

MEMORANDUM

To: Civilian Complaint Review Board CCRB)
FROM: Darius Charney, Director Racial Profiling/Biased Policing Investigations Unit
Date: July 8, 2022
Re: Changing CCRB's Rules to Incorporate CCRB's New Jurisdiction under Local Law 47 (2021) to Investigate Racial Profiling, Bias-Based Policing, and Past Professional Conduct of Certain NYPD Members

The New York City Civilian Complaint Review Board (“CCRB” or “the Board”) investigates civilian complaints of excessive force, abuse of authority, discourtesy, and offensive language (“FADO”), as well as the truthfulness of statements made by members of the New York City Police Department (“NYPD”) to CCRB during CCRB’s investigation of complaints.¹ Abuse of authority is the broadest category under CCRB’s jurisdiction, and it refers to the type of misconduct in which NYPD officers misuse their police powers.

On March 25, 2021, the New York City Council passed Local Law 47 (2021), which amended Chapter 18-A, § 440(c)(1) of the New York City Charter to clarify that the CCRB has the power to investigate complaints of “bias-based policing and racial profiling” under its abuse of authority jurisdiction.²

Local Law 47 also added a new section to Chapter 18-A of the City Charter, § 441, under which the CCRB (i) *shall* investigate “the past conduct in the course of performance of official duties by a current or former member of the police department” whom “a covered entity has found, in a final determination,” to have engaged in a “severe act of bias” within the past five years, and (ii) *may* investigate “the past conduct in the course of performance of official duties by a current or former member of the police department” whom a “covered entity has found, in a final determination,” to have engaged in “an act of bias other than a severe act of bias” within the past five years.³ Section § 441 further provides that certain biased acts—even when committed while off-duty—can trigger a CCRB past professional conduct investigation. It empowers the CCRB to define what constitutes a “severe act of bias,” to designate which covered entities can make final determinations that trigger CCRB past professional conduct investigations, and to define, “in consultation with each covered entity,” what constitutes that entity’s “final determination.”⁴

CCRB now proposes certain changes to its agency rules in order to implement the new areas of jurisdiction set forth in Local Law 47 and codified in the City Charter.

¹ N.Y. City Charter, Chapter 18-A § 440(c)(1).

² See N.Y. City Local Law 2021/47 (Int. No. 2212-A), preamble and § 1, available at <https://legistar.council.nyc.gov/LegislationDetail.aspx?ID=4770945&GUID=B5D55B19-D0FD-440C-999F-1708BF09F374>.

³ *Id.* § 3.

⁴ *Id.*

CCRB’s Rule-Making Authority

The New York City Charter authorizes each board or officer governed by the Charter to exercise any power necessary to carry out its Charter-mandated function.⁵

The CCRB’s governing Charter, as amended by Local Law 47 (2021), merely provides a framework for how the agency should function; the CCRB is entitled to “great weight and judicial deference” in interpreting its Charter, particularly in the context of the rulemaking process.⁶ Accordingly, its interpretation of its own charter authority and mandate is proper unless that interpretation “is irrational, unreasonable, or inconsistent with the governing statute.”⁷

Part I: The Proposed Rule Changes Regarding Bias-Based Policing and Racial Profiling Investigations Have a Rational Basis and are Consistent with Governing Law

There are two proposed rule changes related to bias-based policing and racial profiling investigations: (1) adding “bias-based policing and racial profiling” to the definition of “Abuse of Authority,” and (2) providing specific definitions for “bias-based policing” and “racial profiling.” Both proposed changes have a rational basis and are consistent with governing law.

As discussed above, identifying racial profiling and bias-based policing as an “abuse of authority” was enshrined in § 440(c)(1) of the New York City Charter by Local Law 47 in March 2021. This change is reasonable and long overdue, given that “selective enforcement of the law” based on race and other protected identity traits violates civilians’ fundamental constitutional rights,⁸ much like improper searches and seizures, which the CCRB has long investigated under its abuse of authority jurisdiction. Discriminatory police practices targeting Black, Latino, Muslim, and other marginalized communities have been “an issue of great public concern”⁹ in New York City for more than two decades, impacting hundreds of thousands, if not millions, of New Yorkers and spawning numerous class action lawsuits and complaints to the New York City Commission on Human Rights.¹⁰ Indeed, the legislative history leading to CCRB’s creation almost thirty years ago reveals that concerns over discrimination—particularly allegations

⁵ N.Y. City Charter, Chapter 49 § 1120.

⁶ *Lynch v. New York City Civilian Complaint Review Bd.*, 64 Misc. 3d 315, 341 (N.Y. Co. 2019), citing *Matter of Toys “R” Us v. Silva*, 89 N.Y.2d 411, 418 (1996).

⁷ *Matter of Lynch v. New York City Civilian Complaint Review Board*, 2022 N.Y. App. Div. LEXIS 4041, *4-5 (1st Dep’t 2022).

⁸ See *Whren v. United States*, 517 U.S. 806, 813 (1996); *Hassan v. City of N.Y.*, 804 F.3d 377 (3d Cir. 2015); *Floyd v. City of N.Y.*, 959 F.Supp.2d 540, 667 (S.D.N.Y. 2013); *Brown v. State of N.Y.*, 89 N.Y.2d 172, 191 (1996); see also N.Y. City Local Law 2013/71 § 1 (The City Council finds that . . . [b]ias-based profiling by the police alienates communities from law enforcement, violates New Yorkers’ rights and freedoms, and is a danger to public safety.”)

⁹ *Floyd v. City of N.Y.*, 283 F.R.D. 153, 159 (S.D.N.Y. 2012).

¹⁰ See, e.g., *Hassan v. City of N.Y.*, *supra* note 8 (religious profiling); *Baerga v. City of N.Y.*, 21-cv-5762 (S.D.N.Y.) (biased policing on the basis of psychological disability); *In the Matter of Make the Road New York v. New York City Police Dep’t*, Case No. M-P-N-17-27554 (N.Y. City Comm’n on Human Rights)(biased policing on the basis of national origin/language); *D.H. v. City of N.Y.*, 16-cv-7698 (S.D.N.Y.)(biased policing of transgender women); *In the Matter of Picture the Homeless Inc. v. New York City Police Dep’t*, Case No. M-I-J-16-1034067 (N.Y. City Comm’n on Human Rights)(biased policing on the basis of housing status); *Raza v. City of N.Y.*, 998 F.Supp.2d 70 (S.D.N.Y. 2013)(religious profiling), *Floyd v. City of N.Y.*, 959 F.Supp.2d 540 (S.D.N.Y. 2013)(racial profiling); *Davis v. City of N.Y.*, 10 Civ. 0699 (S.D.N.Y.) (racially-biased policing of public housing residents).

regarding the use of excessive force by NYPD officers against Black and Latino community members—greatly influenced the creation of the agency.¹¹ Moreover, placing racial profiling and biased policing complaints under CCRB’s jurisdiction aligns the agency with *all* the other independent police oversight agencies associated with the twenty largest U.S. police departments, each of which investigates biased policing complaints.¹²

The definition of “bias-based policing” included in the proposed rule changes is, with one modification, taken directly from New York City’s biased-policing statute, Local Law 71 (2013), which is codified in § 14-151 of the New York City Administrative Code.¹³ The modification is that, unlike § 14-151, the “bias-based policing” definition in the proposed rules does not include law enforcement actions that discriminate on the basis of a civilian’s actual or perceived race, color, or national origin. Those discriminatory law enforcement actions are instead covered by the proposed definition for “racial profiling.” This “racial profiling” definition is taken verbatim from the definition of “racial profiling” in the NYPD’s current “Policy Prohibiting Racial Profiling and Bias-based Policing,” (“NYPD Racial Profiling Policy”),¹⁴ which was developed at the direction of and ultimately approved by the federal court in *Floyd v. City of New York*.¹⁵ The NYPD Racial Profiling Policy also specifies that, notwithstanding the inclusion of “race, national origin, and color” in § 14-151’s definition of bias-based policing, an NYPD officer’s conduct with respect to those three protected categories must comply with the standards set forth in the Policy’s (and the proposed rules’) definition of “racial profiling.” Further, § 14-151 specifies that its “bias-based policing” definition does not replace the “rights, procedures and remedies available under the United States Constitution, 42 U.S.C. § 1983, . . . and all other federal law.”¹⁶ The proposed definition of “racial profiling” employs the “motivating factor” standard used to analyze racial and national origin discrimination claims under the Fourteenth Amendment of the U.S. Constitution and 42 U.S.C. § 1983.¹⁷

Part II: The Proposed Rule Changes Regarding Past Professional Conduct Investigations Have a Rational Basis and are Consistent with Governing Law

The proposed rule changes regarding CCRB’s investigation of past professional conduct include: (1) definitions for “act of bias,” “severe act of bias,” “covered entity,” and “final determination”; (2) adding new subsections (b)(1) and (2) to § 1-02 of the rules for the CCRB’s new “past professional conduct” jurisdiction; (3) adding a new § 1-18 regarding the CCRB

¹¹ See N.Y. City Dep’t of Investigation, Office of the Inspector General for the NYPD, *Biased Policing Complaints in New York City: An Assessment of NYPD’s Investigations, Policies, and Training*, at 39 n.45 (June 2019) (citing N.Y.C. CCRB: Hearing on Intro. No. 549 Before the Comm. On Public Safety, N.Y. City Council 52–53, 435 (1992)), available at https://www1.nyc.gov/assets/doi/reports/pdf/2019/Jun/19BiasRpt_62619.pdf.

¹² *Id.* at 39.

¹³ See N.Y. City Local Law 2013/71 § 2(1); N.Y.C Admin. Code § 14-151(a)(1).

¹⁴ See NYPD Admin. Guide § 304-17 (formerly NYPD Patrol Guide § 203-25) ¶¶ 3–4.

¹⁵ See *Floyd v. City of N.Y.*, 08 Civ. 1034, Dkt # 517 (S.D.N.Y. Aug. 24, 2015)(approving the policy set forth in NYPD P.G. § 203-25); *Floyd v. City of N.Y.*, 959 F.Supp.2d 668, 680 (S.D.N.Y. 2013)(Directing the NYPD to develop a new policy on racial profiling).

¹⁶ N.Y.C. Admin. Code § 14-151(e).

¹⁷ See, e.g., *Village of Arlington Heights v. Metro Housing Dev. Corp.*, 429 U.S. 252, 265–66 (1977); *United States v. City of Yonkers*, 96 F.3d 600, 612 (2d Cir. 1996); *Floyd v. City of N.Y.*, 959 F.Supp.2d at 571.

receiving notice from other governmental agencies and courts about acts of bias and severe acts of bias committed by members of the NYPD; (4) adding a new § 1-25, which outlines the methods the CCRB will use to conduct past professional conduct investigations; and (5) adding a new § 1-37 regarding CCRB’s providing notice to subject officers and making final determinations in past professional conduct investigations. All of these proposed rule changes have a rational basis and are consistent with governing law.

As an initial matter, the language used for the proposed rule changes in §§ 1-02(b)(1)-(2), 1-25(b), and 1-37(a)–(d), as well as the definitions for “act of bias” and “final determination,” are taken directly from § 441 of the Charter.¹⁸ The language used in the proposed rule changes in §§ 1-18(a)–(c), while not identical to §§ 441(b)(4),(6), and (7) of the Charter, is entirely consistent with the language in those Charter sections. Similarly, the proposed definition of “covered entity” includes all of the same entities listed in § 441(a), as well as four other state and federal agencies that have jurisdiction to investigate members of the NYPD for on or off-duty conduct that could trigger a past professional conduct investigation.¹⁹ The proposed “covered entity” definition is entirely consistent with § 441(a), which explicitly includes “any other officer or body designated by the [CCRB].”²⁰ Finally, pursuant to the express direction in § 441(b)(2) that the CCRB define what constitutes a “severe act of bias,”²¹ the proposed definition of this term includes examples of the kinds of biased acts that state and federal courts have typically considered to be severe enough to merit either criminal penalties or significant civil liability.

CCRB is Prepared to Investigate Bias-Based Policing, Racial Profiling, and Past Professional Conduct

a. Racial Profiling/Biased Policing Investigations Unit Created and Staffed

Shortly after the passage of Local Law 47 (2021), the Board decided to create a Racial Profiling/Biased Policing (“RPBP”) Investigations Unit within the Investigations Division to conduct the Board’s racial profiling, bias-based policing, and past professional conduct investigations. The Board hired a Director for the RPBP Unit, who started at the CCRB in September 2021. The Director is an experienced civil rights attorney who has spent more than a decade researching, litigating against, and working to reform racially discriminatory stop-and-frisk and other discriminatory policing practices in the NYPD and other police departments around the country.

In Spring 2022, the Board hired a Deputy Director for the RPBP Unit, who is a former policy counsel in the Office of the Chair at the New York City Commission on Human Rights with more than five years of experience investigating complaints of discrimination and enforcing the New York City Human Rights Law, one of the broadest anti-discrimination laws in the nation. The RPBP Unit also has hired two Investigative Managers—each with several years of

¹⁸ See N.Y. City Charter Chapter 18-A, §§ 441(a), (b)(1)–(2), (c), (d)(1)–(4).

¹⁹ These four agencies are the New York State Division of Human Rights, the New York State Office of Attorney General, the United States Equal Employment Opportunity Commission, and the United States Department of Justice.

²⁰ N.Y. City Charter § 441(a).

²¹ See N.Y. City Charter § 441(b)(2).

experience investigating police misconduct cases at the CCRB—who will each lead a team, or squad, of Investigators and Investigating Attorneys that will conduct the racial profiling, bias-based policing, and past professional conduct investigations. The RPBP Unit has already hired three experienced investigators with backgrounds in law enforcement misconduct and criminal defense investigations and three investigating attorneys with prior criminal law and police misconduct experience and is on track to hire two more investigators and four more investigating attorneys by September 2022.

A Chief Data Scientist with nine years of experience conducting quantitative research on racial and other forms of inequality in the healthcare and criminal justice systems started working with the RPBP Unit in early July 2022. The Chief Data Scientist, assisted by a Data Analyst whom the RPBP Unit plans to hire in the next two to three months, will develop and conduct statistical analyses of NYPD and other government data sets to identify potential patterns of discriminatory law enforcement activity by officers, units, and commands in the NYPD that could provide critical evidence for many of the Board’s racial profiling, bias-based policing, and past professional conduct investigations.

In all, the RPBP Unit is on track to have a staff of eighteen by the fall of 2022.

b. Outreach to Stakeholders and Biased Policing Experts

Over the past eight months, the RPBP Unit Director, Deputy Director, and Investigative Managers, along with other CCRB Staff, have held more than two dozen meetings with local elected officials, legal and policy organizations, attorneys and advocates who work on biased policing issues, academic experts on biased policing, and grassroots organizations that work directly with communities most directly impacted by discriminatory policing to discuss biased policing issues and the vision and work of the RPBP Unit. These meetings have served two important purposes: (1) to raise awareness among New York City’s marginalized communities that the CCRB will be investigating allegations of discriminatory policing; and (2) to improve the Board’s understanding of the different ways in which biased policing operates in practice, which will help inform strategies that the RPBP Unit uses to investigate complaints. The RPBP Unit plans to continue these outreach meetings throughout the summer and fall.

c. Technical and Institutional Capacity Built

CCRB’s Information Technology department is ready for the Board to undertake all racial profiling and bias-based policing allegations. The new allegations have been incorporated into CCRB’s line-of-business application, CTS+. The IT department is also working to acquire the necessary statistical software and computer hardware that the RPBP Chief Data Scientist will need to conduct her statistical analyses.

In collaboration with the Intake Unit and Investigations Division leadership, the RPBP Unit has developed protocols for referring FADO cases with possible profiling/biased policing issues for review. The RPBP Unit is also in the process of developing guidelines and best practices for its investigations as well as protocols for coordinating with the Investigations

Division to investigate cases with both traditional FADO and racial profiling/biased policing allegations.

Lastly, as part of their onboarding, the RPBP Unit investigators and investigating attorneys received five weeks of the CCRB's nationally recognized new investigator training as well as an intensive five-day Forensic Experiential Trauma Interview ("FETI") training, and they are currently receiving specific training on biased policing and biased policing investigative strategies, which will continue throughout the summer.

Steps Forward

Since its inception last year, the RPBP Unit has been dedicated to creating its team and its structure so that it is prepared to effectively conduct racial profiling, bias-based policing and past professional conduct investigations. The CCRB should proceed with the proposed rulemaking in order to undertake bias-based policing, racial profiling and past professional conduct investigations in line with the framework established by the New York City Charter.