CAPTAINS ENDOWMENT ASSOCIATION
POLICE DEPARTMENT CITY OF NEW YORK

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VIA FACSIMILE & ELECTRONIC MAIL
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Re: Civilian Complaint Review Board's Proposed Rule Changes

Dear Ms. Cook:

The Captains Endowment Association submits this letter on behalf of our more than 800 executive members, who do the difficult and dangerous work of supervising police officers of all ranks in protecting every resident, visitor, and business in New York City. We present our concerns and objections with respect to certain of the Civilian Complaint Review Board's ("CCRB" or the "Board") proposed changes to its rules published in June 2022 (the "Proposals").

I. The Proposed Definitions Relating to Alleged Bias

Bias-motivated police conduct is reprehensible and can never be condoned. As such, it must always be addressed when it occurs. Allegations of bias-based policing acts have long been the jurisdiction of the NYPD Internal Affairs Bureau, the five District Attorneys, the United States Attorney's offices for the Eastern and Southern Districts of New York, and, under Administrative Code § 14-151, the New York City Commission on Human Rights

CCRB's proposed new rules are overbroad and their proposed new definitions of "bias-based policing" and "severe act of bias" violate existing law because they lack an objective standard to properly account for the statutory distinction between an act of "bias" vis a vis a "severe" act of bias.

A. CCRB's Proposed Definition of "Bias-Based Policing" seeks to expand the Scope of the 2021 Charter Amendment

With the 2021 Charter amendment, the City Council granted CCRB a new category of "abuse of authority" jurisdiction for "bias-based policing."[1] The Council expressly defined an

[1] Charter § 440(c)(1).

"act of bias" for purposes of this amendment as "an act stemming from a specific incident: (i) that is motivated by or based on animus against any person on the basis of race, ethnicity, religion, gender, sexual orientation or disability, and (ii) that the board is empowered to investigate pursuant to paragraph 1 of subdivision c of section 440."[2] As noted above, prior to this amendment, CCRB did not have jurisdiction over acts of bias-based policing, which CCRB referred to the IAB. The City Council made this clear in the Committee Report leading to the amendment:

> "The CCRB is authorized by the Charter to deal with four kinds of public complaints against police officers: excessive force, abuse of authority, discourtesy, and offensive language. If a member of the NYPD displays bias while policing, there are two potential routes for investigation of the action: through the IAB if the allegation is that the actions an officer took (or did not take) were biased, or through the CCRB if the complaint only alleges that offensive language was used. If a complainant alleges both that the NYPD officer took some type of action (or refrained from taking an action) based on the complainant's protected status and an offensive remark was made, the IAB will retain the action allegation while the CCRB will investigate the offensive language allegation. Proposed Int. No. 2212-A would clarify the CCRB's power to investigate bias-based policing and racial profiling complaints made by the public.[3] "

In Charter § 441(a), the City Council specified the bias-based acts that fall within this new grant of jurisdiction to CCRB: "motivated by or based on animus against any person on the basis of race, ethnicity, religion, gender, sexual orientation or disability." This list is exhaustive. The Council did not include any language to suggest otherwise. Moreover, this definition controls the use of the term "bias" in both Charter § 441 and Charter § 440(c)(1). These provisions were added to the Charter as part of the same legislative amendment, and therefore CCRB is required to interpret them the same.[4]

CCRB's proposed definition of "bias-based policing" includes matters that go beyond the categories listed in the statutory definition in Charter § 441(a). The proposed "bias-based policing" definition in the rules includes "an act of a member of the force of the Police Department that relies on actual or perceived creed, age, immigration or citizenship status, gender, sexual orientation, disability, or housing status as the determinative factor." *The proposed definition includes matters that are not included in the Charter's definition, and thus remain outside CCRB's jurisdiction* and within the jurisdiction of the IAB and the Commission on Human Rights. Indeed, the City Council has demonstrated that it knows how to include a

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[2] Charter § 441(a).

[3] City Council, Committee on Civil and Human Rights Report (Mar. 25, 2021), at 10-11 (*available at* https://legistar.council.nyc.gov/View.ashx?M=F&ID=9264678&GUID=6761309B-CF0A-48E0-AC6E-C0398022E0A3).

[4] *Albany Law Sch. v. N.Y. State*, 19 N.Y.3d 106, 121 (2012) (statutes passed as part of the same legislative session addressing the same subject matter must be interpreted consistently).

broader definition when it intends to do so, because in Administrative Code § 14-151, the Council expressly granted jurisdiction to the Commission on Human Rights over categories that it did not include in its grant of jurisdiction to CCRB.[5]

Accordingly, the proposed definition of "bias-based policing" must be revised to be consistent with the statutory definition under Charter § 441(a).

B. The proposed Definition of "Severe Act of Bias" Is Overbroad and Subjective

The proposed definition of "severe act of bias," is also improper because it is (i) so overbroad, encompassing an enormous range of conduct, that it would effectively read "severe" out of the Charter, in violation of the legislative mandate; and (ii) defectively vague and subjective, depriving officers and the public of any predictability and allowing for inconsistent application.

In the Charter amendment, the City Council recognized that alleged acts covered by this new jurisdiction are subject to varying degrees, creating a statutory distinction between "act of bias" and "severe act of bias."[6] This distinction carries significant consequence, because, in addition to the connotation carried by the label itself, pursuant to this new statutory scheme, where a covered entity has found in a final determination that an officer committed a "severe act of bias," CCRB "shall" conduct a past professional conduct investigation, whereas the past professional conduct investigation is permissive where the covered entity makes a final determination of "an act of bias other than a severe act of bias."[7] As discussed above, the City Council defined "act of bias" in the Charter, but it did not define "severe act of bias."

CCRB's proposed definition of "severe act of bias" is "an act of bias by a member of the Police Department that (i) causes death, physical injury, or serious psychological or economic injury to the victim(s) of the act, (ii) subjects the victim(s) of the act to demeaning, degrading, or humiliating treatment, or (iii) involves criminal conduct, sexual misconduct, threat of violence, or conduct that otherwise shocks the conscience."

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[5] CCRB's statement in the belated memo accompanying its proposed new bias/profiling rules that it relied on Administrative Code § 14-151 as the source of the definition of "bias-based policing" confirms CCRB's error. As noted above, § 14-151 pertains to the jurisdiction of the Commission on Human Rights, not CCRB. CCRB's unilateral adoption of another agency's jurisdictional definition violates the more limited jurisdiction that the City Council granted to CCRB pursuant to Charter § 441(a). Moreover, CCRB's proposed definition fails to comply even with Administrative Code § 14-151, as the proposed definition does not include the several exceptions that are specified in § 14-151, such as when the alleged conduct "(A) is necessary to achieve a compelling governmental interest and (B) was narrowly tailored to achieve that compelling governmental interest." Admin. Code § 14-151(c)(1)(i).

[6] *See* Charter § 441(b)(1).

[7] *Id.*

This definition is overbroad because it fails to account for the City Council's statutory recognition that there are degrees of alleged conduct that may constitute an act of bias. The City Council's choice of the word "severe" creates a high standard to trigger the significant consequence of a mandatory past professional conduct investigation. Moreover, the proposed definition is impermissibly vague and highly subjective, making it impossible for officers, the public, and covered entities to understand where the line is between an "act of bias" and a "severe act of bias." The vagueness and subjective nature of the definition would impermissibly allow for uneven application against officers.[8] CCRB is required to adopt a definition that provides "objective standards for implementing the program."[9]

By way of example, subpart (ii) of the proposed definition is insufficient for two reasons. First, it would require CCRB or a covered entity to somehow make a determination within the state of mind of the alleged victim as to whether that individual felt demeaned, degraded, or humiliated, which is not only highly subjective, but provides no predictability because different persons may have different responses to the same alleged conduct. Second, this subpart entirely fails to do what CCRB was directed to do: account for the City Council's recognition of a sliding scale of conduct, which distinguishes "severe" conduct from lesser conduct. There are varying degrees of conduct that could be characterized as demeaning, degrading, or humiliating, and an alleged act that allegedly creates such a subjective feeling would not in every case be "severe." Indeed, by essentially viewing all such conduct as "severe," the definition swallows the statutory distinction.

Similarly, subpart (iii), for example, incorporates CCRB's defined term "sexual misconduct," but that defined term in itself includes a wide range of alleged conduct, ranging from a single alleged verbal comment to alleged physical conduct. CCRB itself has recognized that there are varying degrees of such allegations, in that when it adopted the resolution in 2018, it created a distinction between Phase 1 and Phase 2 allegations of sexual misconduct based on the perceived degree of the alleged conduct, stating that "[s]exual misconduct exists on a spectrum" and "encompasses a diverse range of behaviors."[10] As such, it is inconsistent and overbroad for CCRB to include the broad phrase "sexual misconduct" within the definition of "severe act of bias" without requiring any inquiry into the degree of the conduct alleged.[11]

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[8] *N.Y. Statewide Coalition of Hispanic Chambers of Commerce v. N.Y. City Dep't of Health & Mental Hygiene*, 2013 WL 1343607, at *20 (Sup. Ct. N.Y. Cty. Mar. 11, 2013), *aff'd*, 110 A.D.3d 1 (1st Dep't 2013), *aff'd*, 23 N.Y.3d 681 (2014).

[9] *In re Law Enforcement Officers Union, Dist. Council 82, AFSCME, AFL-CIO*, 229 A.D.2d 286, 292 (3d Dep't 1997).

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

[11] With respect to subpart (i) of the proposed definition, while CCRB included the term "serious" perhaps as an effort to identify "severe" conduct, the definition provides no predictable or objective standard as to what constitutes "serious" psychological or economic injury for purposes of deeming an act "severe," or how CCRB or a covered entity would purport to get into the mind of the alleged victim to determine whether an alleged victim suffered a psychological injury, let alone the "seriousness" of the alleged

Accordingly, the proposed definition of "severe act of bias" is overbroad and subjective.

II. The Proposed Amendments to §1-33(e), Changing Case Dispositions, are overbroad, unnecessary and unjustified

The CEA also objects to several of the proposed changes to CCRB's case dispositions as set forth in Rule 1-33(e). Specifically, we oppose the amendments to the terms "unsubstantiated," "exonerated," and "unable to investigate."

Seemingly, the reason for the amendments to section 1-33(e) is "to include new terms to describe certain case dispositions that will be easier for the public to understand." (Memorandum in Support of Amendment, dated July 6, 2022). However, the proposed dispositions are not easier to understand, will tend to be misleading, and will permanently taint an officer's permanent record with less-than-complete information about how the case was concluded.

For example, the Board proposes using the term "Unable to Investigate" to replace no less than five different current dispositions - complainant unavailable, alleged victim unavailable, complainant uncooperative, alleged victim uncooperative, and alleged victim unidentified.

This is far too broad.

If a complainant or alleged victim is uncooperative with CCRB's investigation, this must be explicitly noted on the case disposition. The public, and everyone else who reviews the officer's record online, including judges, attorneys, prospective employers, and others must know *why* the CCRB was "unable to investigate." Even if the disposition were to read something like "Unable to Investigate – Complainant Uncooperative," that would be far better than the over-broad, general disposition of "unable to investigate" which is inherently confusing and therefore, misleading. The reason(s) CCRB was "unable to investigate" is crucial to a fair and accurate description on our members' permanent record.

Likewise, the term "Exonerated" should not be eliminated as a case disposition. While we have no objection to the proposed phrase "within NYPD guidelines," this should be *added* to the "Exonerated" disposition, not *replace* it. So, it would read **"Exonerated – Within NYPD Guidelines."** This would be the most accurate and complete disposition for a reader to understand the disposition.

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psychological injury. If CCRB seeks to use serious economic injury as a threshold, it could attempt to remedy these defects by, for example, including a monetary threshold to create an objective standard to distinguish economic injury from "serious" economic injury. Similarly, the reference in subpart (iii) of the proposed definition to "conduct that otherwise shocks the conscience" does not provide sufficient, objective guidance as to what type of conduct the rule purports to encompass. It is improper for CCRB to define a statutory phrase in its rules with another phrase that requires definition.

Under the *status quo*, "Exonerated" is the clearest indication that our members did nothing wrong. This term is not confusing; people understand clearly that the officer acted appropriately. Eliminating the word exonerated seems to be an attempt by the CCRB to stop short of actually saying that our officer has been cleared. To what end? What public policy is served by this?

CCRB has failed to articulate why these changes to case dispositions are even necessary. Were there complaints by members of the public that they were confused? Did police officers complain the dispositions were unfair? Did complainants and/or victims complain? Simply stating in conclusory fashion that the new terms "will be easier for the public to understand" does not justify such a wholesale change to the case dispositions under Rule 1-33(e). As such, these proposed changes should be rejected.

III. The Board Does Not Have the Lawful Authority to Delegate Its New Power to Initiate Complaints

The 2022 amendment to Charter § 440(c)(1) granted the Board new jurisdiction to investigate "complaints initiated by the board" that are within CCRB's jurisdiction. Proposed new Rule 1-14 violates the Charter by purporting to allow the Board to "delegate its power to initiate complaints to the Civilian Complaint Review Board's Chair, Executive Director, General Counsel, or Board member panel."

Nothing in the Charter authorizes the Board to delegate this important new power to initiate complaints. The Charter does not grant the Board any generalized delegation authority. To the contrary, where the City Council intended to grant the Board delegation authority, it explicitly said so. In particular, there are only two limited areas where the Charter grants the Board the ability to delegate its powers. First, Charter § 440(c)(3) provides that the Board may "delegate to and revoke from its executive director" the Board's power to issue subpoenas and institute court proceedings to enforce them. This delegation authority was only recently added to the Charter as part of the 2019 Charter Revision Commission process. Second, Charter § 441(e)(1) provides that the Board may "delegate to and revoke from its chair or executive director" responsibility or authority in connection with past professional conduct investigations. The fact that the Charter expressly identifies two areas where the Board has delegation authority confirms that the Board does not have general delegation authority. Otherwise, these provisions would have been superfluous. The City Council did not grant the Board delegation authority with respect to the new jurisdiction to initiate complaints.

To the extent CCRB is relying on Charter § 440(c)(5) for this proposed rule, that reliance would be misplaced. Section 440(c)(5) states, "The board is authorized, with appropriations available therefor, to appoint such employees as are necessary to exercise its powers, including but not limited to the power to initiate complaints in accordance with paragraph 1 of this subdivision, and fulfill its duties." This provision merely authorizes the Board to hire employees to support the Board in exercising its powers and fulfilling its duties. But § 440(c)(5) does not authorize the Board to delegate its ultimate responsibilities to CCRB's employees. This is made clear by the difference in language in § 440(c)(5) authorizing the Board to "appoint" employees

versus the City Council's use of the word "delegate" in other provisions of the Charter, as discussed above, when the Council intended to grant delegation authority.

The City Council's restriction of this new power to the Board makes sense, because the initiation of a CCRB complaint against an officer – even a complaint that is ultimately deemed meritless – has significant adverse consequences for the officer. Among other things, simply the filing of a compliant impairs the officer's ability to be promoted or transferred or receive certain assignments while the complaint is pending. These consequences are exacerbated due to the inordinate time it takes CCRB to investigate a complaint, as discussed above. Moreover, when the Board initiates a complaint without a complaint from a member of the public, the Board will necessarily be relying on second-hand information. As such, the new power to initiate a complaint must be exercised prudently and narrowly and, as per the Charter, only by the Board itself.

Accordingly, proposed new Rule 1-14 must be stricken because the Board does not have authority to delegate its new power to initiate complaints.

We urge the Board to withdraw the proposed amendments consistent with the concerns raised herein. If you would like to discuss any of my comments, please let me know. If you disagree with any of my comments, I request that the Board provide an explanation of the reasons for its disagreement.

Very truly yours,

Christopher Monahan, President
Captains Endowment Association