



**NYC**

**COMMISSION TO COMBAT POLICE CORRUPTION**

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# **Report on Matrix Penalties for Failure to take Police Action**

October 2021

**Commissioners**

Kathy Hirata Chin, Acting Chair

Deborah E. Landis

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Joseph Berkman-Breen  
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Dear Mr. Berkman-Breen:

As per your request, the Commission to Combat Police Corruption is submitting the attached Comment (and Appendix) for the first review period of the NYPD's Disciplinary System Penalty Guidelines. We refer to the Guidelines as the Disciplinary Matrix or the Matrix in the Comment. Our Comment specifically addresses whether the presumptive penalty range for "Failure to take police action" that is set forth in the Matrix is sufficient to address all of the misconduct that is included in this category. The Matrix lists the presumptive penalty as the forfeiture of 20 penalty days, which can be decreased to as low as 10 days in the presence of mitigating factors, or increased to as high as 30 days in the presence of aggravating factors.

We begin our Comment by discussing the framework of the Matrix, specifically explaining that several categories of misconduct can be included under the term "Failure to take police action." Next, we describe the methodology we used to evaluate the adequacy of the presumptive penalty. We then provide examples of cases that we believe would not have been sufficiently addressed by even the aggravated end of the penalty range. Our Comment concludes with seven recommendations to improve the Matrix and the discipline it prescribes for this misconduct. As you will see, we believe that the aggravated penalty should be increased up to termination and that the Matrix should set forth certain factors as aggravating and mitigating.

We appreciate your confidence in our ability to address this issue and we welcome any questions or comments you may have.

Sincerely,  
The Commission to Combat Police Corruption



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## INTRODUCTION

In January 2021, pursuant to a recommendation made by the Independent Panel on the Disciplinary System of the New York City Police Department<sup>1</sup> and a local law passed by the New York City Council,<sup>2</sup> the Department published and implemented a disciplinary matrix (“the Matrix”) that assigned presumptive penalties to various types of police misconduct. The presumptive penalty can be decreased to a minimum-specified penalty if mitigating factors are present, or increased to a maximum-specified penalty where aggravating factors are present.

During the City Council’s hearings regarding police reform, some Council members expressed concern about the adequacy of the presumptive penalty range for an officer’s failure to take police action. This concern stemmed from a 2017 incident in which two officers responded to a 911 call of a fight in an apartment building but did not get out of their vehicle or conduct any investigation before characterizing the assignment as “unnecessary” and leaving. Later, a woman who had been strangled by her husband was found dead at the location.<sup>3</sup>

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<sup>1</sup> The Report of the Independent Panel of the Disciplinary System of the New York City Police Department, (January 25, 2019) at pp. 51-52.

<sup>2</sup> N.Y. Administrative Code §14-186 (effective July 15, 2020).

<sup>3</sup> This case is discussed further at p. 10.

As part of the Police Reform package passed in March 2021, the City Council required an outside oversight agency to examine the adequacy of the presumptive penalties for officers who fail to take police action. Because the Commission to Combat Police Corruption (“CCPC” or “the Commission”) examines and reports annually on disciplinary actions taken by the Department against uniformed officers – including officers disciplined for failing to take police action – the Mayor’s Office asked CCPC to examine this issue and provide its views on the adequacy of the Matrix provisions addressing this type of misconduct. We submit this Comment in response to that request.

As discussed below, the phrase “failure to take police action” encompasses a broad spectrum of misconduct. For the most part, the Commission views the current Matrix provisions as sufficient to provide appropriate discipline for misconduct that falls at the less serious end and the middle of that spectrum. However, the current penalty provisions do not include the options of termination or placement on dismissal probation for more serious misconduct.

The Department is currently conducting a formal review of the Matrix that will include an opportunity for public comment.<sup>4</sup> We hope the information and recommendations set forth in this Comment will aid the Mayor’s Office, the City Council, the Department and other interested parties in evaluating the adequacy of the current provisions and remedying existing deficiencies.

## **FRAMEWORK OF THE MATRIX**

The phrase “failure to take police action” encompasses a wide variety of misconduct. Some types of misconduct, such as failing to respond promptly to a radio run or failing to make a required notification, may be relatively minor, while other types, such as failing to take

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<sup>4</sup> The Matrix is designed to undergo periodic review, and the first review commenced on July 15, 2021. A public comment period is expected to begin this fall.

investigative steps or failing to make an arrest, are typically far more significant, carrying the potential for serious or even deadly consequences. The Matrix contains no single category of misconduct covering all forms of failure to take police action, but instead contains penalties for several categories of misconduct that arguably fall under that broad umbrella.

The section of the Matrix that corresponds most closely to the type of misconduct that is the subject of this Comment falls under the heading “Violation of Department Rules and Regulations.” This section provides presumptive penalty ranges for numerous specific acts of misconduct, including failure to invoice property, failure to prepare a required report, failure to document an investigative encounter, and failure to supervise. More importantly for present purposes, this section includes a general catchall category captioned “Failure to take police action,” a phrase that is not defined. For this category of misconduct, the Matrix calls for penalties ranging from the forfeiture of 10 days to the forfeiture of 30 days.<sup>5</sup> Absent any aggravating or mitigating factors, the presumptive penalty is 20 days; the minimum penalty (with mitigating factors) is 10 days, and the maximum penalty (with aggravating factors) is 30 days. More serious penalties – such as dismissal probation and termination – are not included. No specific mitigating or aggravating factors are identified in this particular section of the Matrix; however, general mitigating and aggravating factors applicable to all categories of misconduct are listed at the beginning of the Matrix.<sup>6</sup>

Other sections of the Matrix address other types of relevant misconduct. For example, the section covering “Use of Excessive Force” and “Abuse of Authority, Discourtesy, and

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<sup>5</sup> A penalty day would either be a day that the officer was suspended or a vacation day forfeited for disciplinary purposes.

<sup>6</sup> See [www1.nyc.gov/site/nypd/about/about-nypd/policy/nypd-discipline-Matrix.page](http://www1.nyc.gov/site/nypd/about/about-nypd/policy/nypd-discipline-Matrix.page), Mitigating and Aggravating Factors, at pp. 9-10 of pdf.

Offensive Language” includes a penalty range for the intentional or reckless failure to obtain medical assistance and a separate penalty range for the negligent failure to obtain medical assistance. Another section sets forth failures to take action that can, if appropriate, be addressed through command discipline rather than the Department’s more formal disciplinary process.<sup>7</sup> These include failure to make proper notifications; failure to make routine inspections and surveys as required; failure to perform duties in connection with court appearances; failure to properly perform patrol or another assignment; failure to submit reports in a timely manner; and failure to respond, report a disposition promptly, or acknowledge a radio call directed to an officer’s unit.

Applying the Matrix retrospectively is not necessarily straightforward and it can therefore be difficult to determine precisely what penalty range is applicable. In the cases we reviewed, many officers were charged with several violations, some of which do not fit into any of the categories in the Matrix. In addition, the Matrix provides that only a single penalty should be applied when the charges result from one underlying act of misconduct, but separate presumptive penalties should be applied for each distinct act of misconduct for which there is a finding or admission of guilt.<sup>8</sup> Where acts of misconduct are closely related or took place at virtually the

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<sup>7</sup> A command discipline, or “CD,” is typically imposed by the officer’s commanding officer and is used for misconduct that is considered minor. The Department Advocate’s Office (DAO), the Civilian Complaint Review Board (CCRB), and the Internal Affairs Bureau (IAB) can also issue command disciplines that are classified as Schedule A or B. Schedule A disciplines carry a penalty of the forfeiture of up to 5 vacation days and are removed from an officer’s personnel file once a year has passed if there have been no further disciplinary incidents. Schedule B command disciplines carry a penalty of up to 10 days and must be approved by DAO. Schedule B command disciplines can be sealed after a period of 3 years if the officer affirmatively requests this. A third type of CD, a Schedule C command discipline, can be issued instead of charges and specifications in order to expedite the resolution of a disciplinary matter. Only DAO has the power to issue Schedule C command disciplines and they cannot be removed from the officer’s personnel records. These command disciplines carry a penalty of up to 20 vacation days.

<sup>8</sup> For example, in connection with a given incident, an officer might not only fail to conduct a proper investigation, but also fail to fill out required reports and fail to make required notifications. The officer might then make false or misleading statements when questioned in official Department interviews. An officer who makes a false or misleading statement could be charged with that misconduct as well as the underlying misconduct.

same time, it can be difficult to predict whether penalties would be imposed concurrently or consecutively. Additionally, the Matrix permits a single penalty “when the effort to maintain a balance between punishment, deterrence and remediation is undermined by consecutive penalties.”<sup>9</sup> Other factors that may come into play in applying the Matrix include the officer’s disciplinary and performance history, and the Department Advocate’s Office’s (DAO’s) evaluation of the strength of the evidence, including the availability and credibility of witnesses.<sup>10</sup>

The Matrix provides important guidance but the Police Commissioner retains ultimate discretion under the law to impose disciplinary penalties.<sup>11</sup> However, if the Commissioner imposes a penalty that deviates from the Matrix, the reasons for that deviation must be explained and memorialized.<sup>12</sup>

## **METHODOLOGY**

The Commission began its review by examining all disciplinary charges adjudicated during the period from October 2016 through February 2021, which totaled more than 1,800. We were generally satisfied that the penalty ranges set forth in the Matrix for specific duty failures such as failure to obtain medical assistance and failure to complete reports are

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<sup>9</sup> See [www1.nyc.gov/site/nypd/about/about-nypd/policy/nypd-discipline-Matrix.page](http://www1.nyc.gov/site/nypd/about/about-nypd/policy/nypd-discipline-Matrix.page) Calculation of Penalties at pp. 12-13.

<sup>10</sup> DAO is the unit within the Department that is responsible for prosecuting disciplinary cases against members of the service.

<sup>11</sup> Some members of the City Council have sought to divest the Police Commissioner of final decision-making authority over disciplinary penalties. As of this writing, the law has not been changed, and we take no position here on the merits of that proposal.

<sup>12</sup> There is a lack of clarity in the Matrix itself as to whether the Police Commissioner need only explain deviations from the full range of possible penalties, or whether an explanation is required for any deviation from the penalty recommended by DAO, the Administrative Prosecution Unit of the CCRB, or a Trial Commissioner, even if the penalty falls within the full range of options under the Matrix.

appropriate.<sup>13</sup> We therefore focused our attention on cases involving conduct that would fall under the Matrix’s general catch-all category of “Failure to take police action” if those cases were brought today. The process of identifying these cases necessarily involved a degree of subjectivity because the potentially relevant cases were all resolved prior to implementation of the Matrix in January 2021.

We identified 86 disciplinary cases involving conduct that we believe would be characterized as “Failure to take police action,” under the Matrix. We analyzed the basic facts of each case to ascertain the penalty that would likely apply to those facts under the Matrix, and then considered 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 will 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.<sup>14</sup>

In analyzing the sufficiency of this range, we focused on the conduct of the officers involved, and whether those officers held supervisory authority, a factor which in our view generally warrants an increased penalty.<sup>15</sup> Moreover, we tried to consider only the misconduct that constituted a failure to take police action, disregarding to the extent practical other

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<sup>13</sup> Indeed, we observed that the presumptive range in the Matrix for failure to obtain medical assistance calls for higher penalties than those that were typically imposed in the past, and thus reflect an improvement. We thought the presumptive penalties for failing to complete reports should be higher in some cases, but we viewed those penalties as sufficient where multiple charges were brought, and where the penalty for failure to file reports was imposed consecutively.

<sup>14</sup> 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](http://www1.nyc.gov/site/nypd/about/about-nypd/policy/nypd-discipline-Matrix.page), “Goals of the Disciplinary System” at p. 3.

<sup>15</sup> 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

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 insufficient as a penalty for an officer with no disciplinary history, it would be equally if not more insufficient for an officer who had previously been disciplined.

We recognize, as mentioned above, that the Police Commissioner has authority to impose a penalty outside the presumptive range set forth in the Matrix, and thus the 30-day maximum we used in our analysis is not absolute. However, it seems unlikely that such deviation will occur frequently.

## **ANALYSIS**

Of the 86 cases of failure to take police action we identified and analyzed, we concluded in 48 cases (55.8%) that the presumptive penalty range would have been sufficient to promote the objectives underlying the Matrix. However, we identified 36 cases for which even the aggravated presumptive penalty of 30 days would not have been adequate to address the misconduct.<sup>16</sup> These cases, which involved a total of 37 officers, revealed misconduct so serious that, in our view, the penalty should have been greater than 30 days. Among the factors that elevated the seriousness of the misconduct in these cases were the officer's failure to protect particularly vulnerable persons, the degree of actual or potential danger created by the officer's dereliction of duty, and/or the complete abdication of the officer's responsibilities.

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<sup>16</sup> 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. In one of the cases, the officer had been on dismissal probation when the misconduct occurred and was summarily terminated. In the second case, the officer was terminated by operation of law after a criminal conviction for narcotics trafficking.

We provide below examples of cases in which we found the presumptive penalty range was insufficient. Because our focus was the Matrix penalty, we chose these cases as examples of situations where the Matrix penalty standing alone would have been inadequate, even while recognizing that because of other charges and such factors as the officer's prior disciplinary history, the discipline actually meted out by the Department was often greater than the Matrix penalty and therefore adequate. To avoid suggesting otherwise, we have included as an Appendix to this Comment a chart that includes more detailed analysis and comparison of the Matrix penalties and actual penalties imposed for each example.

### **Failure to Protect Vulnerable Persons**

When an officer fails to take action to protect vulnerable individuals who lack the ability to protect themselves, a maximum penalty of 30 days is not sufficient, as demonstrated by the following examples. In cases such as these, the officers should be terminated or at least placed on dismissal probation:

**Case 1:** A police officer assigned to the Special Victims Division listened as a six-year-old child described beatings he received at the hands of his stepfather, which included being kicked in the stomach and beaten with a belt. The police officer took no action. He did not notify a supervisor, he did not interview the stepfather, he did not memorialize the information in any report, and he did not speak with an assistant district attorney. Six weeks later, the child was treated in the emergency room after his stepfather severely abused him again.

**Case 2:** A police officer present at a precinct's reception window was approached by a mother who reported that her two children, ages 9 and 12, were missing. The children had not returned home after having had breakfast at their school five hours earlier. The officer instructed the mother to "give it some time" and then call 911. He told the mother, falsely, that he could not take a report at the precinct. Four hours later, the mother called 911. The children were located in another borough the following day.

In these two cases, despite the clear possibility that young children were in great danger, the officers took no action to help. The child in the first case suffered further harm, which could have been prevented. The children in the second case were fortunately found safe, but had they

been lost, injured or abducted, valuable time would have been lost because the officer failed to provide assistance.

**Case 3:** An officer and his partner responded to a call of an attempted abduction of a three-year-old child. When they arrived at the location, they did not exit their vehicle to speak with the child's mother. They told the mother that she should go to the location of the attempted abduction the following day and determine whether there was video of the incident. They instructed her to file a complaint at the precinct if she found video. They did not interview the child's grandmother, who had been present and had thwarted the attempted abduction, but rather disposed of the job as "unnecessary" and left the location. The mother pursued her complaint, and other officers were later able to identify and capture the alleged perpetrator.<sup>17</sup>

In this case, the officer failed to take any investigative steps after being alerted to an attempted child abduction. Instead, the officer placed the onus of initiating the investigation on the child's mother. If the mother in this case had been discouraged and had abandoned her complaint after her interaction with this officer, a potential kidnapper would not have been caught. The Department should not retain an officer who fails to exercise even the most basic responsibilities of his job, yet for this conduct the Matrix does not provide for termination or even dismissal probation.

### **Failure to Take Even Minimal Police Action**

Where officers fail to take minimal investigative steps such as interviewing victims, conducting canvasses, recording witnesses' pedigree information, reporting a potential crime to a supervisor, or even exiting their vehicle, a maximum penalty of 30 days is again not sufficient. Termination or dismissal probation is called for.

**Case 4:** An officer and his partner responded to a 911 call of an assault in progress after teenagers punched a victim, causing bleeding. Upon the officers' arrival, they encountered the 911 caller, an eyewitness to the incident. While speaking to the 911 caller from inside their car, they learned that the victim had been removed from the location by his family to seek medical treatment. The subject officer observed blood on the sidewalk. The two officers left the location, purportedly to search for the victim,

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<sup>17</sup> The officer's partner later resigned.

although they had obtained no description of him. They did not secure the crime scene, canvass for video, collect pedigree information for the eyewitness, or visit the only nearby hospital to try to locate the victim. Instead, they returned to the precinct and disposed of the assignment as “gone on arrival” without ever notifying a supervisor about the crime.

The victim was later identified and found to have suffered serious injuries. At his Department mitigation hearing, the subject officer’s only explanation was that he was tired and that his partner was inexperienced, so he had carried the bulk of the workload during their shift. As noted by the Trial Commissioner who presided over the hearing, the officer was “inexcusably derelict in the most basic duty to investigate an alleged assault.”

Some of the cases in which officers failed to take even minimal action involved significant consequences. In both of the following examples, a civilian’s life might have been spared had the responding officers taken any investigative steps.

**Case 5:** Two officers responded to a complaint of a physical dispute in progress on the second floor of an apartment building. Upon arriving at the location, the officers slowed down their vehicle but did not stop and did not exit their vehicle. Seeing no one outside, the officers tried to contact the 911 caller but were unsuccessful. The officers left the location without taking any further action. Approximately 90 minutes later, the same officers responded to another call at the same location regarding an unconscious female. Upon arrival, they found the female who had been involved in the earlier dispute. She was deceased, having been strangled by her husband.

**Case 6:** Two officers responded to a location after a civilian called 911 to report a person outside who was moaning and in pain. The officers drove to the location and rolled down their windows. Hearing nothing, they contacted the 911 caller, who reported that she still heard the person in the front yard. The officers waited a few minutes and then left the location without ever exiting their vehicle to inspect the area. Upon their return to the precinct, they disposed of the assignment as “unnecessary.” Two hours later, other officers responded to the same location in response to a call reporting an unconscious male. Those officers found a male in the front yard, behind a fence. He was deceased, with a gunshot wound that had severed a major artery in his abdomen. The family filed a civil lawsuit against the City.

In cases such as these, where an officer’s failure to take even the most minimal investigative steps may well have contributed to a loss of life, a 30-day penalty is plainly insufficient. For the protection of the public, and to deter such gross dereliction of duty in the future, these officers should have been terminated or at the very least placed on dismissal probation.

## **Repeated Failures to Perform Responsibilities**

Where officers fail to take necessary investigative steps and fail to do so on multiple occasions, the maximum penalty of 30 days is insufficient. Termination or dismissal probation is necessary.

**Case 7:** A detective prepared 10 reports indicating that he had visited addresses and interviewed witnesses as part of his investigation into 9 different cases. Eight of those cases involved motor vehicle break-ins, and the ninth case involved a residential break-in. The detective prepared reports using addresses that did not exist and citing interviews with the same witnesses across multiple cases; he cut witness names from one report and pasted them into another. In fact, the detective had never conducted any of these interviews; by completing the reports using false information he was able to close the 9 cases. When interviewed, he admitted preparing false reports, stating that his unit was short-staffed and he was overwhelmed.

This officer's behavior called into serious question whether he was capable or willing to perform the duties required of a police officer. It is possible that an officer who committed this misconduct would be charged with making false records in addition to his failure to investigate, but the failure to investigate alone, given the number of instances, calls into question whether an officer who repeatedly failed to fulfill his investigative responsibilities should remain employed by the Department.

## **Failure to Make an Arrest in Cases of Actual or Potential Physical Harm**

When officers fail to arrest a person who is present before them when they have probable cause to believe the person has committed a violent crime, they create a potentially dangerous situation for the public and their fellow officers. A maximum penalty of 30 days is not adequate.

**Case 8:** An auxiliary police officer called 911 to report that he had observed a male for whom there was an outstanding warrant for child molestation. Housing police officers were the first to arrive on the scene, and the auxiliary officer identified the suspect to them. The housing police officers made contact with the suspect and had him in their presence when two other officers (the officers who were disciplined) responded. The auxiliary officer spoke with them as well. He provided them with his pedigree information and showed them a picture he had taken from a news report containing a photograph of the wanted individual. They thanked the auxiliary officer, and he left.

After telling the two housing officers that they would handle the situation, the two officers released the suspect without properly identifying him. They took no steps to determine whether there was, in fact, a warrant for his arrest, and if so, for what offense. Instead, they left the scene.

The officers maintained when questioned that they needed more information but that when they turned to question the auxiliary officer, he had already left the scene. However, they made no effort to locate the auxiliary officer through the communications division.

Fortunately, the auxiliary officer was far more diligent. He called the officers' sergeant, who checked and learned that the suspect was not in custody. A warrants team located and arrested the suspect.

**Case 9:** After a vehicle accident, a male complainant was assaulted and forced to withdraw \$200 from an ATM to pay the three occupants of the other car, which had been damaged. The complainant called for police. Two officers responded, and required the three perpetrators to return the \$200 to the complainant. The officers stated that they would prepare an accident report, but while the complainant was retrieving identification from his nearby home, they let the perpetrators leave without collecting any pedigree information. Dissatisfied, the complainant requested a supervisor. The sergeant who responded was dismissive and condescending to the complainant. He failed to prepare a complaint report and failed to report the actions of the two other officers to IAB. The three perpetrators were never identified and never arrested.

In this case, the Commission believed a penalty in the presumptive penalty range might have been sufficient for the officers who originally responded because they at least took some action to remediate the situation. The sergeant, however, was a supervisor; by failing to take any action he modelled improper behavior for the other officers and implicitly approved their misconduct. In our view, supervisors who neglect their responsibilities in ways such as this should be subject to possible placement on dismissal probation.

**Case 10:** Two officers responded to a domestic incident in which a woman reported that her common-law husband had threatened to set their house on fire and burn her face.<sup>18</sup> The woman showed the officers an order of protection that prohibited the husband from harassing or annoying her. The expiration date on the order of protection was unclear. The officers could have conducted or requested a computer check to determine if the order of protection was still valid but did not do so. As they left the location, the officers encountered and spoke with the husband. According to the husband, the officers told him

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<sup>18</sup> The Commission only reviewed the disciplinary case for one of these officers for this Comment.

that he had to leave the location because of the order of protection. They did not arrest the husband, and they disposed of the case as “no offense committed.” Officers assigned to the Domestic Violence Investigation Unit (DVIU) responded shortly thereafter and arrested the husband.

Had there been no response by the DVIU, these officers’ failure to make an arrest in this “must-arrest” situation could have resulted in harm far more serious than harassment, including physical injury to the complainant.<sup>19</sup>

When officers fail to arrest a suspect who is present before them, particularly where the conduct involves actual or potential physical harm, they fail to perform their most basic police duties. The Commission questions the benefit of retaining an officer who is unwilling to fulfill such fundamental responsibilities; at the very least, the officer’s job performance should be closely monitored.

### **Failure to Take Custody of a Firearm**

Some cases involved officers who came across firearms in the course of their duties but failed to take those weapons into custody when it was clearly their responsibility to do so. A maximum penalty of 30 days is not adequate for such failure to take police action.

**Case 11:** The subject officer and his partner, a probationary officer, responded to the home of a domestic violence victim after she reported having found a firearm in the home. Her husband had been arrested the day before for assaulting her. Instead of notifying his supervisor and taking custody of the firearm, which had a defaced serial number, the officer engaged the safety lock, returned the firearm to the complainant, and instructed her to take the firearm to the precinct. The officer left the location and disposed of the job as “unnecessary.” The complainant took the firearm to the precinct and upon her return home, found her husband at the location, retrieving items that included ammunition for the firearm.

**Case 12:** The subject officer and his partner responded to a call of a robbery with a firearm. Upon arriving at the location, the officers saw three men leaving a building and followed them in an attempt to determine if they were involved in the robbery. Video footage recovered later showed one of the males dropping a firearm and a magazine on the sidewalk while the officers were 20-30 feet behind them. The video clearly showed the subject officer stopping when he approached the firearm, looking down at it, and then continuing without picking it up. He took no action to notify or request a supervisor. An

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<sup>19</sup> Patrol Guide §208-36 requires that an offender who is present must be arrested when probable cause exists that there was a violation of the terms of an order of protection.

unidentified civilian was observed later in the video picking up the firearm. The weapon was never recovered.

When questioned about this incident, the subject officer stated that he did not realize that the object was a firearm when he observed it. However, when shown a still photo taken from the video, the officer agreed that the object depicted appeared to be a firearm.

These two incidents presented obvious risks of harm. In the first case, the officer left an illegal firearm in the home of a domestic violence victim, relying on her to transport the firearm to the precinct on her own. Fortunately, she promptly did so. Had she waited, her husband would have had access to the firearm upon returning home, and might have used it to harm her, or to commit other crimes. In the second case, not only did the officer's dereliction of duty lead to a civilian gaining access to a firearm, it also led to the loss of possible evidence (including fingerprints) in an armed robbery case.<sup>20</sup>

Firearms pose obvious dangers to the public in general but also to members of the Department. Failure to take custody of a firearm that might just have been used in a robbery, or of a firearm that was clearly possessed illegally, especially by an individual who had just been arrested for assault, should be met with a penalty of more than 30 days, as well as a period of monitoring.

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<sup>20</sup> As noted in the Appendix, the Police Commissioner believed that dismissal probation should be part of the penalty in this case.

## **RECOMMENDATIONS**

1. 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, which prosecutes most disciplinary actions, 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.
2. 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 to 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 his or her own other 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.

3. 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. Indeed, as seen in the case examples above, many of the fact patterns are quite straightforward. 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. We note that the Department currently has four Trial Commissioners and the trial calendars are not full.
4. 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.
5. 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.

6. 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.
7. 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.

## CONCLUSION

The Commission was asked to review the adequacy of the presumptive penalty range prescribed by the Matrix for failure to take police action. The Matrix sets forth a 20-day presumptive penalty that can be decreased to 10 days if mitigating factors are present or increased to 30 days if aggravating circumstances are present. To perform its analysis, the Commission reviewed all of the disciplinary cases that were adjudicated between October 2016 and February 2021. The Commission found 86 cases that contained misconduct that fell within the category of “Failure to take police action.”

While the Matrix provided sufficient penalties for less serious types of misconduct, it did not adequately address the most serious duty failures, for which dismissal probation or termination is often appropriate. The Matrix should therefore be revised to include dismissal probation and termination as readily available options. While the Police Commissioner has discretion to override the Matrix and impose penalties higher than 30 days for the most serious misconduct, resort to the Police Commissioner’s discretion should be needed only in unusual circumstances.

# APPENDIX

## Case 1

Charges	Matrix Penalty	Penalty Imposed	Comments/Alternate Calculations	CCPC Recommendation
Failed to conduct a proper investigation	Failure to take police action  Penalty: 20 days Mitigated: 10 days Aggravated: 30 days		The subject officer was also transferred for cause	
	<b>Total Presumptive: 20 days</b> <b>Mitigated: 10 days</b> <b>Aggravated: 30 days</b>	<b>Dismissal</b> <b>Probation</b> <b>+ 30 days</b>		<b>Termination</b>

## Case 2

Charges	Matrix Penalty	Penalty Imposed	Comments/Alternate Calculations	CCPC Recommendation
Failed to interview complainant and obtain information necessary to complete a complaint report worksheet	Failure to take police action  Penalty: 20 days Mitigated: 10 days Aggravated: 30 days			
Failed to notify Desk Officer	Not addressed in the Matrix		Could be considered a failure to make a notification, which can be addressed with an A CD and carry a penalty of up to 5 days	
Failed to prepare a complaint report worksheet and missing persons reports	Failure to prepare a required report  Penalty: 5 days Mitigated: 3 days Aggravated: 10 days			
	<b>If viewed as separate violations: Total Presumptive: 25 days Mitigated: 13 days Aggravated: 45 days</b>	<b>20 days</b>	<b>If viewed as one course of conduct: Total Presumptive: 20 days Mitigated: 10 days Aggravated: 30 days</b>	<b>Dismissal Probation, if not Termination</b>

### Case 3

Charges	Matrix Penalty	Penalty Imposed	Comments/Alternate Calculations	CCPC Recommendation
Failed to prepare complaint report worksheet	Failure to prepare a required report  Penalty: 5 days Mitigated: 3 days Aggravated: 10 days			
Failed to conduct a thorough investigation	Failure to take police action  Penalty: 20 days Mitigated: 10 days Aggravated: 30 days			
Failed to call a patrol supervisor to the scene	Not addressed in the Matrix		Could be considered a failure to make a notification, which can be addressed with an A CD and carry a penalty of up to 5 days	
Conduct Prejudicial (Failed to exit RMP upon interviewing a witness)	Conduct Prejudicial:  Penalty: None specified Mitigated: Training Aggravated: Termination		Failing to exit RMP is not addressed in the Matrix	
Conduct Prejudicial (failed to give a prompt disposition)	Conduct Prejudicial: Penalty: None specified Mitigated: Training Aggravated: Termination		Failed to report a disposition promptly can be addressed with a B CD and carry a penalty of up to 10 days	
	<b>If viewed as separate violations:            Total Presumptive: 25 days            Mitigated: 13 days            Aggravated: Termination</b>	<b>20 days</b>	<b>If viewed as one course of conduct:            Total Presumptive: 20 days            Mitigated: 10 days            Aggravated: 30 days</b>	<b>Dismissal            Probation</b>

### Case 4

Charges	Matrix Penalty	Penalty Imposed	Comments/Alternate Calculations	CCPC Recommendation
Failed to take police action and failed to properly investigate	Failure to take police action:  Penalty: 20 days Mitigated: 10 days Aggravated: 30 days			
Failed to notify a patrol supervisor	Not addressed in the Matrix		Could be considered a failure to make a notification, which can be addressed with an A CD and carry a penalty of up to 5 days	
Failed to promptly report a disposition to radio dispatcher	Not addressed in the Matrix		Failing to report a disposition promptly can be addressed with a B CD and carry a penalty of up to 10 days	
	<b>If viewed as separate violations:</b> <b>Total Presumptive: 20 days</b> <b>Mitigated: 10 days</b> <b>Aggravated: 45 days</b>	<b>25 days</b>	<b>If viewed as one course of conduct:</b> <b>Total Presumptive: 20 days</b> <b>Mitigated: 10 days</b> <b>Aggravated: 30 days</b>	<b>Dismissal</b> <b>Probation</b>

### Case 5 (Officer One)

Charges	Matrix Penalty	Penalty Imposed	Comments/Alternate Calculations	CCPC Recommendation
Failed to perform officer's duty in that failed to take police action and properly investigate a radio run	Failure to take police action:  Penalty: 20 days Mitigated: 10 days Aggravated: 30 days			
	<b>Total Presumptive: 20 days</b> <b>Mitigated: 10 days</b> <b>Aggravated: 30 days</b>	<b>Dismissal</b> <b>Probation + 30 days</b>		<b>Termination</b>

### Case 5 (Officer Two: Subject Officer had Two Cases)

Charges	Matrix Penalty	Penalty Imposed	Comments/Alternate Calculations	CCPC Recommendation
First Case Charges				
Failed to perform officer's duty in that failed to take police action and properly investigate a radio run	Failure to take police action  Penalty: 20 days Mitigated: 10 days Aggravated: 30 days			
Second Case Charges				
Discourteous to civilian	Discourtesy  Penalty: 5 days Mitigated: 1 day Aggravated: 10 days			
Refused to provide name and shield upon request	Failure/refusal to provide name/shield number  Penalty: 3 days Mitigated: Training Aggravated: 5 days		The matrix allows this to also be addressed with a B CD, which carries a penalty of up to 10 days	

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Charges	Matrix Penalty	Penalty Imposed	Comments/Alternate Calculations	CCPC Recommendation
Made inaccurate and misleading statements to CCRB	Intentionally making a misleading official statement:  Penalty: Dismissal Probation + 30 days Mitigated: 20 days Aggravated: Termination		If treated as Making an inaccurate official statement:  Penalty: 10 days Mitigated: 5 days Aggravated: 15 days	
	<b>If second case was viewed as separate violations:</b> <b>Total Presumptive: Dismissal Probation + 58 days</b> <b>Mitigated: 31 days + Training</b> <b>Aggravated: Termination</b>	<b>Dismissal Probation + 45 days</b>	<b>Total Presumptive: 38 days</b> <b>Mitigated: 16 days + Training</b> <b>Aggravated: 60 days</b>  <b>If in the second case, the first two charges were considered one course of conduct:</b> <b>Total Presumptive: 35 days</b> <b>Mitigated: 16 days</b> <b>Aggravated: 55 days</b>	<b>Termination</b>

### Case 6

Charges	Matrix Penalty	Penalty Imposed	Comments/Alternate Calculations	CCPC Recommendation
Failed to conduct a proper field investigation	Failure to take police action  Penalty: 20 days Mitigated: 10 days Aggravated: 30 days			
	<b>Total Presumptive: 20 days</b> <b>Mitigated: 10 days</b> <b>Aggravated: 30 days</b>	<b>33 days</b>		<b>Dismissal</b> <b>Probation, if not</b> <b>Termination</b>

### Case 7

Charges	Matrix Penalty	Penalty Imposed	Comments/Alternate Calculations	CCPC Recommendation
10 Counts of Conduct Prejudicial for making false entries in the business records of the Department	Conduct Prejudicial  Penalty: None specified Mitigated: Training Aggravated: Termination		If Intentionally making a false official statement  Penalty: Termination Mitigated: Forced Separation	
This case did not have charges specifically addressing the officer's failure to take police action, most likely because the administrative statute of limitation had expired.	<b>Total Presumptive: None</b> <b>Mitigated: Training</b> <b>Aggravated: Termination</b>	<b>Vested Interest</b> <b>Retirement +</b> <b>Dismissal</b> <b>Probation + 90</b> <b>days +</b> <b>demotion +</b> <b>forfeiture of all</b> <b>time/leave</b> <b>balances +</b> <b>retire on</b> <b>suspended</b> <b>status</b>	<b>Total Presumptive: Termination</b> <b>Mitigated: Forced Separation</b>	<b>Termination</b>

### Case 8

Charges	Matrix Penalty	Penalty Imposed	Comments/Alternate Calculations	CCPC Recommendation
Failed to render police services in that failed to arrest an individual who had an active warrant	Failure to take police action  Penalty: 20 days Mitigated: 10 days Aggravated: 30 days		These charges could have been considered as addressing the same underlying misconduct, therefore only meriting a single penalty	
Failed to conduct an investigation in that released an individual without conducting a proper warrant check	Failure to take police action  Penalty: 20 days Mitigated: 10 days Aggravated: 30 days			
	<b>If viewed as separate violations:</b> <b>Total Presumptive: 40 days</b> <b>Mitigated: 20 days</b> <b>Aggravated: 60 days</b>	<b>20 days</b>	<b>If viewed as one course of conduct:</b> <b>Total Presumptive: 20 days</b> <b>Mitigated: 10 days</b> <b>Aggravated: 30 days</b>	<b>Dismissal</b> <b>Probation</b>

### Case 9 (Subject Officer had Two Cases)

Charges	Matrix Penalty	Penalty Imposed	Comments/Alternate Calculations	CCPC Recommendation
First Case Charges				
Failed to prepare or direct the preparation of a complaint report worksheet	Failure to prepare a required report  Penalty: 5 days Mitigated: 3 days Aggravated: 10 days			
Failed to properly supervise officers under his direct supervision	Failure to supervise  Penalty: 20 days Mitigated: 15 days Aggravated: 30 days		Matrix provides that this can be addressed with a C CD with a penalty of up to 20 days	
Failed to report an allegation of misconduct to IAB	Not addressed in the Matrix		Could be considered a failure to make a notification, which can be addressed with an A CD and carry a penalty of up to 5 days	
Failed to make activity log entries	Omitted activity log entries  A CD penalty of up to 5 days			
Second Case Charges				
Failed to prepare or ensure preparation of an accident report-City involved and/or an aided report	Failure to prepare a required report  Penalty: 5 days Mitigated: 3 days Aggravated: 10 days			

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Charges	Matrix Penalty	Penalty Imposed	Comments/Alternate Calculations	CCPC Recommendation
Failed to follow Department procedures and failed to supervise properly police officers under his direct supervision	Failure to supervise  Penalty: 20 days Mitigated: 15 days Aggravated: 30 days		The Matrix provides that this could be addressed with a C CD with a penalty of up to 20 days  This charge also includes a failure to follow Department procedures regarding the handling of an assignment involving an emotionally disturbed person and/or barricaded person, which is not addressed in the Matrix	
Conduct Prejudicial (entered or damaged a door to an apartment without sufficient legal authority)	Conduct Prejudicial  Penalty: None Mitigated: Training Aggravated: Termination		This could also be covered by Unlawful entry of premises pursuant to a public service/safety function  Penalty: Training Mitigated: None Aggravated: 1 day	
<b>If all charges are viewed as separate violations:</b>	<b>Total Presumptive (both cases): 50 days</b> <b>Mitigated: 36 days + Training</b> <b>Aggravated Termination</b>	<b>30 days</b>	<b>Total Presumptive (both cases): 50 days + Training</b> <b>Mitigated: 36 days + Training</b> <b>Aggravated: 91 days, which under the Matrix requires Termination</b>	<b>Dismissal Probation</b>
<b>If Failure to prepare report charges are treated as part of the Failure to supervise charges, thereby addressed with one penalty</b>	<b>Total Presumptive (both cases): 40 days</b> <b>Mitigated: 30 days + Training</b> <b>Aggravated: Termination</b>	<b>30 days</b>	<b>Total Presumptive (both cases): 40 days + Training</b> <b>Mitigated: 30 days + Training</b> <b>Aggravated: 71 days</b>	<b>Dismissal Probation</b>

### Case 10 (Subject Officer had Two Cases)

Charges	Matrix Penalty	Penalty Imposed	Comments/Alternate Calculations	CCPC Recommendation
First Case Charges				
Interfered with an official Department investigation in that failed to cooperate with investigators	Impeding an investigation  Penalty: Dismissal Probation + 30 days Mitigated: 20 days Aggravated: Termination			
Conduct Prejudicial (wrote entries in an unauthorized notebook that were not related to official Department business)	Conduct Prejudicial:  Penalty: None Mitigated: Training Aggravated: Termination		Conducting personal business while on duty:  Penalty: 10 days Mitigated: 5 days Aggravated: 15 days	
Second Case Charges				
Failed to verify the existence of an order of protection	Failure to take police action  Penalty: 20 days Mitigated: 10 days Aggravated: 30 days			
Failed to take police action by seeking further information of alleged offender or effecting an arrest	Failure to take police action  Penalty: 20 days Mitigated: 10 days Aggravated: 30 days			

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Charges	Matrix Penalty	Penalty Imposed	Comments/Alternate Calculations	CCPC Recommendation
Made misleading statements during an official Department interview (charged as Conduct Prejudicial)	<p>Intentionally making a misleading official statement</p> <p>Penalty: Dismissal            Probation + 30 days            Mitigated: 20 days            Aggravated:            Termination</p>		<p>If charged as Conduct Prejudicial:</p> <p>Penalty: None            Mitigated: Training            Aggravated:            Termination</p>	
	<p><b>If viewed as separate violations:</b></p> <p><b>Total Presumptive (both cases):</b>            Dismissal            Probation + 110 days (under the Matrix this would lead to termination)            Mitigated: 65 days + training            Aggravated:            Termination</p>	<p><b>Dismissal            Probation + 40 days</b></p>	<p><b>Total Presumptive (both cases):</b>            Dismissal Probation + 70 days            Mitigated: 45 days + Training            Aggravated:            Termination</p>	<p><b>Termination</b></p>

## Case 11

Charges	Matrix Penalty	Penalty Imposed	Comments/Alternate Calculations	CCPC Recommended
Failed to take custody and voucher a firearm and ammunition	Fail to invoice property  Penalty: 10 days Mitigated: 5 days Aggravated: 20 days		The matrix also permits the failure to invoice property to be addressed with a C CD, which would carry a penalty of up to 20 days	
Failed to report immediately to the patrol supervisor and platoon commander the discovery of a defaced firearm	Not addressed by the Matrix		Could be considered a failure to make a notification, which can be addressed with an A CD and carry a penalty of up to 5 days	
Failed to transmit an accurate disposition to the radio dispatcher	Making an inaccurate official statement  Penalty: 10 days Mitigated: 5 days Aggravated: 15 days		It is not clear that the Department would use this category to address this charge	
Improperly failed to render proper services in that failed to properly investigate the circumstances of a found firearm and failed to search premises	Failure to take police action  Penalty: 20 days Mitigated: 10 days Aggravated: 30 days			
Conduct Prejudicial (allowed a civilian to transport a firearm from her home to Department facility)	Conduct Prejudicial  Penalty: None Mitigated: Training Aggravated: Termination			

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Charges	Matrix Penalty	Penalty Imposed	Comments/Alternate Calculations	CCPC Recommendation
Failed to follow Department procedures for the handling and the processing of a firearm	Not addressed in the matrix		This would probably be covered by the other charges and not assessed a separate penalty	
	<b>If viewed as separate violations:</b> <b>Total Presumptive: 49 days</b> <b>Mitigated: 23 days</b> <b>Aggravated: Termination</b>	<b>30 days</b>	<b>If viewed as one course of conduct:</b> <b>Total Presumptive: 20 days</b> <b>Mitigated: 10 days</b> <b>Aggravated: 30 days</b>	<b>Dismissal Probation</b>

## Case 12

Charges	Matrix Penalty	Penalty Imposed	Comments/Alternate Calculations	CCPC Recommendation
Failed to secure a firearm and magazine observed in the street	Failure to safeguard a firearm resulting in its loss or possession by another  Penalty: 20 days Mitigated: None Aggravated: Dismissal Probation + 30 days		Failure to take police action  Penalty: 20 days Mitigated: 10 days Aggravated: 30 days	
Failed to immediately notify a supervisor and failed to invoice abandoned property at the command	Failure to invoice property  Penalty: 10 days Mitigated: 5 days Aggravated: 20 days		Matrix allows the failure to voucher property to be addressed with a C CD, which can carry a penalty of up to 20 days  Regarding the failure to notify a supervisor, the closest provision is the failure to make notifications, which the Matrix allows to be addressed by an A CD, which carries a penalty of up to 5 days	

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Charges	Matrix Penalty	Penalty Imposed	Comments/Alternate Calculations	CCPC Recommendation
	<p>If viewed as separate violations:  <b>Total Presumptive: 30 days</b>  <b>Mitigated: 25 days</b>  <b>Aggravated: Dismissal Probation + 50 days</b></p>	<p><b>Dismissal Probation + 30 days (as increased by Police Commissioner, DAO had recommended only a 25-day penalty)</b></p>	<p><b>Total Presumptive: 30 days</b>  <b>Mitigated: 15 days</b>  <b>Aggravated: 50 days</b></p> <p>If viewed as one course of conduct and failure to safeguard a firearm used:  <b>Total Presumptive: 20 days</b>  <b>Mitigated: none</b>  <b>Aggravated: Dismissal Probation + 30 days</b></p> <p>If viewed as one course of conduct and Failure to take police action:  <b>Total Presumptive: 20 days</b>  <b>Mitigated: 10 days</b>  <b>Aggravated: 30 days</b></p>	<p><b>Dismissal Probation</b></p>