



BILL DE BLASIO  
MAYOR

**CIVILIAN COMPLAINT REVIEW BOARD**  
100 CHURCH STREET 10th FLOOR  
NEW YORK, NEW YORK 10007 ♦ TELEPHONE (212) 912-7235  
www.nyc.gov/ccrb



FREDERICK DAVIE  
CHAIR

September 29, 2020

Police Commissioner Dermot Shea  
New York City Police Department  
1 Police Plaza  
New York, NY 10007

Dear Commissioner Shea,

On August 30, 2020, the New York City Police Department (“NYPD”) released its draft Disciplinary Matrix (“Matrix”), a system for determining penalties for members of the NYPD who committed misconduct. The Matrix is based on a progressive system of discipline,<sup>1</sup> and designates presumptive penalties for specific misconduct ranging from training to termination. The NYPD defines “presumptive penalty” as “the assumed penalty or penalty range generally deemed appropriate for a specific proscribed act.”<sup>2</sup> The Matrix identifies aggravating and mitigating factors to be considered alongside the presumptive penalty when making a discipline recommendation.

The NYPD stated it would accept comments about the Matrix for 30 days but scheduled no public hearings. In order to give the public a full and fair opportunity to express opinions about the Matrix, on September 17, 2020, the Civilian Complaint Review Board (“CCRB”) held a public hearing to obtain feedback on the proposed Matrix.<sup>3</sup> Various non-profit organizations, elected officials, NYPD representatives, and members of the general public participated in the hearing. Below is a summary of the relevant public testimony<sup>4</sup>.

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<sup>1</sup> Progressive discipline is the process of imposing increasingly greater levels of discipline when an officer continues to engage in the same acts of misconduct and/or fails to correct their behavior after being given a reasonable opportunity to do so. All of the presumptive penalties in the Matrix are deemed appropriate for the first instance of a specific proscribed act. Some misconduct is sufficiently serious that termination is the presumptive penalty.

<sup>2</sup> NYPD Matrix, p. 12.

<sup>3</sup> The CCRB’s Power Point presentation can be found on our website. Written testimonies from other participants are attached to this letter.

<sup>4</sup> The speakers included: New York City Councilmember Donovan Richards, New York State Assemblymember Rodnyse Bichotte, First Deputy Public Advocate Nick Smith on behalf of Public Advocate Jumaane Williams, Center for Constitutional Rights Senior Staff Attorney Darius Charney, , New York Civil Liberties Union Lead Counsel, Michael Sisitzky, and members of the general public. The CCRB also appreciates the participation of NYPD Chief Matthew Pontillo and First Deputy Commissioner Jeffrey Schlanger, who provided meaningful insight into the Matrix creation process and engaged in productive conversations with the other speakers throughout the hearing.

## Common Themes

There were several common themes raised by participants during the CCRB public hearing.

### ***Inappropriate Legal Standards***

There was significant testimony related to the frequent use of the “objectively reasonable mistake of fact or law” standard to justify the imposition of a lower presumptive penalty for many Fourth Amendment violations such as stop, question, frisk, search and unlawful entries. There is no definition of this concept anywhere in the Matrix. The Center for Constitutional Rights (“CCR”) and the Legal Aid Society (“LAS”) both stated that this term is most often associated with the qualified immunity doctrine and that including it in the Matrix conflates legal liability with appropriate standards for police discipline.

### ***Force Should Be Analyzed Based on Conduct Rather Than Outcome***

Many of the force categories in the Matrix are broken into sub-categories based on the nature of the injury to the civilian. In order to maintain fair and uniform discipline, the focus should be on the propriety of the officer’s excessive use of force; the nature of the injury sustained by the civilian should only be considered as an aggravating or mitigating factor.

### ***Aggravating and Mitigating Factors***

Many of the aggravating and mitigating factors identified in the Matrix are vague or subjective. Some factors can even be both aggravating and mitigating depending on the circumstances. It will be difficult to build public trust in the efficacy and transparency of the discipline process without a written explanation from the NYPD detailing which factors were considered and how each was weighted anytime there is a deviation from the presumptive penalty.

The Matrix includes several mitigating factors that reward officers for simply performing their required job functions. For example, cooperating with an investigation and testifying truthfully is expected of a police officer—it should not be a factor in reducing a presumptive penalty. Likewise, having no prior record of misconduct is considered a mitigating factor. However, in a progressive disciplinary system, the presumptive penalty is already based on the first instance of misconduct. Reducing the presumptive penalty for no prior disciplinary history is redundant and completely inapposite to a progressive disciplinary system.

### ***Compliance with Body-Worn Cameras (“BWC”)***

The presumptive penalties for BWC offenses are inadequate as they fail to address instances where officers turn their cameras on too late or turn them off before an incident has concluded. There are also no penalties for officers who fail to accurately log their footage at the end of the tour or misclassify the videos, making it more difficult to access the videos for misconduct investigations. Overall, the penalties that address BWC infractions are also too low to generate any meaningful compliance with the BWC program.

## Summary of Public Testimony

### *Civilian Complaint Review Board (“CCRB”)*

The CCRB identified several issues that must be clarified before the agency can utilize some or all of the Matrix in its disciplinary recommendations.

- CCRB needs access to the Central Personnel Index (“CPI”), or a summary thereof, of every member of service for whom it is making a disciplinary recommendation. Without knowledge of an officer’s complete employment history, it is impossible for the CCRB to fully evaluate all aggravating and mitigating factors and recommend a penalty consistent with the progressive discipline system outlined in the Matrix.
- The main issues for clarification included:
  - The subjective nature of aggravating and mitigating penalties
    - The Matrix also rewards officers by considering “Respondent’s level of cooperation” and the “veracity of the Respondent’s testimony” as mitigating factors. Cooperating with investigations and testifying truthfully is a requirement of the job, not a mitigating factor.
  - The reasons that committing one of the 15 prohibited acts of force does not carry a presumptive penalty of termination.
  - The reason for the Justification paragraph at the end of the Force section.
  - Penalties specifically for unlawful Taser use.
  - Comprehensive coverage of the Right to Know Act (“RTKA”)
    - “Failing to Provide a Right to Know Act Business Card,” is specifically mentioned in the Matrix, but there is no category for failure to comply with other provisions of The Right to Know Act (“RTKA”) such as the request for consent and documentation of consent. It is unclear whether the NYPD will analyze these cases under the general unlawful entry and search categories or has simply failed to address these altogether.
  - Matrix does not address uniformity among penalty recommendations when anything other than the presumptive penalty is imposed.
    - Deviations from presumptive penalty should include an explanation of the aggravating/mitigating factors and how they were applied.
    - There is no indication how the effectiveness of the Matrix will be measured, what percentage of deviations from the presumptive penalty will be acceptable, and how the NYPD will ensure that penalties are consistent across precincts and boroughs.
  - What “Training” as a penalty means
    - There are no details as to when, how, and what type of training will be imposed. To ensure transparency and demonstrate that the NYPD is retraining officers who exhibit a lack of understanding of Department policies and rules, the Matrix must elaborate on the length, subject matter, and relevance of training to each act of misconduct it proposes to address.
  - An explanation of when penalties for multiple allegations will run concurrent or consecutive

### ***New York City Councilmember Donovan Richards***

Councilmember Richards expressed concern about the Police Commissioner having sole decision-making power over the NYPD discipline system, including this Matrix.

### ***New York State Assemblymember Rodneyse Bichotte***

Assemblymember Bichotte's concerns about the Matrix are:

- There must be a mechanism for collecting data on racial profiling.
- Penalties for officers who fail to identify themselves or cover their badges, should be significantly higher than those listed in the Matrix.

### ***Public Advocate Jumaane D. Williams***

First Deputy Public Advocate, Nick E. Smith made the following recommendations:

- The Police Commissioner should also determine whether the officer's actions violated NYC Administrative Code § 14-115, which allows for discipline where an officer's actions are "injurious to the public peace or welfare, or immoral conduct, or conduct unbecoming of an officer."<sup>5</sup>
- Regardless of rank, an officer who is on any type of probationary status should be subject to termination if the nature of the misconduct is serious.
- Misconduct against vulnerable populations such as elderly, disabled and LGBTQIA+ should be considered an aggravating factor.
  - Specifically, misgendering and deadnaming of transgender individuals as well as failing to provide necessary accommodations for elderly and disabled civilians during police interactions.

### ***The Center for Constitutional Rights ("CCR")***

Darius Charney, Senior Staff Attorney for CCR, raised four (4) main concerns about the Matrix:

- Inappropriate mitigating factors
  - Using disciplinary history as a mitigating factor in a progressive disciplinary system is inappropriate because the presumptive penalty is already deemed appropriate for the first instance of misconduct.
  - Several of the mitigating factors inappropriately focus on the behavior of the civilian rather than the conduct of the officer. Even if a civilian is intoxicated or using rude or hostile language, officers should be held to a higher standard of conduct.
- The "weight of the evidence" standard is only appropriate when determining whether an allegation should be substantiated. It should have no bearing on penalty decisions, nor should it be considered an aggravating or mitigating factor.

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<sup>5</sup> New York City Administrative Code § 14-115: *Discipline of members*

The commissioner shall have power, in his or her discretion, on conviction by the commissioner, or by any court or officer of competent jurisdiction, of a member of the force of any criminal offense, or neglect of duty, violation of rules, or neglect or disobedience of orders, or absence without leave, or any conduct injurious to the public peace or welfare, or immoral conduct or conduct unbecoming an officer, or any breach of discipline, to punish the offending party by reprimand, forfeiting and withholding pay for a specified time, suspension, without pay during such suspension, or by dismissal from the force; but no more than thirty days' salary shall be forfeited or deducted for any offense....

- Training as the presumptive penalty for improper stops/frisks/searches/seizures based on an “objectively reasonable mistake of fact or law”
  - The term “objectively reasonable mistake of factor or law” is used numerous times in the Matrix but is never defined. The Matrix already considers “good faith or reasonable mistake of fact or law” and “complexity of legal analysis as applied to facts,” as mitigating factors, which renders the “objectively reasonable mistake of law or fact” sub-category unnecessary.
- Failure to include all (“BWC”)-related misconduct such as turning on the BWC too late in the incident, turning off the BWC before the incident concludes, and not properly tagging and categorizing the BWC footage at the end of a tour.

### ***The Legal Aid Society***

Staff Attorney of the Cop Accountability Project, Jennvine Wong, outlined several concerns about the Matrix, including:

- Failure to include penalty ranges and memorialize escalating penalties
  - There should be fixed minimum as well as fixed maximum penalties, which include consideration of aggravating factors.
  - There should be clearly established penalties for repeated misconduct, including guidance on how penalties will increase with each additional act of misconduct.
- Ambiguous aggravating and mitigating factors
- Failure to include penalties for failing to intervene in non-force related misconduct
- Failure to include perjury in the list of offenses that would result in termination for officers on entry-level or dismissal probation
  - A finding of incredibility by a court or prosecutor should be an aggravating factor.
- Focusing on the outcome of the use of force rather than the propriety of the force itself
- Inappropriate use of “reasonable mistake of fact or law” as a mitigating factor
- Failure to include clear procedural requirements to maintain consistency and transparency of discipline process.

### ***New York Civil Liberties Union (“NYCLU”)***

Michael Sisitzky, Lead Policy Counsel, detailed the following issues with the Matrix:

- The usefulness of the Matrix is only as strong as the Department’s willingness to implement the guidelines.
- There should be a minimum and maximum penalty range for deviations based on aggravating and mitigating factors.
- Overall, the presumptive penalties are too low.
- NYPD should engage in a meaningful comment period, hold public hearings and give full, good faith consideration to the public recommendations.

### ***General Public***

Members of the public expressed the following opinions:

- The NYPD should publish an explanation of why it is or is not adopting public comments
- Training is an insufficient as a penalty for misconduct.
- Stop, Question and Frisk allegations should not be parsed out by intent.

- The penalties for chokeholds, sexual misconducts and failing to obtain medical treatment are inadequate.

This letter is just a summary of the hearing testimony, the full recording of which can be found on the CCRB's website. I encourage you to watch the hearing in its entirety to get a more detailed understanding of the issues raised by the public. We look forward to continuing to work with the Department to incorporate these comments and concerns into the Matrix before the guidelines are finalized.

Sincerely,

A handwritten signature in black ink, appearing to read 'F. Davie', enclosed in a light blue rectangular box.

Frederick Davie  
Chair  
NYC Civilian Complaint Review Board