that result in changes, we hope that our recommendations will be considered and adopted during the current Department review.

We follow the order of categories as set forth in the Matrix, where they exist. This is not meant to indicate that any particular recommendation is of greater importance.

1. False, Misleading & Inaccurate Statements and Impeding an Investigation

The Commission has made numerous recommendations regarding the Department's false statement policy and the introductory language in the guidelines that precedes the penalty ranges for this category of misconduct.[51] There is, however, another clarification that is necessary. This involves officers making or causing to be made false entries in Department records.

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[49] *See supra* at pp. 1-2. Due to this review, there is no section on our analysis of the disciplinary cases that were adjudicated in 2021.

[50] *See Twentieth Annual Report* at pp. 101-109 and Appendices B and C. *See also Report on Matrix Penalties for Failure to Take Police Action* (October 2021) at pp. 15-17. We do not repeat most of those suggestions here, however, a full list of our recommended changes to the Matrix that have not yet been adopted can be found at Appendix C of this Report.

[51] *Id.* The Department's false statement policy is currently located in its Administrative Guide at §304-10.

The additional data section of Administrative Guide §304-10 states:

> Circumstances in which false or misleading official statements are made include, but are not limited to, verbal statements made pursuant to a statutory or procedural requirement, or under oath during a civil, administrative, or criminal proceeding, *in addition to written statements made in a sworn document, including affirmations made in Department (e.g., COMPLAINT REPORT….) and non-Department (e.g., New York State Domestic Incident Report ….) forms.* (emphasis added).

While this language contemplates that some written entries can be considered false or misleading (or even inaccurate) official statements subject to the disciplinary penalties in the Matrix, the examples could be interpreted to limit those charges to those written statements that are made under oath, or those where a false narrative is provided. In fact, the Commission has heard from Department executives that false or misleading official statements can only be charged when the subject officer has received a specific warning regarding the prohibition against making false official statements.

If this type of formal notice is a requirement to a charge of making a false and/or misleading statement, then there is no provision in the Matrix that addresses all of the other documentary false entries that are commonly seen in disciplinary cases. These types of false entries include providing false information to the Department regarding an officer's location while out on sick leave, false entries regarding hours worked, and even falsely checking the wrong box on reports regarding whether or not force was used in a civilian encounter. While it is possible that some of these statements do not rise to a level requiring the significant penalties set forth in the false statement section of the Matrix, this type of violation occurs often enough that it should be addressed in the Matrix—if for no other reason than to provide members of the service with notice that this constitutes misconduct that will result in discipline and to reinforce the need for accuracy in Department records.

In many of the disciplinary cases that charge making (or causing to be made) false entries in Department records, the false entries are a necessary part of the overall misconduct.[52] For example, this charge is often used in cases involving officers falsely claiming to have worked overtime. The false entries charges cover the submission of overtime slips with the hours that the officers falsely claim they worked. In these situations, the false entries are a necessary step in collecting the unearned overtime, so a separate penalty for that specification may not be appropriate as the Matrix contemplates a single penalty when the misconduct "supports multiple definitions of proscribed conduct or supports alternate theories of prosecution."[53] As the following case demonstrates, however, there are times when the false entries alone constitute misconduct.

> The subject officer was impermissibly living out-of-state with his wife, children, and parents between October 2017 and June 2020. During his official Department interview, when questioned about where he lived, the subject gave evasive, conflicting, misleading, non-responsive, and inaccurate answers. After being ordered to change his residence to New York City or one of its surrounding counties, the subject failed to comply. In February 2020, the subject submitted a change of address form to the Department, indicating that he resided in Brooklyn. Subsequent investigation determined that he did not live in Brooklyn, but continued to live out-of-state.
>
> In addition to charges addressing the subject's failure to comply with residency requirements, lack of candor during his official Department interview, computer misuse, and failure to comply with an order to remedy his residency issue, the subject also pled guilty to making or causing inaccurate entries in Department records based on his submission of the false change of address form.[54] He was placed on dismissal probation and forfeited 60 vacation days.

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[52] Previously, this charge was made pursuant to Patrol Guide §203-05(4). It is now found at Administrative Guide §304-05(4).

[53] New York City Police Department Disciplinary System Penalty Guidelines (February 15, 2022) at p. 13.

[54] Another specification charging that the subject had made false statements during an official Department interview was dismissed prior to the officer pleading guilty to the remaining charges. This specification was brought pursuant to Patrol Guide §203-08 (now located at Administrative Guide §304-10).

In arriving at this penalty, DAO partly relied on precedent and partly relied on the penalty ranges in the Matrix. DAO noted that the Matrix addressed the charges of intentionally making a misleading official statement,[55] computer misuse,[56] and the failure to comply with an order.[57] DAO noted that the Matrix was silent as to residency violations, but found that precedent supported a standard penalty of dismissal probation plus the forfeiture of 30 vacation days.[58] Since there was no Matrix provision to address the false change of address form, DAO also relied on a prior case to address making an inaccurate entry in Department records. In that case, the subject officer received an eight-day penalty, but the Commission found that the misconduct in that case was dissimilar and did not believe that it should have been used as precedent.[59]

In the instant case, submission of the false change of address form was not part and parcel of the overall misconduct. It was a separate action, designed to cover up the fact that this officer had not changed his residence as directed. It was a false statement, and as such, it deserved a significant penalty on its own. While the penalty imposed was significant and might adequately address the majority of the charged misconduct (assuming the officer eventually complied with the residency requirements), in future cases involving false entries in Department records, the precedent of only eight penalty days may not be adequate. The Department should 1) define what types of false entries constitute false official statements, subject to the false statement policy and its corresponding penalties, and 2) add a new penalty range to the Matrix

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[55] The presumptive penalty is dismissal probation with the forfeiture of 30 penalty days, but the penalty range for making a misleading statement can be as low as 20 penalty days but could be increased to termination.

[56] The presumptive penalty for computer misuse is the forfeiture of 10 penalty days, but this penalty can be decreased to 5 days or increased to 20 days. It can also be addressed with a schedule C command discipline, which carries a penalty of up to 20 days.

[57] The Matrix provides that the failure to comply with an order can be addressed with a schedule C command discipline, which carries a penalty of up to 20 days.

[58] Since this case was adjudicated, a penalty range has been added to the Matrix for residency violations.

[59] The precedent cited involved an officer making a derogatory gesture to a sergeant and failing to report to her assigned post. She also filled out a form for lost time and smoked a cigarette instead of going to her post, and only went to her post when she was threatened with suspension.

addressing false entries in Department records, either in the section addressing False, Misleading and Inaccurate Statements or in Violations of Department Rules and Regulations.

2. On-Duty Abuse of Department Regulations

a) Failure to Prepare a Report

Currently, the Matrix sets forth a presumptive penalty of five penalty days for the failure to prepare a required report. This penalty can be reduced to three days with mitigating factors or increased to ten days with aggravating factors.[60] The same penalty range applies to the failure to document an investigative encounter. While this penalty range may be sufficient in most situations, the Commission believes greater penalties should be available for failure to take a complaint report. A complaint report, unlike most other Department reports, initiates investigative action. Without the preparation of this report, the appropriate NYPD unit will have no knowledge of the alleged crime, no investigation will take place, and the ability of the Department to arrest a perpetrator is reduced. The failure to complete a complaint report deprives the relevant command or precinct of information regarding crime patterns in the area, as well as information helpful in the best deployment of police personnel within the command. Finally, when there are multiple failures to prepare complaint reports, Department executives, City government officials, and the public do not receive an accurate picture of the City's crime rate. For all these reasons, a greater penalty range for the failure to prepare a complaint report would be more appropriate than the three- to ten-day range currently provided.

b) Unauthorized Vehicle Pursuits

One type of misconduct that has occurred with increased frequency over the last several years is unauthorized vehicle pursuits. Due to the high population density of New York City,

[60] It can also be addressed by a schedule C command discipline.

any vehicular pursuit -- with the potential to invite speeding, disobedience of traffic regulations, and other forms of reckless driving -- can lead to vehicular accidents. Such accidents have the potential not only to cause injury to the parties involved in the pursuit, but also to cause injuries to members of the public who happen to be "in the wrong place, at the wrong time." Due to these risks to public safety, the Patrol Guide has strict requirements that officers must follow when engaging in this type of pursuit.[61] When a member of the service is unable to conduct a vehicle stop, that officer is directed to consider whether the potential risks of the pursuit outweigh the benefits. The Patrol Guide specifically directs the officer to consider the nature of the suspected offense, the time of day, the weather conditions, the location and population density, the capability of the Department vehicle, and the officer's familiarity with the area. This section explicitly states that the vehicle pursuit must be terminated when the danger to the public and officers outweighs the potential harm to the community if the perpetrator is not immediately apprehended.

To further safeguard the public and to prevent officers from deciding to initiate and/or continue a pursuit despite the potential for harm, this Patrol Guide section also requires that the pursuing officers notify the radio dispatcher upon the initiation of the pursuit, provide information about the vehicle being pursued, and maintain regular contact with updates regarding the pursuit while it is in motion. Patrol supervisors are directed to monitor the pursuit, to send additional units to aid in the pursuit if appropriate, and to terminate the pursuit when necessary. Certain actions are generally prohibited unless exigent circumstances exist, including ramming the other vehicle, positioning a Department vehicle so the perpetrator will collide with it, and driving alongside the pursued vehicle. After a vehicle pursuit occurs, the officer is

[61] Patrol Guide §221-15 "Vehicle Pursuits".

required to complete a vehicle pursuit report, which must be approved by a supervisor and sent to the commanding officer of those officers who initiated the pursuit.

Under the Matrix, a vehicle pursuit that is conducted outside Department guidelines is addressed by a schedule C command discipline, which carries a penalty of up to 20 days. Failure to make proper notifications is punishable by a schedule A command discipline, which carries a penalty of up to five days. While a 25-day penalty may be adequate for unauthorized pursuits that do not result in serious physical injuries or fatalities, when these occur, the Commission believes that penalties consistent with the ranges set forth in the Matrix for the excessive use of physical force are more appropriate. When physical force is unjustifiably used, whether the force qualifies as deadly or not, and its use results in death or serious physical injury, the Matrix sets forth as the penalty either forced separation or termination, depending on whether mitigating circumstances exist. However, even in those instances where the use of non-deadly force results in a physical injury that does not qualify as serious, or in no injury, the aggravated penalty of termination is still available. Termination should also be explicitly applicable in unauthorized vehicle pursuits that result in significant but avoidable harm. This aggravated factor should apply when the pursuing officers are directed to cease a pursuit in progress but fail to do so. The following example demonstrates the necessity for more serious penalties for some vehicle pursuits:

> In November 2019, Police Officer A and Police Officer B stopped a vehicle for speeding. When the officers stepped out of their vehicle and approached the other car, the car drove away at a high rate of speed. Officer A, the driver, pursued the other vehicle on the highway. This surprised Officer B, who considered this type of pursuit to be "generally unsafe." While following the vehicle, it collided with two other vehicles. The collision, as well as the officers' response following the collision, was captured on Officer A's body-worn camera. In this footage, the officers were heard laughing when the other vehicle crashed and acknowledging that they knew a collision had occurred. Rather than proceeding to the crash site, however, the officers exited the highway and drove in the other direction.

> Meanwhile, the officers' supervisor had been traveling on the other side of the highway and saw the turret lights flashing on the officers' vehicle. He called the officers to determine what was occurring. At that time, the officers had already witnessed the accident and driven away. Officer A told the supervisor that they had been pursuing a vehicle, but that the driver was driving too recklessly so they had terminated the pursuit. After meeting with the officers to sign their memo books, the supervisor heard over the Department radio that there had been a vehicle accident and responded to the accident location. The driver who had been pursued by the officers had fled on foot, while one other motorist was injured. Recalling the earlier pursuit, the supervisor called both officers to the location and asked whether either of the vehicles had been the vehicle they had been chasing. They confirmed that one was. The supervisor did not realize that the collision had occurred during the actual pursuit until he returned to the precinct and reviewed the officers' body-worn camera footage.
>
> Officer B, who was the recorder, explained in his official Department interview that he had been uncomfortable with Officer A's actions in following the vehicle and then in driving away once the collision occurred. However, he also admitted that he took no action to stop Officer A, and that he did not inform his supervisor of the correct sequence of events.
>
> In Officer A's official Department interview, he stated that he decided to terminate the pursuit once he saw the flash of the brake lights of the pursued vehicle and those of another vehicle. While he said he thought that there might have been a collision, he denied actually seeing the crash.
>
> Both officers pled guilty to failing to notify the radio dispatcher of the pursuit, failing to terminate the pursuit, failing to render police services to the people who were involved in the collision, and making misleading statements to their supervisor about the sequence of events.[62]

DAO recommended the forfeiture of 35 vacation days for Officer A and 25 vacation days for Officer B. DAO arrived at these recommendations based on the following calculations: The presumptive penalty for the failure to take police action (based on their failure to respond to the collision site) was the forfeiture of 20 vacation days. Although acknowledging that the unauthorized vehicle pursuit was punishable by up to 20 vacation days, DAO treated it as an

[62] A fifth specification for improperly deactivating their body-worn cameras was dismissed against each of the officers.

aggravating factor, and added an additional five days. The failure to notify the radio dispatcher of the vehicle pursuit was also treated as an aggravating factor, adding another five days. A final five days was added for Officer A's misleading statements to his supervisor.[63] DAO recommended a lesser penalty for Officer B as he had no control over the decisions made by Officer A and was not the first officer to provide incorrect information to the supervisor.

The First Deputy Commissioner and the Police Commissioner viewed those penalties as insufficient to address the misconduct. Citing the officers' failure to respond to the collision and their failure to provide a truthful account of the events, the Police Commissioner imposed dismissal probation and forfeiture of 60 vacation days on both officers. In our view, this increased penalty was more appropriate, and we appreciate that both the First Deputy Commissioner and the Police Commissioner recognized that a greater penalty than the schedule C command discipline set forth in the Matrix was necessary. We note though that even these Executives' stated rationale did not account for the fact that the pursuit itself was a factor in causing the collision and an injury, albeit minor, to a bystander.

Due to the potential harm that can result from a vehicle pursuit, along with the failure to follow the directives in the Patrol Guide, this type of misconduct should be addressed with a specific penalty range in the Matrix, and the range should include an aggravated penalty of termination. Aggravating factors could include insufficient justification for the pursuit, failure to notify the dispatcher of the pursuit, harm as a consequence of the pursuit (including property damage or injuries), and failure to terminate a pursuit when so directed.

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[63] DAO reasoned that making misleading statements to a supervisor was not addressed in the Matrix but was an aggravating factor to consider. The Commission believes that the false statement provisions and the Matrix penalties associated with them include statements to supervisors. In past comments on the Matrix, we have urged the Department to provide a definition of "official" in order to provide notice to all members of the Department regarding which statements are addressed by these provisions. *See Twentieth Annual Report* at p. 104 and Appendix B to that report at pp. 15-16.

c) Unfit for Duty While On-Duty

Administrative Guide §304-04(1) requires members of the service to be fit for duty at all times, except when on sick report. This requirement applies even when members of the service are off duty. Section (2) prohibits members of the service from consuming intoxicants to the extent that they become unfit for duty. In the Off-Duty Misconduct and Prohibited Conduct Generally section of the Matrix, a penalty range is included for consuming intoxicants while in uniform (30 penalty days plus dismissal probation to termination) and for being unfit for duty (30 penalty days, dismissal probation, ordered breath testing, and cooperation with Department counseling programs up to termination.)[64] However, there is no category for being unfit for duty *while on duty*. An officer's unfitness for duty due to intoxication on duty would seem to be a significant aggravating factor, deserving a greater penalty than those officers who are unfit while they are on their own time, as on-duty members of the service can deprive civilians of their liberty through stops and arrests. A member of the service who is intoxicated does not have the same judgment and perception as one who is not. Salaries of officers are paid by the taxpayers, and when officers become intoxicated while on duty, they are not performing to their best abilities. Also, if a civilian views a member of the service in an intoxicated state, this may affect the Department's reputation. For these reasons, the lowest penalty in the range for being unfit for duty, dismissal probation plus the forfeiture of 30 penalty days, is not sufficient for the officer who is unfit while on duty.

In the following example, two members of the service spent the better part of their workday becoming intoxicated.

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[64] There is another section of the Matrix to address Driving While Ability Impaired/Intoxicated incidents, which lists presumptive penalties as well as aggravating factors with penalty enhancements for members of the service who drive while under the influence of an intoxicant.

> In January 2020, Lieutenant X was assigned to work from 10:00 a.m. to 6:35 p.m. She met Sergeant Y, who worked in another command, for lunch at approximately 12:30 p.m. Neither was in uniform or armed. Between the two subjects, at least 8 martinis were consumed.[65] They remained at the restaurant where they had eaten lunch until approximately 4:08 p.m., over 3 ½ hours. From the restaurant, they walked to and entered various locations, only returning to Lieutenant X's command at 6:21 p.m. Upon entering the command, they walked straight into the ladies' room. Another sergeant entered the restroom approximately 40 minutes later and saw 4 legs in one bathroom stall. This sergeant called to the stall occupants, but when no one answered, the sergeant notified another lieutenant who ordered the occupants of the restroom to leave. Approximately 5 minutes later, Sergeant Y was observed leaving the bathroom and the building. The lieutenant who had taken charge of the situation entered the bathroom and found Lieutenant X laying on the floor. Her underwear was pulled down and the skirt she was wearing was flipped up. Everyone left the bathroom approximately 15 minutes later, and Lieutenant X went back and sat down at her desk.
>
> In her official Department interview, Lieutenant X stated that this was the first time she had become that intoxicated. Both she and Sergeant Y stated that they were in the restroom because the lieutenant did not feel well and the sergeant was trying to help her. The lieutenant also stated that this incident made "her acknowledge and seek help for alcohol addiction" and she enrolled in an inpatient program for alcohol abuse, which she attended for approximately one month. The sergeant similarly claimed this incident made him realize that he had a drinking problem, and he enrolled in an outpatient program.

DAO recommended that both subjects be placed on dismissal probation, forfeit 30 penalty days, and cooperate with quarterly breath-testing and Department counseling. DAO reasoned that this was the presumptive penalty for being unfit for duty while off-duty. While both subjects were on-duty and this could be considered an aggravating factor, since both had positive employment histories, there were limited consequences resulting from their intoxication, and "the fact that alcoholism has been recognized as an addiction," DAO justified that the presumptive penalty for being unfit while off-duty was appropriate here. However, there was no evidence, other than the subjects' self-serving statements in their official Department interviews

[65] In Sergeant Y's second official Department interview, he admitted to purchasing between eight and 11 martinis during this incident.

that either was actually an alcoholic. Further, while there were no serious consequences such as an unjustified shooting, the lieutenant failed to perform the responsibilities of her position for a six-hour time period and was observed by two of her colleagues in this state. This set a poor example to her subordinates about acceptable behavior while on duty. The sergeant similarly was not fulfilling his job responsibilities for the same period.

The First Deputy Commissioner and Police Commissioner did not believe that this was an appropriate penalty for either subject and added in 30 suspension days for both. The Police Commissioner specifically found that the subjects' otherwise positive employment histories were not sufficient to mitigate the misconduct as it occurred on-duty.

The only mitigating factors to this misconduct, in the Commission's view, were that the officers were not in uniform while they engaged in their misconduct in full view of the public, so it is likely that no one realized that they were members of the NYPD.[66] Also, they were both unarmed, thereby reducing the risk that physical harm could occur. However, they were paid for almost six hours, during which they drank martinis and were unjustifiably absent from their commands. Meanwhile, their job responsibilities were not being performed. Therefore, a more severe penalty than the penalty for unfit for duty while off-duty was appropriate.

This type of behavior occurs with enough frequency that it should have its own penalty range in the Matrix. During 2021 alone, there were four other cases that the Commission reviewed in which officers were inebriated at some point while they were on-duty. The Department needs to send a strong message that this behavior is not acceptable, is more serious, and deserves more significant penalties, than being unfit for duty while off-duty.

[66] However, the media was alerted to the incident and published the details of what occurred.

d) Failure to take Police Action in Domestic Violence Cases

As mentioned above in the summary of our *Report on Matrix Penalties for Failure to Take Police Action*, the only recommendation the Department has implemented to date was our recommendation to increase the aggravated penalty for failure to take police action to termination.[67] The Department has not yet implemented our second recommendation, which was to create a non-exhaustive list of aggravating and mitigating factors to be considered in these cases. During this review period, the Commission examined a series of cases that has led us to recommend inclusion as an aggravating factor whether the failure occurred while responding to a domestic violence incident, including failing to follow the procedures directed in Patrol Guide §208-36. Although some of the proposed aggravating factors that we previously identified may sometimes apply to domestic violence incidents (such as whether the duty failure had the potential to result in injury or death; whether the incident involved an individual who was particularly vulnerable, such as a child, elderly person, or an individual with a disability; and whether the crime that was not fully investigated was a violent one, or part of a pattern), not all domestic violence situations necessarily include these factors. The following examples demonstrate situations that did not at first glance involve any of our previously recommended aggravating factors. However, these examples show how quickly a domestic incident can escalate without the appropriate police intervention. Furthermore, explicitly including domestic violence incidents in this section of the Matrix would signal to all members of the service that failures to respond appropriately in these cases will be viewed particularly seriously.

[67] *But see supra* p. 33, fn. 47.

The Patrol Guide lays out specific and detailed procedures to be followed whenever a member of the service responds to a domestic violence incident.[68] These procedures include providing medical assistance if requested or if the need is apparent, ascertaining all facts by interviewing witnesses separately and collecting evidence, and determining whether there is probable cause that any offense has been committed. The Patrol Guide also directs that when a complainant indicates that an order of protection has previously been obtained, the responding officer must request a copy of the order, if available, and query several databases to confirm whether an order of protection is in effect. When there is probable cause that a felony has been committed or an order of protection has been violated, the responding officer is required to arrest the suspect, even if the complainant objects. When there is probable cause that a misdemeanor or violation has been committed, other than a violation of an order of protection, the responding officer must arrest the suspect unless the complainant specifically states on their own initiative that they do not want the suspect arrested, in which case the officer has discretion to make an arrest based on a number of specific factors.[69]

In several cases we evaluated during this review period, officers failed to follow these procedures, sometimes with serious consequences. For example, in the following case, responding officers failed to conduct a proper investigation and take appropriate police action in response to a domestic violence incident. Had the officers performed as required, a later assault on the complainant might have been prevented.

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[68] Patrol Guide §208-36 "Family Offenses/Domestic Violence". These procedures are to be followed whenever a member of service responds to an offense that occurs between members of the same family or household, which includes those who are married, related by blood, have a child in common, are or have been in an intimate relationship, or have lived together in a family-type relationship, currently or in the past.

[69] The responding officer may not ask the complainant if they want the suspect to be arrested. Factors to be considered in determining whether to make an arrest when that decision is discretionary include past arrest history of the offender and victim, observations of the scene and victim, witness statements, offender statements (especially threats of suicide, homicide, or future violence), threatened use of weapons or the presence of or access to weapons by the offender, the mental and physical state of the offender (drug or alcohol intoxication, etc.), and the presence of other household members who may be at risk, including the elderly.

> Two officers responded to domestic violence incidents at the complainant's home twice in the same day. When they arrived the first time, they observed the defendant yelling outside the complainant's apartment door. The defendant was bleeding from his hand and two of the apartment windows were shattered. The defendant told the officers multiple times that he wanted to die, and it took them 20 minutes to calm the defendant down before they could speak to the complainant. The complainant and her mother both told the officers that the defendant had broken their windows. The officers did not call an ambulance for the defendant or place him under arrest for Criminal Mischief, but instead let him leave the location unaccompanied. They completed a Domestic Incident Report (DIR) regarding that first incident, but did not complete a complaint report for Criminal Mischief. Instead, they told the complainant and her mother not to open the door if the defendant returned and to obtain an order of protection against the defendant in family court.
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> Shortly after leaving, the officers were called back to the scene because the defendant had returned and assaulted the complainant. The defendant was no longer on the scene when the officers arrived. After observing the complainant crying with a swollen eye, one of the responding officers berated her and her family for disobeying his instruction not to open the door for the defendant, implying that the assault was her fault.[70]

The subject officers in this case violated the Patrol Guide in multiple ways. They should have called an ambulance to treat the defendant, as the need for medical assistance was readily apparent.[71] They also should have conducted a thorough investigation the first time they responded by interviewing the witnesses separately and ascertaining the basis for the complainant and her mother's statements that the defendant broke the windows. During his Department interview, one of the subject officers stated that he did not arrest the defendant the first time they responded because he believed he needed an eyewitness or an admission of guilt to make an arrest for Criminal Mischief, but he never conducted even a basic investigation to make a determination regarding whether there was an eyewitness. If the officers determined that

[70] The officer who berated the complainant and her family received a penalty of 40 vacation days and training. The other officer, who attempted to call for backup at one point and immediately reported the incident to a supervisor, received a schedule B command discipline and three penalty days.

[71] The defendant told the officers he had injured his hand himself. The officers asked the defendant at one point if he needed an ambulance, but he said "fuck this" and continued to state that he wanted to die.

there was probable cause that the defendant had committed Criminal Mischief, a misdemeanor, they would have been required to place him under arrest unless the complainant specifically stated that she did not want him arrested, at which point they would have had discretion to make an arrest after evaluating the surrounding circumstances.[72]

Also troubling in this example is the fact that the officer further traumatized the complainant by berating her and her family and making them feel responsible for the assault. Blaming victims for their abusers' actions reinforces harmful stigmas around domestic violence, and may make those individuals (and others who hear about such encounters) less likely to report them in the future.

When members of the service fail to investigate or take police action on orders of protection, they strip complainants of an important legal tool, rendering those orders useless. The following example illustrates the lethal consequences that can occur when officers disregard Department policy:

> The complainant called 911 because her ex-boyfriend was at her residence, in violation of a valid order of protection. The complainant and suspect had previously lived together, but the complainant's order of protection did not allow him to be in her presence. The complainant had just returned home from a brief stay in a shelter to find the suspect in her residence. The first officers to respond incorrectly believed that the complainant was violating the order of protection and that they did not have a basis to arrest the suspect. They left the scene without conducting computer inquiries to confirm that an order of protection was in effect or completing all required paperwork. A few hours later, the complainant called 911 again, but the officers assigned to the radio run conducted a car stop instead and never responded to the scene. The complainant called 911 again almost an hour later and reported that the suspect was now holding a knife to her face.
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> When officers responded to this third call, the complainant was calling for help from her upstairs window. Once the officers were inside, she informed the officers that the suspect had menaced her with a knife and a screwdriver, and she provided them with a copy of the order of protection, but they still did not conduct a full investigation and did not make an arrest. Instead, they designated

[72] There was no indication that the complainant told the officers she did not want the defendant arrested.

> the suspect an "emotionally disturbed person" and took him to the hospital. They did not prepare an Aided Card, did not stay with the suspect in the hospital, and did not place him under arrest when he was released from the hospital.
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> The suspect was released, and he returned to the complainant's residence that evening, prompting her to call 911 for a fourth time. Many of the same officers returned, but once again failed to arrest the suspect. Instead they again designated him an "emotionally disturbed person" and took him back to the hospital without guarding him or preparing an Aided Card. The suspect subsequently left the hospital and again returned to the complainant's residence, where he was later found dead. The complainant could not be found. Police believed that she or a family member may have killed the suspect after he returned to her residence.[73]

Officers in this case violated the Patrol Guide by failing to confirm the existence of the order of protection and incorrectly concluded that the complainant rather than the ex-boyfriend was in violation of the order of protection. They also failed to investigate fully and respond appropriately to the complainant's allegation that the suspect had menaced her with a knife and a screwdriver; once they had probable cause to believe the ex-boyfriend had violated an order of protection and committed the felony of Aggravated Criminal Contempt by menacing the complainant with a weapon in violation of the order of protection, this was a must-arrest situation. One of the officers who responded when the complainant alleged that the suspect had menaced her was a Field Training Officer who was training two officers at the time. He admitted he did not conduct any computer checks or tell the sergeant who arrived on the scene after him about the knife and screwdriver, explaining that he thought other officers would ask what had happened.

These cases illustrate what should be obvious: when law enforcement officers fail to conduct proper investigations and make arrests when appropriate in domestic violence cases,

[73] The Field Training Officer on scene, who was training two officers at the time and was initially the most senior officer present, received a penalty of dismissal probation and 35 vacation days. The six other responding officers were not put on dismissal probation but forfeited a range of five to 40 penalty days based on their involvement and prior discipline.

people can be injured or killed. In addition to these examples, we examined at least four other cases during this review period where members of the service failed to properly perform their duties when responding to domestic violence incidents. In past reviews, we have observed the occasional disciplinary case in which officers failed to take appropriate action in a domestic violence situation, but the number of officers who did not respond properly during this review period caused us concern. Including domestic violence as an aggravating factor for failing to take police action in the Matrix would make it clear that such conduct will be punished severely.

Additionally, given the high volume of these cases and the lack of understanding and inappropriate attitudes demonstrated by some of the officers in these examples, we also recommend that the Department take steps to ensure that all officers are properly trained on the appropriate tactics and demeanor to employ in these encounters.

3. Equal Employment Opportunity Violations

Every year, the Commission reviews disciplinary cases in which members of the service are charged with using derogatory language towards other members of the service based on membership in a protected class[74] or with some form of sexual harassment.[75] While we do not review a large number of these disciplinary charges each year, unfortunately, these behaviors persist as we have commented on the penalties in these cases in almost all of our reports.[76] While the Matrix sets forth significant penalties for such misconduct, including maximum penalties of termination when aggravating factors are present, the Commission recommends that either dismissal probation or termination be the presumptive penalty in cases involving sexual

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[74] In the Matrix, the Department sets forth the protected classes pursuant to Federal, State, and Local Law. The New York City Police Department Disciplinary System Penalty Guidelines, (February 15, 2022) at p. 51. These include, but are not limited to, race/ethnicity, gender, color, religion, disability, and sexual orientation.

[75] The Commission categorizes these cases as harassment/improper contact.

[76] *See Fifteenth Annual Report of the Commission* (September 2013) at pp. 33-35; *Sixteenth Annual Report* at pp. 66-69; *Eighteenth Annual Report* at pp. 147-149; and *Nineteenth Annual Report* at pp. 86-87.

harassment. Significant penalties should also be available when derogatory statements based on a person's membership in a protected class are utilized. Such a policy would place members of the service on notice that behavior of this type will be treated with utmost seriousness.

Misconduct that demeans or objectifies people based on their membership in a protected class is harmful not only to the member of the service who is the object of such abuse, but also to colleagues who witness or hear about the misconduct, and members of the public, who may also experience similar inappropriate actions, including slurs or discriminatory enforcement actions. Other members of the service may be made similarly uncomfortable by this type of misconduct, but fail to speak out against it for fear of reprisal. Even worse, some members of the service may believe that this type of misconduct is acceptable because they see other members, often their superiors, engage in this misconduct without serious repercussions.

a) Disparaging Remarks Based on Membership in a Protected Class

The current version of the Matrix sets forth a presumptive penalty of the forfeiture of 20 penalty days for making a disparaging remark based on membership in a protected class. This penalty can be decreased to ten penalty days if mitigating factors are present and increased to termination if aggravating factors exist. While a 10- or 20-day penalty may be appropriate for a one-time remark, depending on the circumstances, when there is a pattern of behavior, which the Matrix lists as an aggravating factor, more serious consequences are necessary. This is true even if it does not appear that anyone was offended or negatively affected by the remarks.

> Between September 2018 and March 2019, the subject lieutenant reportedly made several disparaging statements in front of other members of the service. He made these statements while he was supervising Department training and was the commanding officer of the unit. These statements were:
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> "The Police Academy is a haven for gay cops who couldn't hack it in the streets."

"Goodnight f****ts," on multiple occasions as he left the command.

"You have child care issues. Your husband is on the job. You got a child with special needs. I don't give a fuck. Get in line." This was directed to a subordinate who was raising a child with special needs.

"How can you go out eating with that c**t? (in reference to a female detective who had worked at the command, but not made in that female's presence) That c**t is a rat."

Despite the fact that four of the subject's subordinates confirmed that he had made these statements, the subject denied making them in his official Department interview.

The charges were all brought pursuant to either Patrol Guide §203-10(1) or (5). The first subsection of §203-10 prohibits using discourteous or disrespectful remarks regarding another person's ethnicity, race, religion, gender, gender identity/expression, sexual orientation, or disability. Patrol Guide §203-10(5) is a catchall provision prohibiting members of the service from engaging in conduct prejudicial to good order, efficiency, or discipline of the Department. The lieutenant in this case was not charged with Equal Employment Opportunity violations, at the direction of the former Police Commissioner, because the audience for his disparaging statements regarding sexual orientation and gender were not members of the protected classes he belittled. As an initial matter, the Commission disagrees with that assessment. First, it is by no means clear how the former Police Commissioner or his surrogates could have determined definitively that no person who identified as LGBTQIA+ was present when the subject made the first two statements. Second, even if it is true that no one from the protected group heard these remarks, it does not follow that these statements were not offensive and did not create a hostile working environment for the officers who heard them.

Because the former Police Commissioner disapproved substantiated findings of Equal Employment Opportunity violations, DAO reasoned that the higher penalties set forth in the Matrix for these violations did not apply and recommended the forfeiture of 12 vacation days in exchange for the subject's *nolo contendere* plea.[77] Finding that the subject demonstrated "a lack of professionalism and poor judgment," the former First Deputy Commissioner recommended that the penalty be increased to 30 days, which was approved by the Police Commissioner who cited the subject's status as the commanding officer of his unit and his lengthy supervisory tenure as justification for an increased penalty.

The Commission notes that all the aggravating factors listed in the Equal Employment Opportunity Division section of the Matrix were present in this case. The subject was a supervisor, and a high-ranking member of the Department. The statements he made were in the presence of, or directed at, his subordinates. He was the commanding officer and was training his unit at the time. His misconduct continued over time, indicating a pattern of behavior, and it was directed at two separate protected classes. Due to the subject's lengthy tenure with the Department (25 years at the time of this misconduct), lack of disciplinary history, and his stellar performance ratings, as a Commission, we did not disagree with his penalty. However, we believed that given the multiple statements, over a six-month period, he should have been the subject of some non-disciplinary form of monitoring to ensure that this behavior stopped. We also believed that the subject's behavior could be reflective of a general police culture that needs to change. To affect that change, stronger penalties (and notice that there will be stronger penalties) must be imposed for this type of misconduct. Given the possible harm to other officers and members of the public from disparaging statements about members of protected

[77] A *nolo contendere* plea means that the subject does not admit guilt but accepts the discipline as if they were found guilty.

classes, the Commission believes that the Department should carefully consider whether the presumptive penalty for this misconduct should include dismissal probation. Where there are multiple instances, demonstrating a pattern of behavior or an animus towards a particular class of people, the officer should be terminated.

b) Sexual Harassment - Suggestive Touching and Overt Sexual Touching

The Matrix provides a presumptive penalty of the forfeiture of 25 days for sexual harassment involving suggestive touching, which cannot be decreased but can be increased to termination in the presence of aggravating factors. In the case of sexual harassment involving overt sexual touching/intimate physical contact, the presumptive penalty is termination and the mitigated penalty is dismissal probation accompanied by a 30-day suspension. When the subject exhibits predatory or habitual sexually harassing behavior, the only penalties available are forced separation or termination, with termination being the presumptive penalty.

In our initial comments prior to publication of the Matrix, the Commission recommended that the Department include a definition of suggestive touching as compared to overt sexual touching.[78] That has not been done, and we continue to recommend that these terms be defined in the Matrix. In our comments, we also stated that the penalties for sexual harassment with any form of touching were too low, and we recommended that the presumptive penalty for suggestive touching include dismissal probation.[79] We still believe that this is the appropriate presumptive penalty. The following case is illustrative.

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[78] *See Twentieth Annual Report*, Appendix B, at p. 23.

[79] *Id.* In the draft initially reviewed and commented upon by the Commission, the presumptive penalty for overt sexual touching was dismissal probation and 30 suspension days. When the Matrix was published, that was the mitigated penalty and the presumptive penalty was increased to termination.

> The subject sergeant had two encounters with a police officer whom he occasionally supervised. In the first, he sent the police officer a text message that contained a video that depicted a scene from a movie that had been photoshopped to include an abnormally long penis on a male. The police officer took offense at the video and spoke with a union delegate, who in turn, spoke with the subject.
>
> Four months later, the subject approached the police officer at her desk, and said, "Your hair looks nice. Se puede?"[80] The subject then touched the police officer's hair and ran his hand down the side of her face. The police officer reported both acts to the precinct's assistant integrity control officer.
>
> In his official Department interview, the subject admitted that he sent the video to the police officer, but claimed he had done so by mistake because he had a new smartphone and was unfamiliar with how it operated. He stated he did not even know he had sent the video until the union delegate spoke with him. He also admitted to touching the police officer's hair with one finger, and claimed he did not recall touching the side of her face. He claimed he did this because the police officer had been disclosing personal issues to him, and he was only trying to change the subject.[81]

The subject was charged with wrongfully sending a text message containing an inappropriate video-recording to another member of the service and wrongfully touching another member of the service. DAO believed that there were no relevant categories in the Matrix, finding the most comparable categories to be verbal sexual harassment, with a presumptive penalty of 20 days, and sexual harassment through suggestive touching, with a presumptive penalty of 25 days. DAO did not believe the subject's behavior rose to the level of these categories and recommended a penalty of 35 days. The Police Commissioner increased the penalty to 45 days, which was the sum of the presumptive penalties for both acts. However, this penalty did not go far enough, and in the Commission's opinion, a period of dismissal probation

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[80] This translates to "May I?".

[81] The Commission also notes that four other supervisors were informed about the allegations but failed to take any action, including reporting the misconduct. These supervisors were given schedule A command disciplines. This emphasizes the need for a category in the Matrix to address the failure to report allegations of misconduct or corruption to IAB accompanied by a significant penalty range. The necessity of adding this category of misconduct was addressed by the Commission in *Matrix Penalties for Failure to Take Police Action* (October 2021) at p. 17 and our *Twentieth Annual Report* at pp. 69-70. In its proposed changes to the Matrix, the Department has now included this category.

to monitor this sergeant's behavior would have been more appropriate. There were several aggravating factors present including the subject's superior rank to the police officer and the fact that he, at times, had supervisory responsibilities over her; the subject's commission of two sexually harassing acts towards the complainant, one of which occurred after he had already been spoken with by the delegate; and finally, the subject's lack of remorse as evidenced by his statements in his official Department interview.

No member of the service should be intentionally touching any other member of the service without that person's consent. When such touching has a sexual component, the recipient can be placed in an uncomfortable situation in which it becomes their responsibility to inform the person doing the touching that their advances are unwelcome and/or offensive. This is especially difficult when the person performing the touching is a superior officer. It also may foster resentment or rumors from colleagues and make the recipient uncomfortable in their place of work, and may lead to civil lawsuits against the Department and City.

4. Fraternization Policies

Somewhat related to sexually harassing behavior is that of fraternization, when a member of the service engages in a romantic, intimate, and/or sexual relationship with either a superior or subordinate in the same command, or with a civilian they meet while performing their job responsibilities. Only recently did the Department publish a policy addressing the permissibility of these relationships and currently there are no corresponding Matrix provisions to address violations of this policy.

a) Administrative Guide §304-06

In April 2022, the Department enacted a policy prohibiting fraternization in various

contexts.[82] The policy first prohibits romantic relationships between supervisors and subordinates who are "routinely under the direct supervision of the supervising member." It also prohibits members of the service from "engaging in a relationship beyond the scope of official duties" with several categories of civilians, including confidential informants, witnesses, and victims.[83] Conduct beyond the scope of official duties includes dating and romantic/sexual relationships.[84]

This policy is desirable for several reasons. First, there are power differentials present in these categories of relationships that put individuals in vulnerable positions. Superiors often control or influence their subordinates' schedules, assignments, overtime, performance reviews, and promotions. Subordinates may feel compelled to consent to a relationship to avoid workplace retaliation. Similarly, complainants or witnesses may feel pressured to consent in order to have their criminal cases properly investigated or prosecuted. Inappropriate relationships can also lead to other forms of misconduct, such as computer misuse for looking up romantic interests in Department databases, misuse of time for engaging in personal relationships while on duty, or failing to follow Department protocols or take necessary investigative steps because a member of the service is pursuing a relationship with a victim or witness. In the case of victims, witnesses, and confidential informants, relationships with members of the service can compromise criminal investigations and prosecutions and lead to allegations of retaliation for rebuffed advances. Members of the service who pursue inappropriate relationships with civilians have been known to breach the confidentiality of criminal investigations and Department databases, such as tip lines,

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[82] Administrative Guide §304-06 "Prohibited Conduct".

[83] It also prohibits such relationships with youth and young adults involved with the Department, such as explorers, interns, or students attending schools to which members of the service are assigned.

[84] Other examples of prohibited conduct include socializing, carpooling, unauthorized meetups or home visits, and contact on social media. This section also includes guidance regarding the appropriate manner of contact between members of the service and civilians.

which can cause community members to feel unsafe reporting crimes or assisting in criminal investigations. This new policy puts members of the service on notice that even relationships that can be perceived to be consensual are prohibited and subject to discipline.

Although this policy is a positive development, certain improvements should be made. First, the policy omits relationships between members of the service and suspects, arrestees, and defendants in criminal cases. As we have noted several times in the past, these are inherently coercive relationships that implicate most of the concerns discussed above for other types of fraternization. The power imbalance is even greater in these relationships because of the member of the service's actual or perceived ability to impact the civilian's liberty or safety, and the outcome of their criminal case. This coercive element was recognized by the New York State Legislature when it amended the Penal Law in 2018 to provide that an individual is incapable of consent when detained or otherwise in the custody of a police officer, peace officer, or other law enforcement officer.[85] The Department should recognize this same principle by adding this category of relationships to Administrative Guide §304-06.

Second, a note in the provision related to supervisor/subordinate relationships states that such relationships will result in the transfer of one of the involved parties, and appears to make

[85] Criminal Procedure Law § 130.05(3)(j). This change to the Penal Law came about after the case of former NYPD Detectives Edward Martins and Richard Hall, who arrested an 18-year-old woman for a small amount of marijuana in 2017 and were initially accused of sexually assaulting her while she was handcuffed in the back of their police van. Although prosecutors had DNA evidence and the two defendants admitted that a sexual encounter took place, at the time it was not legally presumed that all sexual activity between police officers and people in their custody was nonconsensual. Inconsistencies in the complainant's story eventually led prosecutors to discard her testimony and drop the most serious charges. The two defendants pled guilty to the less serious charges of bribery and official misconduct and received five years of probation, rather than the 25 years in prison they were initially facing. This case prompted lawmakers to close this loophole and ensure that all sexual activity that takes place between police officers and individuals in their custody is presumed to be nonconsensual as a matter of law. *See* Edgar Sandoval, *After Rape Case Unravels, Ex-Detectives Plead Guilty to Lesser Crimes*, N.Y. Times (Aug. 29, 2019), https://www.nytimes.com/2019/08/29/nyregion/nypd-rape-guilty.html; *Ex-NYPD cops get probation for on-duty sex with teen in Brooklyn*, ABC 7 N.Y., (Oct. 10, 2019), https://abc7ny.com/nypd-rape-richard-hall-eddie-martins/5608336/.

reporting such relationships voluntary rather than mandatory.[86] This gives members of the service an excuse not to report these relationships, and incentivizes them to cover up such relationships, rather than report them and request a transfer. Supervisor/subordinate relationships can be disruptive to commands for several reasons. Even if a relationship between a supervisor and subordinate is consensual, there can be claims of workplace retaliation if the relationship ends. Other officers in the command may make claims of favoritism in assignments, overtime, and scheduling or allege that other forms of misconduct are taking place, such as misuse of time. Even when these allegations are not true, they must be investigated by IAB or another investigative unit, diverting Department resources from other investigations. The Department should amend this policy to make it mandatory that the parties immediately report a relationship and request a transfer. Additionally, the Department should provide notice to members of the service regarding the factors that will be considered when deciding which party to transfer. Such factors could include whether either party volunteers to transfer, the length of time at the command, the disruption to the command caused by the transfer, and the burden of transfer on the parties caused by the commute, schedule, childcare, or other issues.

b) Disciplinary Matrix

This new policy does not currently have corresponding provisions in the Matrix.[87] Instead there is a patchwork of categories addressing sexual misconduct in the Abuse of

[86] The note states: "Romantic relationships between supervisors and subordinates who the supervisor routinely supervises will result in the transfer of one of the involved parties. Members of the service are ***strongly encouraged*** to make a notification requesting a transfer in order to avoid workplace disruption." (Emphasis added.)

[87] During the final drafting of this Report, the Department published changes to the Matrix for public comment. One proposed change is the inclusion of a category for engaging in a relationship beyond the scope of official duties which addresses the prohibition on fraternization contained in A.G. §304-06 "Prohibited Conduct". This category of misconduct has a presumptive penalty of 20 penalty days, which can be decreased to 10 penalty days when mitigating factors are present and increased to 30 penalty days and dismissal probation when aggravating factors are present. While we approve of the inclusion of this category, in our view the presumptive penalty should include dismissal probation for the reasons stated in this section.

Authority section (for conduct directed at civilians) and the Equal Employment Opportunity Violations section (for conduct directed at other members of the service). These provisions generally address nonconsensual conduct and include categories such as Sexual Harassment (verbal) and Sexual Harassment (suggestive touching) in the Equal Employment Opportunity section and Sexual Proposition/Unwanted Verbal Sexual Advances and Sexually Motivated Enforcement Action/Sexual Touching/Sexual Solicitation in the Abuse of Authority section. These penalties would not necessarily apply to the categories of fraternization discussed above.

In three of the fraternization cases we analyzed during this review period, DAO or a trial commissioner noted the lack of guidance in the Matrix and relied on precedent cases--some of which were five years old or older--to make their penalty recommendations. As we have described in past reports, the Department has not always punished this type of misconduct sufficiently to deter future misconduct. For example, in one 2019 case a detective was kept on the force and given dismissal probation and forfeited 45 vacation days after contacting three anonymous female tipsters from the "Crime Stoppers" hotline, engaging in sexual banter with them, and meeting one of them. In a 2017 case, a domestic violence officer forfeited only 15 vacation days for engaging in a sexual relationship with a woman he met while mediating marital issues between her and her husband and for utilizing a Department database to provide the woman with the contents of a 911 call made by her husband. In our view, both of these officers should have been penalized more severely.[88]

If the Department relies on inappropriately lenient precedent to decide current cases, it will generate additional inappropriately lenient precedent for the future. The Department must instead address these offenses in the Matrix. The Department should add categories for engaging

[88] *Twentieth Annual Report* at pp. 71-72. We believed this subject officer should have been terminated. *Nineteenth Annual Report* at pp. 88-89. We believed this subject officer should have forfeited more penalty days.

in a sexual/romantic relationship with a supervisor or subordinate and failing to report that relationship. The presumptive penalty range for the supervisor should be higher in these cases. The Department should also add categories for fraternizing with a witness, complainant, or confidential informant. The presumptive penalty for these categories should at a minimum include dismissal probation because this pattern of behavior often repeats and requires a period of monitoring. The imposition of dismissal probation would provide that monitoring and send a strong message to the subject officer. The Department should also list any mitigating and aggravating factors to be considered. Some of these factors could include the type of fraternization, the length of the relationship, who initiated the relationship, whether a criminal investigation or prosecution was negatively impacted, and whether the civilian claims that the relationship was nonconsensual.[89] If there is a second similar offense after a first offense is penalized, termination is the appropriate penalty, absent extraordinary circumstances. Finally, the Department should add a category for fraternization with a suspect, arrestee, or defendant in a criminal case. The presumptive penalty for these cases should be termination because of the inherently coercive nature of the relationship.

[89] Although we realize that at times false allegations are made, officers should be on notice that if they engage in prohibited relationships with civilians whom they meet in their professional capacities, they risk a greater penalty if that civilian later claims that the sexual relationship was nonconsensual.

CONCLUSION

We appreciate the improvements that IAB has made, including expediting the investigative process so that cases are not languishing, searching for video earlier in the investigation, and increased documentation of regular supervisory reviews. Improvement is still necessary though in IAB's interviews, which often are perfunctory and fail to address areas that may uncover further evidence. We also hope that the Department will carefully review and adopt our recommendations for additions and changes in the Disciplinary Matrix during the current review period.[90]

[90] A list of all of our recommendations that have not yet been adopted can be found in Appendix C.

EXECUTIVE ORDER

THE CITY OF NEW YORK
OFFICE OF THE MAYOR
NEW YORK, N.Y. 10007

EXECUTIVE ORDER NO. 18

February 27, 1995

ESTABLISHMENT OF COMMISSION TO COMBAT POLICE CORRUPTION

WHEREAS, an honest and effective police force is essential to the public health, safety and welfare; and

WHEREAS, the Commission to Investigate Allegations of Police Corruption and the Anti-Corruption Procedures of the Police Department, chaired by Milton Mollen, (the "Mollen Commission") has recently concluded an investigation of the nature, extent and causes of police corruption today; and

WHEREAS, the Mollen Commission's Report finds that the vast majority of New York City police officers are honest and hard-working, and serve the City with skill and dedication every day, and that the current leadership of the Police Department has a firm commitment to fighting police corruption among those few officers who betray the public trust and tarnish the Police Department in the eyes of the public; and

WHEREAS, the Mollen Commission determined that the primary responsibility for combatting corruption in the Police Department rests with the Police

Department, and that the Police Department must be the first line of defense against police corruption;

WHEREAS, the Mollen Commission has recommended the establishment of an independent monitor, in the form of a Police Commission, to monitor and evaluate Police Department anti-corruption measures and to ensure that the Police Department remains vigilant in combatting corruption; and

WHEREAS, such a Police Commission provides the public with assurance that the Police Department is implementing and maintaining an effective anti-corruption program; and

WHEREAS, the Mayor and the Police Commissioner are accountable for combatting police corruption; and

WHEREAS, the establishment of a Police Commission can assist the Mayor and Police Commissioner in assessing the effectiveness of the Police Department's implementation and maintenance of anti-corruption efforts; and

WHEREAS, the District Attorneys, the United States Attorneys, and other government departments and agencies have committed resources and personnel to the investigation and prosecution of police corruption, and it is desirable that a Police Commission not supplant such investigative efforts;

NOW, THEREFORE, by the power vested in me as Mayor of the City of New York, it hereby is ordered:

Section 1. Establishment Of Commission.

a. There hereby is established a Police Commission (the "Commission") which shall consist of five members appointed by the Mayor, who shall be residents of the City of New York or shall maintain a place of business in the City of New York. Each of the members shall serve without compensation. The Commission shall include among its members persons having law enforcement experience. The Mayor shall appoint the Chairperson from among the members.

b. Of the members first appointed, the Chairperson shall be appointed for a term ending December 31, 1998; two of the members shall be appointed for terms ending December 31, 1997; and two of the members shall be appointed for terms ending December 31, 1996. Upon the expiration of such initial terms, all members shall be appointed for a term of four years. Vacancies occurring otherwise than by expiration of a term shall be filled for the unexpired term.

c. Each member shall continue to serve until the appointment of his successor.

d. Any member shall be removable for cause by the Mayor, upon charges and after a hearing.

Section 2. Duties.

a. Monitoring the Performance of Anti-Corruption Systems. The Commission shall perform audits, studies and analyses to assess the quality of the Police Department's systems for combatting corruption, including but not limited to audits, studies

and analyses regarding the following:

(i) the Police Department's development and implementation of anti-corruption policies and procedures;

(ii) the effectiveness of the Police Department's systems and methods for gathering intelligence on corrupt activities and investigating allegations of corruption;

(iii) the effectiveness of the Police Department's implementation of a system of command accountability, supervision and training for corruption matters;

(iv) the effectiveness of the procedures used by the Police Department to involve all members of the Department in combatting corruption; and

(v) such other policies and procedures, without limitation, of the Police Department relating to corruption controls as the Commission deems appropriate.

b. Monitoring Agency Conditions. The Commission shall perform audits, studies and analyses of conditions and attitudes within the Police Department that may tolerate, nurture or perpetuate corruption, and shall evaluate the effectiveness of Police Department policies and procedures to combat such conditions and attitudes. In the performance of this function, the Commission shall maintain liaison with community groups and precinct councils and shall consult with law enforcement agencies of federal, state and local government and others, as appropriate, to provide the Police Department with input about their perception of police corruption and the Department's efforts to combat police corruption.

c. Corruption Complaints from the Public. The Commission shall be authorized to accept complaints or other information from any source regarding specific allegations of police corruption and, subject to the provisions of Section 4, shall refer such complaints or other information to the Police Department and such other agency as the Commission determines is appropriate, for investigation and/or prosecution. The Commission may monitor the investigation of any such complaints referred to the Police Department to the extent the Commission deems appropriate in order to perform its duties as set forth herein.

Section 3. Investigations.

a. The Police Commissioner shall ensure and mandate the full cooperation of all members of the Police Department with the Commission in the performance of audits, studies or analyses undertaken pursuant to this Order, and shall provide that interference with or obstruction of the Commission's functions shall constitute cause for removal from office or other employment, or for other appropriate penalty. The Police Department also shall provide to the Commission upon request any and all documents, records, reports, files or other information relating to any matter within the jurisdiction of the Commission, except such documents as cannot be so disclosed according to law.

b. The Police Department remains responsible for conducting investigations of specific allegations of corruption made against Police Department personnel, and the Commission shall not investigate such matters except where the

Commission and the Commissioner of the City Department of Investigation (the "DOI"), with the approval of the Mayor, determine that exceptional circumstances exist in which the assessment of the Police Department's anti-corruption systems requires the investigation of an underlying allegation of corruption made against Police Department personnel.

c. The Commission, in cooperation with the DOI, shall take all reasonable measures to ensure that any hearings or investigations held pursuant to this Executive Order do not inappropriately interfere with ongoing law enforcement matters being undertaken by other law enforcement agencies.

d. Any hearings or investigations undertaken by the Commission may include the issuance of subpoenas by the DOI in accordance with the DOI's powers under Chapter 34 of the New York City Charter, to the extent that the Commission and the DOI Commissioner jointly determine is appropriate.

Section 4. Reporting to the Police Department.

a. The Commission shall promptly notify the Police Commissioner of all allegations of corrupt police activity or other police misconduct and of any investigations undertaken pursuant to this Order. The Commission also shall make regular reports to the Police Commissioner regarding its activities, including the progress of audits, studies and analyses prepared pursuant to this Order.

b. The Commission may exclude a matter from the notifications and reports required by this Section and Section 2(c) only where the Commission and the DOI Commissioner, with the approval of the Mayor, determine either that the matter concerns

the activities of the Police Commissioner or would create an appearance of impropriety, and that reporting on the matter would impair the Commission's ability to perform its duties under this Order.

Section 5. Reporting to the Mayor.

a. The Commission shall report to the Mayor as to all its activities, without limitation, at such times as the Mayor may request, and as otherwise may be required by this Order.

b. The Commission shall provide the Mayor no later than each anniversary of the Commission's establishment an annual report which shall contain a thorough evaluation of the effectiveness of the Police Department's systems for preventing, detecting and investigating corruption, and the effectiveness of the Police Department's efforts to change any Department conditions and attitudes which may tolerate, nurture or perpetuate corruption, including any recommendations for modifications in the Police Department's systems for combatting corruption. The annual report further shall contain any recommendations for modifications to the duties or the jurisdiction of the Commission as set forth in this Executive Order to enable the Commission to most effectively fulfill its mandate to ensure that the Police Department implements and maintains effective anti-corruption programs.

Section 6. Staff. The Commission shall employ an Executive Director and other appropriate staff sufficient to organize and direct the audits, studies and analyses set forth in Section 2 of this Order from appropriations made available therefor. The Commission from time to time may supplement its staff with personnel of the DOI, including investigatory personnel as may be necessary, to the extent that the Commission and the DOI Commissioner determine is appropriate.

Section 7. Construction With Other Laws. Nothing in this Order shall be construed to limit or interfere with the existing powers and duties of the Police Department, the DOI, the District Attorneys, the United States Attorneys for the Southern and Eastern Districts of New York, or of any other department or agency of federal, state or city government to investigate and prosecute corruption.

Rudolph W. Giuliani
Mayor

CASE CATEGORIES

CASE CATEGORIES

In analyzing IAB investigations, the Commission utilizes the following categories of misconduct:[1]

Bribery/Gratuities: Accepting or soliciting anything of value in exchange for favorable treatment, or accepting or soliciting any improper gifts, meals, merchandise, currency, or other item of value.

Computer Misuse: Unauthorized access to and/or dissemination of information from a Department or law enforcement database.[2]

Criminal Association: Associating with, and/or disclosing confidential information to, individuals known to have a criminal history or known to be engaging in criminal activities.

Domestic Incident: Misconduct involving a member of the service and a family member or someone with whom the member of the service had a present or past intimate or familial relationship.[3] This category includes verbal disputes requiring the intervention of law enforcement, harassment, physical assaults, stalking, and violations of protective orders.

DWI/Unfit for Duty: Driving while intoxicated or impaired, or being intoxicated to the extent that the member of the service is unfit for duty, regardless of whether the member of the service is on or off duty.

FADO: On-duty excessive or unnecessary force or threats of force, abuse of authority, discourtesy to civilians, and offensive language.

Failure to Report Misconduct/Corruption: Failure to report known or suspected allegations of wrongdoing to IAB as required in the Patrol Guide.[4] This category also includes the failure to notify the Department of the officer's own involvement in an off-duty unusual police incident.[5]

Firearms: Firearms-related misconduct, including improper display (off-duty), improper discharge (on or off-duty), failure to safeguard (on or off-duty), and possession of unauthorized firearms.[6]

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1 The Commission also uses these same categories when analyzing the Department's disciplinary cases.

2 The Commission excluded from this category using Department computer equipment to send personal e-mails or to conduct non-Department related internet searches. That type of misconduct is included in the Performance of Duties category, as the subject officer is improperly engaging in personal activities while on duty.

3 This category includes incidents involving the current "significant other" of an ex-romantic partner or the ex-partner of a current boyfriend/girlfriend.

4 Patrol Guide §207-21 "Allegations of Corruption and Other Misconduct Against Members of the Service".

5 Patrol Guide §212-32 "Off Duty Incidents Involving Uniformed Members of the Service".

6 The unjustified on-duty display of a firearm is included in the FADO category.

Harassment/Improper Contact: Workplace harassment between members of the service, or harassment of, and/or improper contact with victims, witnesses, or suspects.

Insubordination: Defiance of a supervisor's authority, discourtesy toward a supervisor, and failure to obey a lawful order.

Minor Rules Violation: Misconduct related to adherence to uniform and paperwork requirements, including failing to maintain or record adequate memo book entries.

Narcotics: Possession, use, or trafficking of illegal drugs, or the improper possession, use, or sale of prescription medication. This category includes charges related to a Department drug test failure or the refusal to take such a test.

Performance of Duties: Nonfeasance of duty. This category includes failure to investigate, failure to respond, failure to supervise, failure to appear in court or offer adequate testimony, failure to take police action, and body-worn camera activation issues.[7]

Perjury/False Statements: False, misleading, or inaccurate statements, regardless of the intent of the member of the service, including those made under oath or in an official Department or CCRB interview, false or inaccurate entries in Department records, and false statements to prosecutors or other investigative bodies.

Property: Missing or stolen property. Broadly includes property missing/stolen/improperly released during any interaction with members of the public, or property missing/stolen from a Department facility, vehicle, etc. This category also includes allegations related to the handling of personal or Department property or evidence including failure to safeguard, failure to voucher, failure to secure, and damage to property.

Tow/Body Shop: Unauthorized business referrals and/or improper associations with tow or body shop businesses. Also includes allegations of not adhering to the Department's Directed Accident Towing Program (DARP) procedures.

Unlawful Conduct: Unlawful acts not otherwise categorized.

Miscellaneous: Misconduct that does not readily fit into any of the other categories, including sick leave violations and engaging in unauthorized off-duty employment.

[7] These issues could include the failure to activate body-worn camera in a required situation, the late activation of body-worn camera, or the premature deactivation of body-worn camera.

MATRIX RECOMMENDATIONS

MATRIX RECOMMENDATIONS

Recommendations that are being made for the first time are marked with an asterisk. All page numbers refer to pages in the *New York City Police Department Disciplinary System Penalty Guidelines* effective February 15, 2022.

General Principles

- The definition section, currently found on pp. 15-16 of the guidelines, should be moved earlier in the document as many of the terms in this section are used before their definitions appear.

- Positive employment history should not be available as a mitigating factor for any misconduct so serious that the guidelines specify a presumptive penalty of forced separation or termination.

- In addition to the nature or extent of any actual injury or endangerment to another, the obvious potential for such injury or endangerment should also be an enumerated aggravating factor.

- All prior discipline should presumptively be considered when imposing a penalty. Prior discipline should only be disregarded if, after considering all the facts of a given case, the prior misconduct and penalties are so far in the past, dissimilar, and/or minor that they are not relevant.

- The guidelines indicate that when the total number of penalty days calculated is greater than 90 days, the presumed penalty shall be termination or forced separation (p. 13). We believe the 90+ day threshold is too high.

- On p. 14, under dismissal probation, the guidelines state that "[I]f there is further misconduct during the probationary period, the Department *may* summarily dismiss the member of the service without a formal hearing, including for offenses that would not ordinarily result in termination for a member not on Dismissal Probation." (Emphasis added). We believe there should be a strong presumption that termination will result from further misconduct committed by a member of the service who is on dismissal probation. Therefore, we suggest that the language be modified to read, "[I]f there is further misconduct during the probationary period, regardless of the penalty that would be imposed on a member of the service who is not on dismissal probation, the presumptive penalty is dismissal. The Department may summarily dismiss the member of the service without a formal hearing. If the presumption of termination is overcome, a member of the service may be required to submit to an additional period of dismissal probation as a condition of remaining with the Department."

- ❖ On p. 15, under "Effect of Precedent," the section should be modified to state, "Penalties resulting from settlement negotiations do not necessarily have the same weight of precedent as penalties imposed following trials, because factors such as expediency or resolution and the strength of evidence may affect the calculation and warrant a lesser penalty. However, negotiated settlements will be given precedential weight to the extent other cases involve such factors."

- ❖ In the definitions section of the guidelines, under forced separation, (p. 16) a footnote explaining terminal leave could be helpful.

Abuse of Authority Presumptive Penalties

- ❖ In the presumptive penalties for abuse of authority, discourtesy, and offensive language, (p. 27) it might be helpful to indicate that improper sexual interactions with other members of the service are covered by either the Equal Employment Opportunity provisions or by a newly created section specifying penalty ranges for fraternization. (See next comment.)

- ❖ As the Department issued a written policy in April 2022 regarding fraternization between members of the service, as well as with civilians encountered in the course of performing their police duties, the guidelines should be updated to address sexual or intimate relationships that are not obviously non-consensual.*[1] This should include: Categories for engaging in a sexual or romantic relationship with a supervisor or subordinate and failing to report that relationship as set forth in Administrative Guide §304-06. The penalties for a supervisor who engages in a relationship with a subordinate without making the necessary notifications should be higher than for the subordinate.*

- ❖ The Department should add categories with penalty ranges for fraternizing with a witness, complainant, or confidential informant. The presumptive penalty for these categories should include dismissal probation because we have noticed that this pattern of behavior often repeats.[2] The imposition of dismissal probation would provide monitoring and send a strong message to the subject officer. The Department should also list any mitigating and aggravating factors that will be considered in increasing or decreasing the penalties in these cases. Some of these factors could include the type of fraternization, the length of the relationship, who initiated the relationship, whether a criminal investigation or prosecution was negatively impacted, and whether the civilian claims that the relationship was nonconsensual.*

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[1] This replaces our prior recommendation that the sexual misconduct category in the abuse of authority section include categories of victims in the text or a footnote to put officers on notice that engaging in, or attempting to engage in, sexual conduct or a sexual relationship with an arrestee, witness, complainant, or victim is prohibited.

[2] During the final drafting of this Report, the Department published proposed changes to the Matrix for public comment. One such change was the addition of a category, "Engage in a relationship beyond the scope of official duties" to address violations of the prohibition on fraternization. This misconduct has a proposed presumptive penalty of 20 penalty days, with a range between 10 penalty days and 30 penalty days with dismissal probation. As discussed in here and *supra* at pp. 62- 63, we believe violation of this prohibition should presumptively include a period of dismissal probation.

If there is a second similar offense regarding relationships with witnesses, complainants, or confidential informants after a first offense is penalized, termination is the appropriate penalty, absent extraordinary circumstances.* Finally, the Department should add a category with penalty ranges for fraternization with a suspect, arrestee, or defendant in a criminal case. The presumptive penalty for these cases should be termination because of the inherently coercive nature of the relationship.*

- ❖ In the abuse of authority, discourtesy, and offensive language section, we continue to recommend more significant penalties, including the imposition of dismissal probation when the constitutional rights of civilians have been intentionally violated.

- ❖ The penalty of an unlawful entry into premises is currently assessed according to the extent of the entry, instead of according to the officer's state of mind. Even a *de minimus* entry is a violation of constitutional rights and should be penalized by more than the presumptive three to five days that is currently in the guidelines when such entry is made intentionally, recklessly, and/or in bad faith.

- ❖ We believe the penalty ranges for both interfering with a recording/recording device and deleting information from a recording device should be the same and should have the presumptive penalty of 30 penalty days plus dismissal probation.

False, Misleading and Inaccurate Statements

- ❖ The first sentence of the guidelines appears to limit the scope of these penalties to false, misleading, and inaccurate statements made during an official investigation. This is too limiting. The phrase "made during an official investigation" should be deleted.

- ❖ The term "official" should be defined. This definition should be broad enough to include all statements made in the course of police-related duties or responsibilities and not just limited to those statements made under oath or in a formal setting such as an official Department interview.

- ❖ To the extent that the definition of "official" does not include false, misleading, or inaccurate statements in Department reports or other paperwork, we believe that a penalty range should be established for making or causing to be made false statements in Department records. While the Department may not believe that the presumption of termination is warranted for certain documentary entries, such as providing incorrect information to the Medical Division regarding a member of the service's whereabouts while on sick leave or submitting a small number of overtime requests with hours the member of the service did not actually work, this type of misconduct appears sufficiently often in Department disciplinary charges to justify its own penalty range.*

- When a denial of recollection is provably false, it should be met with the same presumptive penalty as an official false statement--termination. Denials of recollection should be included under false statements, not misleading statements.

- The definition of "material fact" on p. 31 should be amended to delete the second sentence, which inappropriately narrows the false official statements that would be subject to the presumption of termination.

- Denials made in the course of official Department interviews and CCRB interviews as well as in other official contexts where the denial is a substantive denial (as opposed to a procedural denial, such as entering a plea of not guilty in a criminal proceeding) should not be exempted from the application of the false statement provisions and the presumption of termination.

- The definition of denial on p. 32 states that members of the service can be charged with a false statement if after afforded the opportunity to recollect, they deny specific facts that are proven by credible evidence to have occurred. The inclusion of the phrase "after being afforded the opportunity to recollect" appears to place a requirement on an investigator to show their evidence to the member of the service who is clearly lying. No such requirement should be implied and this phrase should be removed.

- Under the definition of "misleading statement" on p. 32, we recommend that the first bullet point be amended to read, "Intentionally omitting a material fact or facts, as long as the statement, viewed in context, is not false, … ."

- The apparent discrepancy between the definition of an inaccurate statement, the definition of impeding an investigation, and the significantly divergent penalties for both should be reconciled.

- The introduction to the False, Misleading and Inaccurate Statements section indicates that each allegation of a false, misleading or inaccurate statement should be charged separately. (p. 31) There should be clarification regarding whether penalties for each false, misleading or inaccurate statement will be calculated consecutively or concurrently.

- On p. 34, an additional mitigating factor to consider when imposing discipline for false, misleading or inaccurate statements is that the misconduct about which the member of the service is being questioned does not have a presumptive penalty of termination itself, and the false, misleading or inaccurate statement was made to protect the member of the service from embarrassment, especially when the question would call for revelations about interpersonal relationships or health conditions. We recommend modifying this factor to read, "… that the statement was made solely with the intent to avoid personal embarrassment (particularly in the context of interpersonal relationships or health conditions), and not for the purpose of avoiding the discovery of any member of the service's misconduct or the imposition of

discipline." Alternatively, we suggest removing this factor from the list, and if such a situation arises, the Police Commissioner could consider it an extraordinary circumstance to justify a penalty short of termination.

Domestic Violence Incidents

- A definition of "Physical Act of Domestic Violence" should be included.

- For a first intentional violation of an order of protection, dismissal probation should be imposed as part of the penalty.

Driving While Ability Impaired/Intoxicated Incidents

- There should be a higher penalty enhancement for driving with a child in the vehicle than the additional ten-day suspension currently set forth.

- Termination should be the penalty when a member of the service leaves the scene of an accident when the accident could have resulted in serious injury or death, and the member of the service fails to check on the well-being of other persons who were involved in the accident.

Firearm-Related Incidents

- The presumptive penalty for failing to immediately report an improper firearms discharge should be termination unless there are extraordinary mitigating circumstances.

- The penalty range for failing to promptly report a lost firearm should be greater than the 10- to 20-day penalty range currently in effect.

- A presumptive penalty range should be added for the unjustified off-duty display of a firearm and the presumptive penalty should include dismissal probation. The aggravated penalty should be termination or forced separation.

Violations of Department Rules and Regulations

- The presumptive penalty of 20 days for the purposeful failure to record a prescribed event with body-worn camera is too low. The starting point for this misconduct should be 30 penalty days plus dismissal probation.

- A category should be added for failing to report to IAB the alleged misconduct or corruption of other members of the service. The presumptive penalty for this failure should be between 15 and 20 penalty days.[3]

[3] During the final drafting of this Report, the Department published proposed changes to the Matrix. One such change was the addition of the misconduct category of "Fail to report misconduct to Internal Affairs." This

- The guidelines should identify a non-exhaustive list of factors that might warrant an aggravated penalty that includes either dismissal probation or termination for failing to take police action. This list could include: whether the failure resulted in or had the potential to result in injury or death to a person; whether the incident involved an individual who was particularly vulnerable; whether the incident involved a domestic offense,* a violent crime, or was part of a pattern; whether there were repeated duty failures; whether the incident involved a supervisory failure; and whether the failure involved a member of the service's effort to hide their own misconduct or the misconduct of another member of the service. We are recommending the addition of "incidents involving domestic offenses" to the list of aggravating factors due to the potential for these types of incidents to escalate quickly with severe consequences and to reinforce the necessity for officers to respond to these incidents appropriately at their outset.

- The guidelines should have specific presumptive penalties added for failing to request the response of a supervisor when required and failing to notify a supervisor of an incident when required.

- The guidelines currently prescribe a penalty range of three to ten days for failing to prepare a required report, with five days as the presumptive penalty. While this may be generally sufficient, we believe that the failure to prepare a complaint report should have a more significant penalty. This report initiates investigations and without the preparation of the report, the appropriate Department unit will not have knowledge of the alleged crime, negating the possibility of an investigation and an arrest. Additionally, commanding officers may not become aware of patterns within their commands and may not deploy their personnel in the most effective manner. On a large scale, failure to prepare complaint reports also obscure the true crime rate.*

- While a schedule C command discipline may be appropriate for vehicle pursuits that are outside Department guidelines and related policy violations in some cases, (p. 55) there should also be a category in the guidelines with an attached penalty range. Often, there is other misconduct associated with unauthorized vehicle pursuits and the pursuit is included with other specifications. Further, a command discipline is not sufficient when the unauthorized vehicle pursuit results in injury to another person. We would recommend that when a pursuit is unauthorized and a person is injured as a consequence of the pursuit, that penalties similar to those for the use of less-lethal physical force be set forth. Aggravating factors could include failing to put the pursuit over the radio, failing to terminate a pursuit when ordered to do so, the consequences of any pursuit, and whether the pursuit was initiated and continued for an insufficient reason given the risk to the public.*

misconduct has a proposed presumptive penalty of 10 penalty days, which can be decreased to five penalty days if mitigating factors are present or increased to 20 penalty days if aggravating factors are present.

Off-Duty Misconduct & Prohibited Conduct Generally

- The presumptive penalty range for causing the incorrect rate of vehicle insurance to be applied should be greater than the 5- to 15-day penalty currently in effect.

- While the guidelines have a category for Unfit for Duty that has a presumptive penalty of 30 penalty days, dismissal probation, ordered breath testing, and cooperation with counseling that can be increased up to termination, that misconduct is contained in the Off-Duty Misconduct & Prohibited Conduct section. Another category should be added for Unfit for Duty while On-Duty that has a more severe presumptive penalty.*

Equal Employment Opportunity Division and the Discipline System

- The terms "suggestive sexual touching" and "overt sexual touching/intimate physical contact" should be defined.

- The presumptive penalty for sexual harassment with suggestive touching should be increased from the current 25 penalty days to include a period of dismissal probation.

Command Disciplines

- Schedule C command disciplines should not be available for computer misuse and the dissemination of confidential Department information except in limited circumstances.

- Schedule C command disciplines should also not be available for misconduct involving the misclassification of complaint reports and failing to supervise.

COMMISSIONER BIOGRAPHIES

The individuals listed below served on the Commission as this Report was being developed, drafted, and/or finalized.

Kathy Hirata Chin, Acting Chair

Kathy Hirata Chin is a Partner at Crowell & Moring LLP, where she is a member of the healthcare and litigation groups. She served as Commissioner on the New York City Planning Commission from 1995 to 2001 and has served as a Commissioner on the New York City Commission to Combat Police Corruption since August 2003. She has served on the Federal Magistrate Judge Merit Selection Panel for the Eastern District of New York, Governor Mario Cuomo's Judicial Screening Committee for the First Department, the Gender Bias Committee of the Second Circuit Task Force, former Chief Judge Judith Kaye's Commission to Promote Public Confidence in Judicial Elections, the Board of Directors of the New York County Lawyers Association, and the Board of Directors of New York Lawyers for the Public Interest, a non-profit that advocates for marginalized New Yorkers. She currently serves on the Attorney Emeritus Advisory Council and the Commercial Division Advisory Council, appointed to both by former Chief Judge Jonathan Lippman of the New York State Court of Appeals; Co-Chair of the Board of Directors of the Medicare Rights Center, a national nonprofit organization dedicated to helping older adults and people with disabilities get affordable health care; and as a member of the Board of EmblemHealth. Since 2016, she has served on the Governor's First Department Judicial Screening Committee and on the Second Circuit Judicial Council Committee on Civic Education & Public Engagement. In 2012, 2014, and 2021 she was nominated for appointment to the New York State Court of Appeals by the New York State Commission on Judicial Nomination. She has received the NYC Bar's Diversity and Inclusion Champion Award, the Women's Leadership Award of the Asian American Bar Association of New York, the inaugural Hong Yen Chang Awards from Columbia APALSA and the Columbia Law School Association and the 2022 Daniel K. Inouye Trailblazer Award from the National Asian Pacific American Bar Association.

Jabbar Collins (since May 12, 2023)

Jabbar Collins is a former adjunct professor at St. John's Law School and President of Horizon Research Services, a consulting firm providing legal research and writing for appellate, civil rights, and criminal defense attorneys, particularly with respect to municipal liability based on police and prosecutorial disciplinary practices. A frequent lecturer on criminal justice issues, Mr. Collins is also an Instructor for Continuing Legal Education courses on the New York Freedom of Information Law, federal habeas corpus, and post-conviction litigation. In 1995, Mr. Collins was wrongfully convicted of murder and spent 16 years in prison before he was exonerated in 2010, largely due to his own legal work. A federal judge dismissed all charges against him and barred a retrial through a rare unconditional writ of habeas corpus, finding his conviction resulted from egregious prosecutorial misconduct. His resultant civil litigation exposed systemic misconduct and resulted in one of the largest wrongful conviction settlements

in New York City history. While incarcerated, Mr. Collins worked as a Legal Research Instructor, assisted several men in successfully challenging their convictions, and established a Second Circuit precedent recognizing prisoners' Fourteenth Amendment right to information necessary to make informed decisions regarding medical treatment. His legal work following his exoneration resulted in several wrongfully convicted men being freed, including a man who served 27 years in prison for a crime he did not commit.

Clifton Stanley Diaz (until December 22, 2022)
Clifton Stanley Diaz presently works with the NYPD as a Community Partner and currently serves as the Chairman of the Rochdale Village Board as well as the Chairman of their Public Safety Committee. He is a member of the Queens Community Board 12, and Chairman of their Public Safety Committee; a board member of the Queen District Attorney's Advisory Council; a board member of the Queens Defenders; and he also serves as a Queens Judicial Delegate. He participated with Mayor De Blasio in implementing the NYPD Customer Service Program which has a civilian greet a person when they enter any police station to file a complaint or seek information. He previously served as a Law Enforcement Officer with the United States Air Force Security Police where he worked in the area of crime prevention and community relations. He also had the additional duty of serving as a United States Federal Court Liaison. Upon his discharge from the military, Mr. Diaz worked as an Internal Affairs investigator with the New York City Department of Transportation, which now falls under the jurisdiction of the New York City Police Department. He later served as an Assistant Director of Public Safety at Queens College (CUNY), and as a Police Detective with the United States Department of Veterans Affairs. In 1988, Mr. Diaz was responsible for successfully reintroducing a failed Community Board 12 motion to have the street in front of the 103rd Precinct named after Police Officer Edward R. Byrne – who was protecting the home of a witness in a narcotics case and was shot and killed while sitting in a marked patrol car. Mr. Diaz was later appointed to work with the Mayor's Southeast Queens Anti-Drug Task Force Coalition. Mr. Diaz is a graduate with honors from the New York City College of Technology (CUNY), attended the City College of New York (CUNY) and graduated from the National Crime Prevention Institute. Mr. Diaz has received a joint City Council Proclamation from all three southeast Queens area City Council Members: Donavan Richards – now Queens Borough President, I. Deneek Miller and Adrienne E. Adams – now Speaker of the City Council for his outstanding work in Public Safety and he was recently inducted into the New York State Senates "Hall of Fame."

Randall W. Jackson (since February 24, 2023)
Randall W. Jackson is a Partner in the Litigation Department at Willkie Farr & Gallagher LLP, where he is Co-Chair of the White-Collar Defense Practice Group. Mr. Jackson graduated from Harvard Law School, where he was a Senior Editor of the Harvard Civil Rights Civil Liberties Law Review, and Morehouse College. Mr. Jackson focuses on government and internal investigations, white collar criminal defense, complex civil litigation and regulatory compliance. Mr. Jackson is ranked by Chambers USA (2022) as one of the leading attorneys in the area of Litigation: White-Collar Crime & Government Investigations and recognized as a "Litigation Star" in the 2023 edition of Benchmark Litigation. Prior to working in private practice, Mr. Jackson was an Assistant U.S. Attorney for the Southern District of New York, where he was a

senior member of the Securities Fraud, Public Corruption and Terrorism and International Narcotics Unit. Mr. Jackson has served as lead or co-lead attorney in over 20 federal trials, including some of the longest and most complicated in recent history. In 2022, he co-led the defense to a complete acquittal of client Thomas Barrack, founder of Colony Capital, in a highly publicized trial in the Eastern District of New York alleging illegal foreign lobbying, obstruction of justice and other charges. In 2019, Mr. Jackson co-led the successful defense against securities fraud charges brought by U.S. Department of Justice against shipbuilding executive Jean Boustani, securing a complete acquittal on all counts after a two-month long jury trial in the Eastern District of New York. In 2013, as a prosecutor, Mr. Jackson successfully co-led the six-month long prosecution of five lieutenants of Bernard L. Madoff. Mr. Jackson has also briefed and argued numerous appeals before the U.S. Courts of Appeals. He was awarded the U.S. Department of Justice's Distinguished Service Award in 2011 and the John Marshall Award in 2014 for his work as a prosecutor on the Times Square Bomber and Madoff cases, respectively.

Deborah E. Landis (until March 31, 2023)
Deborah E. Landis is a consultant who provides investigative assistance and litigation support to other attorneys. She focuses primarily on white-collar criminal and regulatory matters. Ms. Landis served as an Assistant United States Attorney for the Southern District of New York for more than twenty years, investigating and prosecuting cases involving police corruption, perjury, narcotics trafficking, racketeering, money-laundering, tax fraud, and other fraud on the government. As Chief of the General Crimes Unit and as Senior Litigation Counsel, she also had responsibility for supervising and teaching other prosecutors. During 2000, Ms. Landis served the Department of Justice (DOJ) in Washington, D.C., acting as an Associate Deputy Attorney General and as DOJ's Special Counsel for Health Care Fraud. Ms. Landis received many awards for her work as a prosecutor, including the Henry L. Stimson Medal for Outstanding Contributions to the Office of the United States Attorney, which was awarded by the Association of the Bar of the City of New York (1999), and the Attorney General's John Marshall Award for Trial of Litigation (2000). Ms. Landis also taught Trial Advocacy at the Harvard Law School for many years. Ms. Landis earned her JD from the University of Wisconsin Law School.

Freya Rigterink (since December 31, 2021)
Ms. Rigterink is the Executive Director of the Policing Project. As Executive Director, Ms. Rigterink oversees the Policing Project's day-to-day operations and initiatives. She also leads the organization's Reimagining Public Safety portfolio. Ms. Rigterink came to the Policing Project with a background in municipal government and oversight. Most recently, Ms. Rigterink served as Chief of Staff to the First Deputy Mayor for New York City, where she focused on public safety and the City's pandemic response, among other areas. Prior to that, Ms. Rigterink served as the Senior Advisor for Criminal Justice to the First Deputy Mayor, overseeing the City's plan to close the jails on Rikers Island and other initiatives to build a smaller, safer, and fairer justice system. Before joining the New York City Mayor's Office, Ms. Rigterink worked as an Assistant Inspector General for the City of Chicago Office of the Inspector General, where she focused on investigations, agency performance, and police accountability. Earlier in her career, Ms. Rigterink co-founded a start-up that expands educational and engagement opportunities for incarcerated people. Ms. Rigterink has also held a variety of policy and

legislative roles at the New York City Council. Ms. Rigterink holds a BA from Wesleyan University and a JD from Northwestern University.

Benjamin E. Rosenberg (since February 26, 2023)
Benjamin E. Rosenberg has been a partner at Dechert since 2005. He focuses his practice on white collar criminal defense and securities litigation, with a specific emphasis on defending executives and corporations in connection with governmental investigations, and proceedings of federal grand juries and offices of the United States Attorney, the Securities and Exchange Commission, the Attorney General of New York, and the New York District Attorney. He has appeared in federal and state appellate and trial courts, and before administrative tribunals, in civil, regulatory, and criminal matters. In 2013, he was ranked by The Legal 500 U.S. for his white-collar criminal defense practice, and was recognized by The International Who's Who of Business Crime Defense Lawyers. Mr. Rosenberg twice left Dechert to serve in government. He took an 18-month leave of absence from Dechert beginning in 2007 to serve as the Chief Litigation Counsel of the New York State Attorney General. He was in charge of the Office's most high-profile investigation, and led the AG's team investigating unlawful student lending practices. He also represented the Office in successfully defending the constitutionality of New York's lis pendens statute. From 2014 through 2016, Mr. Rosenberg served as the General Counsel to the Manhattan District Attorney, where he represented the District Attorney in both trial-level and appellate courts, and was deeply involved in the District Attorney's cyber-related initiatives, as well as his forfeiture and conviction integrity programs. Following graduation from Harvard Law School, Mr. Rosenberg clerked for the Honorable Judge Edward R. Becker of the United States Court of Appeals for the Third Circuit, and from 1990 to 1994 he was an Assistant United States Attorney in the criminal division in the Southern District of New York, where he tried and investigated cases involving narcotics trafficking, identification theft, perjury and obstruction of justice, and gang violence. Mr. Rosenberg teaches as a Lecturer in Law at Columbia Law School, and as a Lecturer in American Studies at Columbia University. He has written extensively, including articles about grand jury practice, conspiracy law, discovery under the Federal Rules of Criminal Procedure, petit jury instructions, sentencing matters, and harm and loss calculations in financial cases. Several of the articles have been cited in federal and state courts. Mr. Rosenberg was twice nominated (in 2015 and 2016) to serve on New York's Court of Appeals.

James D. Zirin
James D. Zirin has been a trial lawyer for over 40 years, handling a wide variety of white-collar criminal and complex commercial litigation, and has served on the Commission since August 2003. Mr. Zirin is a former Assistant United States Attorney for the Southern District of New York. He is also a fellow of the American College of Trial Lawyers, a past trustee of New York Law School, a past member of the advisory board of the Woodrow Wilson School of Public and International Affairs at Princeton University, a former director and member of the executive committee of the Legal Aid Society, a member of the Council on Foreign Relations, and a past vice president and trustee of the Federal Bar Council. Mr. Zirin is the host of the critically acclaimed cable TV talk show "Conversations with Jim Zirin" and author of three best-selling books: "The Mother Court--Tales of Cases That Mattered in America's Greatest Trial Court",

"Supremely Partisan -- How Raw Politics Tips the Scales in the United States Supreme Court," and his current book "Plaintiff in Chief-A Portrait of Donald Trump in 3500 Lawsuits Supreme Court."

COMMISSION STAFF

Marnie L. Blit, Executive Director
Murad Agi, Examining Attorney
Christina Arno (until January 28, 2023)
Kathy Barrett, Examining Attorney
Tamela Gaither, Examining Attorney
Agnes Kusmierska, Examining Attorney
Uyen Tang, Examining Attorney
Cristina Stuto, Office Manager