

**TESTIMONY OF DARIUS CHARNEY
CENTER FOR CONSTITUTIONAL RIGHTS
TO THE NEW YORK CITY CIVILIAN COMPLAINT REVIEW BOARD
REGARDING THE NEW YORK POLICE DEPARTMENT'S
PROPOSED DISCIPLINARY MATRIX**

September 17, 2020

Good afternoon. My name is Darius Charney, and I am a senior staff attorney at the Center for Constitutional Rights. I would like to thank the Board for providing me this opportunity to offer CCR's views on the New York City Police Department's proposed discipline matrix.

For more than two decades, CCR, in close collaboration with our grassroots partners in the New York City police accountability movement, has used legal, legislative and administrative advocacy to challenge the abusive and discriminatory practices of the NYPD and push for a police department that is more transparent and accountable to the people of New York City. We took part in the legislative campaigns to pass the Community Safety and Right to Know Acts in the New York City Council and more recently were part of the successful statewide campaign to repeal New York Civil Rights Law 50-a, one of the broadest police secrecy laws in the nation. In addition, we have served for the past 12 years as lead plaintiffs' counsel in *Floyd v. City of New York*, the federal civil rights class action lawsuit that successfully challenged the NYPD's unconstitutional and racially discriminatory stop-and-frisk practices and resulted in a federal court injunction requiring, among other things, changes to the NYPD's procedures for disciplining officers found by the CCRB to have committed misconduct during pedestrian *Terry* stops, changes which, seven years later, the Department has unfortunately yet to fully implement.¹

History of the NYPD's Disciplinary Matrix

The proposed discipline matrix we are discussing today is the result of years-long efforts by those communities most heavily impacted by abusive and discriminatory policing in New York City to obtain real transparency and accountability through meaningful discipline of officers who have violated laws, NYPD policies, and New Yorkers' rights. These efforts include the two-year court-ordered community input process in *Floyd*, during which community members identified an officer disciplinary matrix as one of the priority reform recommendations that was submitted to the federal court in May 2018.² Though the current proposed discipline guidelines in this matrix give short shrift to this important context, any discipline matrix that the NYPD uses must reflect the concerns and priorities of those New York City communities that

¹ See *Floyd v. City of New York*, 959 F.Supp.2d 668, (S.D.N.Y. 2013) (requiring that the NYPD Department Advocate's Office "improve its procedures for imposing discipline in response to the Civilian Complaint Review Board's ("CCRB") findings of substantiated misconduct during stops" through "increased deference to credibility determinations by the CCRB, an evidentiary standard that is neutral between the claims of complainants and officers, and no general requirement of corroborating physical evidence."). To date, the NYPD and Court-Appointed Monitor have yet to finalize and submit these new DAO protocols to the *Floyd* court for approval.

² See Ariel Belen, *et al.*, New York City Joint Remedial Process: Final Report and Recommendations at 224-25, *Floyd v. City of New York*, 08 Civ. 1034, Dkt # 597 (May 15, 2018).

have been disproportionately harmed by NYPD officer misconduct. However, in many respects, the proposed matrix does not reflect these concerns and priorities.

Global Problems with the Proposed Matrix

Several of the guidelines in the proposed matrix that apply to all or most misconduct categories will likely undermine meaningful accountability by providing too much discretion or ambiguity and ultimately leading to inconsistent results and unwarranted downward departures from presumptive penalties. These include:

- Inappropriate Potential Mitigating Factors-
 - The proposed matrix repeatedly cites an officer’s “lack or low level of” prior disciplinary history as a mitigating factor that could warrant imposing a less severe disciplinary penalty than the presumptive penalty for the category of misconduct committed by the officer. This is inappropriate in a progressive discipline matrix where the presumptive penalty is already deemed appropriate for an officer’s first instance of misconduct and higher presumptive penalties are in turn set for repeated instances of misconduct by that officer within a given time period.³ Moreover, all NYPD MOS are already duty-bound to always comply with the law and NYPD policy and to treat all civilians they encounter with courtesy, professionalism, and respect and should therefore not be afforded special treatment for doing what are mandatory requirements of their jobs.
 - The matrix also lists several potential mitigating factors that unduly or inappropriately focus and/or place blame on the characteristics or circumstances of the civilian victims of the subject officer’s misconduct. For example, dealing with an intoxicated person, or circumstances where individuals are using rude or “hostile” language. This sets a dangerous precedent and shifts the focus away from officers who are duty bound to behave properly and professionally in all circumstances and who should be held to a higher standard of conduct given their immense power over civilians.
- Use of “the weight of the evidence” to determine the presumptive penalty- In its introductory explanation of presumptive penalties, the proposed matrix specifies that “the weight of the evidence must be assessed and the availability of witnesses must be considered when contemplating the appropriate penalty in a case.” However, the weight of the evidence is only relevant to determining whether the preponderance of the evidence standard necessary for the CCRB to substantiate a misconduct allegation and/or for the subject officer to be found guilty at a Departmental disciplinary trial has been met. By contrast, using the weight of the evidence as a basis to decrease or eliminate a

³ See, e.g., Denver Sheriff Department, *Discipline Handbook: Conduct Principles and Disciplinary Guidelines* (Nov. 12, 2013), available at [https://www.denvergov.org/content/dam/denvergov/Portals/744/documents/handbooks/Handbook%20-%20Complete%20with%20Appendices%20-%20Revised%20November%2012%202013%20\(2\).pdf](https://www.denvergov.org/content/dam/denvergov/Portals/744/documents/handbooks/Handbook%20-%20Complete%20with%20Appendices%20-%20Revised%20November%2012%202013%20(2).pdf)

disciplinary penalty for an officer who the CCRB and/or an NYPD administrative trial judge has already found by a preponderance of the evidence has committed misconduct would perpetuate the very problem identified by the federal court in Floyd, which held that the DAO's practice of reducing penalties or refusing to discipline officers with CCRB-substantiated misconduct allegations because of supposed concerns about the weight of the evidence demonstrated the NYPD's deliberate indifference to unconstitutional stop-and-frisk behavior by its officers.⁴ Thus, the weight of the evidence of an officer's misconduct should play no role in determining presumptive disciplinary penalty for an officer who the CCRB and/or an NYPD trial judge has found committed misconduct, nor should it be considered as a mitigating or aggravating factor.

Stop/Frisk/Search and Body-Worn Camera Issues

- Training as the Presumptive Penalty for Improper Stops/Frisks/Searches/Seizures based on an "Objectively Reasonable Mistake of Fact or Law"- In the section on presumptive penalties for various misconduct categories involving "abuse of authority, discourtesy and offensive language," the proposed matrix lists "training" as the presumptive "penalty" for an improper pedestrian stop or frisk, vehicle stop or search, and search or seizure of a person that is based on a so-called "objectively reasonable mistake of fact or law," a term that is defined nowhere in the matrix. However, civil rights and police accountability advocates have seen this term before. It is a central component of the federal court-created qualified immunity doctrine,⁵ which legal experts have long recognized as one of the primary obstacles to obtaining real accountability for police misconduct that violates fundamental constitutional rights.⁶ The NYPD should not now adopt this standard to also shield officers from internal disciplinary accountability for improper stops, frisks and searches. Moreover, because the matrix also lists "good faith or reasonable mistake of fact or law" and "complexity of legal analysis as applied to facts" as potential mitigating factors for all ADO misconduct categories, these separate "objectively reasonable mistake" stop, frisk and search presumptive penalty categories are unnecessary and superfluous and should therefore be removed from the matrix altogether.
- Penalties for limited categories of body-worn camera violations- While the proposed matrix includes presumptive penalties for negligent and purposeful failure to record a

⁴ *Floyd v. City of New York*, 959 F.Supp.2d 540, 618-19 (S.D.N.Y. 2013).

⁵ See *Ricciuti v. N.Y.C Transit Auth.*, 124 F.3d 123, 127 (2d Cir. 1997) ("The doctrine of qualified immunity shields police officers from being subject to personal liability for damages. . . insofar as it was *objectively reasonable* for such officials to believe, *even if mistakenly*, that their conduct did not violate [constitutional] rights.") (emphasis added);

⁶ See, e.g., *Jamison v. McClendon*, 16-CV-595, 2020 WL 4497723 (S.D. Miss. Aug. 4, 2020); *Thompson v. Clark*, 14-CV-7349, 2018 WL 3128975 (E.D.N.Y. June 26, 2018) (Weinstein, J.); Hon. Jon O. Newman, "Here's a Better Way to Punish Police: Sue Them for Money," THE WASHINGTON POST, June 23, 2016, available at https://www.washingtonpost.com/opinions/heres-a-better-way-to-punish-the-police-sue-them-for-money/2016/06/23/c0608ad4-3959-11e6-9ccd-d6005beac8b3_story.html; Erwin Chemerinsky, "How the Supreme Court Protects Bad Cops," THE NEW YORK TIMES, August 26, 2014, available at <https://www.nytimes.com/2014/08/27/opinion/how-the-supreme-court-protects-bad-cops.html>

prescribed event on a body-worn camera (BWC), it does not address a myriad of other BWC policy-related violations which CCR has learned through its *Floyd* remedial work and the CCRB has learned through its FADO misconduct investigations are very prevalent and can significantly hinder internal and external efforts to detect and hold officers accountable for misconduct. These include officers' failing to record portions of mandatory recording events by turning the BWC on too late (e.g. after the officer has already begun questioning a person during a Terry stop) or turning it off too early (i.e. before the encounter with the civilian has ended). In addition, there continues to be a widespread problem throughout the Department of officers failing to properly tag and categorize the BWC videos they record on each tour, which, given the large number of videos an officer typically records on a given tour, makes it very difficult for NYPD supervisors and investigators to locate and review videos of particular incidents after-the-fact. Each of these failures is a violation of mandatory requirements of the NYPD's Body-Worn Camera Policy,⁷ and the matrix should also include separate presumptive penalties for them.

Conclusion:

In sum, the aforementioned issues with the NYPD's proposed matrix undermine its stated goals and must be remedied before we can confident that the NYPD's disciplinary systems can meaningfully address the officer misconduct that continues to harm our most vulnerable communities in any meaningful way. Thank you.

⁷ See NYPD P.G. § 212-123 ¶¶ 4, 16-19.