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HEARING ON THE NEW YORK CITY POLICE DEPARTMENT'S DISCIPLINARY PRACTICES

BEFORE THE PUBLIC SAFETY COMMITTEE OF THE NEW YORK CITY COUNCIL

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I. INTRODUCTION

The Center for Constitutional Rights would like to thank the Public Safety Committee of the New York City Council for holding this important hearing on the disciplinary practices of the New York City Police Department (NYPD or Department).

The Center for Constitutional Rights works with communities under threat to fight for justice and liberation through litigation, advocacy, and strategic communications.¹ For nearly twenty years, we have been challenging abusive and discriminatory practices of the NYPD, the largest and most influential municipal police department in the United States, through litigation and advocacy.

We are a founding member of the Communities United for Police Reform campaign, and supported the passage of bills which end unconstitutional searches and increase transparency during police interactions, created an Inspector General of the NYPD, and ban on NYPD

¹ Since 1966, we have taken on oppressive systems of power, including structural racism, gender oppression, economic inequity, and governmental overreach. Learn more at ccrjustice.org.

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profiling. In our case, *Floyd v. the City of New York*, a federal judge issued a historic decision against the NYPD, finding that police had engaged in a widespread practice of unconstitutional and racially discriminatory “stops–and–frisks.”² We are currently in the remedial phase of the case, working with a court-appointed monitor to make a number of critical changes to NYPD policies and practices, including how disciplinary matters are handled.

While the NYPD’s disciplinary system is complex and complicated,³ there are a number of necessary changes the Department must implement in order to truly be an accountable, transparent department, as well as meet the requirements set forth in the *Floyd* remedial order to address its unconstitutional practices, including racial profiling.

In this written submission, we address several aspects of the practices of the NYPD disciplinary system, which, at this juncture are most critical for the Committee’s attention.

II. RECENT DEVELOPMENTS: INDEPENDENT NYPD PANEL REPORT AND CITY COUNCIL BILLS

We would like to commend the Independent Panel on the Disciplinary System of the New York City Police Department for its crucial report, which was released in early February 2019, and for their key recommendations, including their finding that the Department Advocate’s Office (DAO) limit their use of reconsideration requests to the Civilian Complaint Review Board (CCRB).⁴ Further, we acknowledge NYPD Commissioner James O’Neill’s commitment to implementing the panel’s recommendations, which will improve the Department’s disciplinary system.⁵

We also appreciate the suite of bills introduced several weeks ago by Members of City Council looking at a number of issues related to the NYPD’s disciplinary system, and share some preliminary thoughts on those bills in our testimony.

² See *Floyd v. City of New York*, 959 F. Supp. 2d 540 (S.D.N.Y. 2013) (“Liability Opinion”). Currently the NYPD is under the oversight of a court-appointed independent monitor to implement a series of concrete reforms to the NYPD’s policies, training, supervision, disciplinary systems, among other things, to ensure that individuals are stopped only based on the constitutionally required standard of “reasonable suspicion” and that the police no longer no longer systemically use race as a criteria for law enforcement actions. The court also ordered the City to engage in a “Joint Remedial Process,” currently underway, bringing together affected communities, elected officials, the NYPD, and other stakeholders to collaboratively develop reforms to the Department’s stop and frisk practices – and to provide a forum for a broader conversation about unfair policing practices. One of the final recommendations emanating from the JRP was the development of a discipline matrix. Learn more about *Floyd v. the City of New York* at www.ccrjustice.org/floyd.

³ Kendall Taggart & Michael Hayes, *The NYPD’s Secret Files*, BuzzFeed (Apr. 16, 2018), <https://www.buzzfeed.com/kendalltaggart/nypd-police-misconduct-database-explainer>.

⁴ Report of the Independent Panel on the Disciplinary System of the New York City Department, January 25, 2019, released to the public on February 1, 2019, available: <https://www.independentpanelreportnypd.net/>, (hereinafter Independent Panel Report”)

⁵ New York City Police Department, Press Release: Commissioner O’Neill Announces Changes to NYPD Disciplinary System, February 1, 2019, available: <https://www1.nyc.gov/site/nypd/news/pr0201/commissioner-o-neill-changes-nypd-disciplinary-system>.

a. *Court-Ordered Reforms to NYPD Disciplinary Systems Will Complement These Developments*

While the NYPD must work proactively to enact the Panel Recommendations, there are still a number of necessary requirements compelled by our case, *Floyd v. the City of New York*, to ensure the Department has fully remedied the constitutional violations found by the federal court and is in substantial compliance with the law, including the ushering in of a suite of necessary reforms. Rather, the Panel Recommendations and the bills introduced by the Council may complement future *Floyd* reforms.

First, there is a matter of prematurity, given the state of discipline reform development in *Floyd*. The substance of the court-ordered reforms necessary to bring the NYPD's discipline system into compliance with constitutional standards have yet been developed, approved by the court, or fully implemented. NYPD actions to enact the Panel Recommendations or even the passage of the legislative package by the Council do not obviate necessary court reforms.

Second, many of the bills proposed by City Council are aimed towards increasing public understanding of disciplinary processes through public reporting. Public reporting is naturally separate and distinct from any court-ordered changes to NYPD disciplinary procedures to ensure the Department actually holds officers accountable when they have been found to have committed unlawful and racially discriminatory stops-and-frisks.

Third, though there may be *complementary themes* in overall changes to the NYPD disciplinary system among the bills, the Panel Recommendations and what is eventually ordered in our case, there is a level of specificity which will likely appear in the court-ordered reforms in *Floyd* to ensure legal compliance in our case, which understandably do not appear in the bills nor in the Panel Recommendations.

For example, the Panel recommends that the DAO limit their use of reconsiderations for civilian complaints, stating specifically that the “DAO should not request reconsideration where it merely disagrees with CCRB’s conclusions, when those conclusions were based on a complete evidentiary record and an accurate understanding of the law.”⁶ We wholeheartedly welcome that recommendation, however, in our litigation, it may be that the court orders an even more strict interpretation and orders that the DAO *cannot* request such reconsiderations based on certain, unpermitted circumstances.

Notably, in its Remedial Order, the court found the “[DAO] must improve its procedures for imposing discipline in response to the [CCRB] findings of substantiated misconduct during stops.”⁷ This includes “revisions to the deference given to CCRB determinations, evidentiary standards, and corroborating physical evidence.” As such, we are particularly concerned about the prevalence of NYPD reconsideration requests based on whether the NYPD disagreed with the CCRB’s credibility determinations as to one or more witnesses; the NYPD disagreed with the weight CCRB gave to respective witnesses’ testimony (i.e. that CCRB gave more weight to

⁶ Independent Panel Report at 53.

⁷ *Floyd v. City of New York*, No. 08-cv-1034, Dkt. #372 (“Remedial Order”), at 24.

civilian witness than to officer witness testimony; and/or CCRB substantiated the allegation based solely on witness testimony that was not corroborated by physical or other extrinsic evidence).

We believe that in order to come into compliance with the law, the DAO must improve procedures for imposing discipline by increasing deference to CCRB credibility determinations, applying an evidentiary standard that is neutral between claims of complainants and officers and not requiring corroborating physical evidence in every case in order to ensure that officers are in fact held accountable for misconduct that was substantiated by the CCRB.

III. DISCIPLINE MATRIX

The NYPD must develop, in consultation with impacted communities, a discipline matrix or set of progressive disciplinary guidelines for misconduct and associated proportional penalties. The Independent Panel also notes that the NYPD should consider adopting a matrix to guide the Commissioner in exercising his broad discretion. Furthermore, a NYPD disciplinary matrix is featured as one of the recommendations in the Joint Remedial Process Final Report (“JRP Final Report”).⁸ Moreover, social science scholarship also support this recommendation; the benefits of discipline matrices include, among other things, “operationalized” progressive discipline which can contribute to more efficient, consistent, proportional, and fair discipline of police officers.⁹ This can improve both officer and public attitudes toward the department, as well as “enhance police accountability,” particularly if the matrix is made public.¹⁰

It is imperative that *all* entities which oversee or have a role in discipline of members of the NYPD follow a single, standard matrix to ensure uniform decision-making, fairness, and efficacy overall. Without standards, the NYPD’s historic lack of uniformity and accountability, and practice of issuing low or disproportionate punishment in disciplinary matters will continue. Concrete penalties enumerated through a binding discipline matrix, and employed by all entities implicated in disciplinary matters, would address this issue.

As the Independent Panel on Discipline discusses in their report, the matter in which the NYPD Commissioner addresses issues of misconduct actively contributes to a perception that disciplinary decisions are arbitrary. In cases where the Commissioner would depart from the matrix, the Commissioner should provide specific explanations to the complainant, the subject

⁸ HON. ARIEL E. BELEN, NEW YORK CITY JOINT REMEDIAL PROCESS FINAL REPORT & RECOMMENDATIONS, (2018) (hereinafter “JRP Final Report”), at 224. (“We therefore recommend that the NYPD be ordered to develop and publish progressive disciplinary standards to be used in cases arising from unconstitutional stops and trespass enforcement regarding excessive force, abuse of authority, discourtesy or offensive language, and racial profiling allegations.”)

⁹ See Christopher J. Harris et al., *The Prevalence and Content of Police Discipline Matrices*, 38(4) POLICING: INT’L J. POLICE STRATEGIES & MGMT. 788, 789–91 (2015).

¹⁰ *Id.*, see also Jon M. Shane, *Police Employee Discipline Matrix: An Emerging Concept*, 15(1) POLICE QUARTERLY 62, 62–67 (2012); Samuel Walker, *Best Practices in Policing: the Discipline Matrix: An Effective Police Accountability Tool?* (2003).

officer as appropriate, and agencies such as the CCRB as further enumerated later in this Testimony.

IV. NEED FOR PUBLIC REPORTING ON DISCIPLINARY OUTCOMES, SUCH REPORTING WITHSTANDS 50-A CONCERNS

We highlight the critical need for public reporting on NYPD disciplinary outcomes. The JRP Final Report also recommended a monthly discipline report, publication of progressive disciplinary standards, timely disciplinary action, and increased attention to public understanding of disciplinary standards.¹¹

Moreover, we believe that public reporting on disciplinary outcomes is both feasible and also permissible under Civil Rights Law 50-a. This is supported by the findings of the Independent Panel, which notes, “Section 50–a poses no impediment to the release of anonymized statistical data about disciplinary outcomes. At present, CCRB issues monthly, semi-annual, and annual reports that include these statistics.”¹² The Panel provides examples of other city agencies which release valuable analyses “rich in statistical data,” including those of the OIG NYPD, the CCPC, and the CCRB, adding,

These reports do not identify any officer, but are invaluable resources and possible catalysts for reform. None of this reporting was forbidden by § 50–a. Data compilations are not personnel records, even under the most restrictive interpretation of existing law. The fact that CCRB, the CCPC, OIG-NYPD, and the federal monitor issue regular reports on Department discipline, while the Department does not, helps create the impression that the Department has something to hide. The Panel recommends that the Department join these agencies in publishing an annual report on police discipline to provide meaningful transparency about its disciplinary process and outcomes.¹³

We are delighted that the reporting of disciplinary outcomes is contemplated in the suite of bills introduced. In order to identify valuable information and trends, including discriminatory impact, we recommend including: Investigatory Body;¹⁴ Description of Misconduct; Assignment Precinct or Unit of Member(s) of Service; Rank of Member(s) of Service; Recommended Penalty;¹⁵ and Final Penalty including Term//Days docked (if applicable); and whether no disciplinary action was taken. This reporting should also be aggregated by precinct, so that future NYPD interventions are targeted and effective.

¹¹ JRP Final Report at 222-25.

¹² Independent Panel Report at 46.

¹³ Independent Panel Report at 47.

¹⁴ The disciplinary outcome reporting should include the investigatory body (i.e. the CCRB, IAB, Office of the Chief of Department [OCD], etc.) in order to determine potential trends of differential treatment or resolution of particular cases.

¹⁵ It is compelling to include the Recommended Penalty particularly in cases in which the ultimate resolution may differ, or where the NYPD may not pursue discipline.

V. NYPD HINDERS ACCOUNTABILITY FOR CIVILIAN COMPLAINTS

As we alluded to during our previous testimony before this Committee,¹⁶ the NYPD's "nonconcurrency" with the CCRB is probably one of the starkest symbols for how they treat civilian complaints. By frequently disagreeing with the CCRB, lowering recommended penalties and even declining to pursue any disciplinary action, the Department demonstrates that it will refuse to hold officers accountable when they violate peoples' rights.

Moreover, the NYPD's frequent use of Reconsideration Requests to the CCRB of both recommended disciplinary penalties as well as the cases the Board has substantiated is a serious matter of concern. As I shared before this Committee, the reconsideration process writ large allows for the historical ignoring of and downgrading of the CCRB's recommended penalties to continue today. We are also concerned by cases in which the Commissioner departs downwards from recommended penalties, particularly for CCRB cases.¹⁷ Despite our concerns and the Board's inclination to pursue lower penalties in recent years, the NYPD's use of reconsiderations is on the rise, indeed this was an issue reported on publically in 2017, and again in 2018.

Relatedly, we are concerned about the prevalence of NYPD Reconsideration Requests issued on the basis of the Department's disagreement with the CCRB's credibility determinations as to one or more witnesses; with the weight CCRB gave to respective witnesses' testimony (i.e. that CCRB gave more weight to civilian witness than to officer witness testimony); and/or for cases in which CCRB substantiated the allegation based solely on witness testimony that was not corroborated by physical or other extrinsic evidence. We believe that necessary court-ordered reforms must address and put a stop to this practice, through sweeping and permanent changes to DAO procedures for handling substantiated CCRB complaints, but welcome the Independent Panel's recommendation to limit the DAO's requests overall.

VI. NYPD PREFERENCE FOR LOWER PENALTIES

Based on our understanding of the resolution of CCRB complaints, we can infer that the DAO, and other internal entities with investigatory and disciplinary authority, are leaning towards lower penalties overall. This was confirmed in the Ninth Status Report of the independent federal monitor in our case, which discusses how "final discipline and penalties imposed have declined" from 2014-2017.¹⁸ The NYPD's gravitation toward administering lower penalties from CCRB initiated cases is troubling, to say the least. With the publishing of disciplinary outcomes, and the public development of a matrix, we will be able to firmly establish whether this is a widespread, Department phenomenon of administering lower-level penalties.

¹⁶ Center for Constitutional Rights, *Testimony on the Civilian Complaint Review Board before the Public Safety Committee of the New York City Council: Testimony of Nahal Zamani*, January 22, 2019, available at: <https://ccrjustice.org/ccr-testimony-civilian-complaint-review-board-nyc-council>.

¹⁷ Independent Panel Report at 26.

¹⁸ Ninth Report of the Independent Monitor, *Floyd v. City of New York*, No. 1:08-cv-01034-AT, at 49-62, Jan. 11, 2019 at 57 (hereinafter "Ninth Status Report").

VII. NYPD PURSUES *NO DISCIPLINARY ACTION*

NYPD also fails to take *any* disciplinary action for a number of matters which come before it. Regarding civilian complaints, in 2017, the NYPD pursued no disciplinary action in 28 percent of the cases brought before it.¹⁹ Because we do not have enough public reporting on this issue, we do not have a sense of the prevalence of this phenomenon Department-wide. This lack of action on disciplinary matters should be studied further, and publicly reported. Importantly, the current suite of bills introduced by the City Council, as written, should provide that any public reporting must include tracking of "no disciplinary action is taken". Thus, we support the inclusion of any language, which would help track this phenomenon across the NYPD, within the current package of bills being contemplated by the City Council.

VIII. SUPERVISORS AND DISCIPLINARY MATTERS, ISSUING OF COMMAND DISCIPLINES, ETC.

Given the NYPD's purported de-centralizing of disciplinary matters,²⁰ supervisors play a critical role in ensuring that officers' actions are lawful and that misconduct is being adequately addressed through effective interventions. Supervisors have great responsibilities with regards to "everyday" disciplinary interventions, including the issuing of Command Disciplines and ensuring that subject officers are held accountable for incidents of misconduct. The federal monitor in *Floyd* also has underscored the role of supervisors, and supervisory failures to intervene for a vast number of unlawful and racially discriminatory stops and frisks and the number of improvements.²¹ Examining the practices of supervisors, and suggesting targeted interventions to ensure they are holding Members of Service (MOS) responsible is key.

a. *Patrol Guide Removal of Command Disciplines*

Another area of concern is regarding Patrol Guide rules concerning the permanence of penalized misconduct on personnel records.²² The NYPD Patrol Guide compels Commanding Officers (CO) to fully expunge Schedule "A" command disciplines after one year—whether they are

¹⁹ *NYC Civilian Complaint Review Bd. 2017 Annual Report*, NYC.Gov 30 (2017) (hereinafter "CCRB 2017 Annual Report"), available at: https://www1.nyc.gov/assets/ccrb/downloads/pdf/policy_pdf/annual_bi-annual/2017_annual.pdf at 34, (Noting, "Cases in which the Board recommended some type of discipline, but no discipline was imposed by the Police Commissioner, increased from 9% in 2016 to 28% in 2017.")

²⁰ Baker, Al, "Bratton Tries a Community Policing Approach, on the New York Police," *The New York Times*, (September 20, 2015), available at: <https://www.nytimes.com/2015/09/21/nyregion/bratton-tries-a-community-policing-approach-on-the-new-york-police.html>

²¹ As underlined in the federal Monitor's Ninth Status Report, a number of deficiencies related to supervision remain, including failures to engage in non-perfunctory reviews of stop forms; repeated approval of deficient stop reports; lack of clarity of corrective action for subject officers; and prevalence of lack of reasonable suspicion for stops and frisks, as well as unjustified searches. *See* Ninth Status Report at 16-18.

²² *See* New York Police Department Patrol Guide Procedure No. 206-02, Schedule "A" and Schedule "B" Command Disciplines, (Effective 4/20/17) available at: https://www1.nyc.gov/assets/nypd/downloads/pdf/public_information/public-pguide1.pdf. *See also* New York Police Department Patrol Guide, Procedure No. 206-14, Sealing Disciplinary Records (Effective 4/20/17) available at: https://www1.nyc.gov/assets/nypd/downloads/pdf/public_information/public-pguide1.pdf.

substantiated or unsubstantiated and conditional upon no intervening "A" disciplines for the relevant officer. The CO must "remove and destroy records and dispositions of convictions."²³ Additionally, Schedule "B" disciplines may be sealed at the officer's request after three years.

However, if such penalties are sealed, how can they be adequately or meaningfully considered in assessing an MOS' performance or fitness for duty, particularly those MOS with repeat incidents over the course of their NYPD tenure? Relevant entities should have full access to the officer's entire personnel history for consideration when substantiating cases or determining disciplinary penalties. The NYPD should end this practice by removing it from the Patrol Guide.

IX. INTERNAL AFFAIRS FAILS TO SUBSTANTIATE RACIAL PROFILING CLAIMS

We also raise our serious concerns regarding how the NYPD Internal Affairs Bureau (IAB) is investigating and substantiating racial profiling cases. Since trial in *Floyd*, the IAB developed several mechanisms to investigate and substantiate racial profiling claims. Disconcertingly, the IAB has never substantiated *any* allegations of racial profiling.²⁴ Failing to substantiate any racial profiling allegations incorrectly implies that the Department is no longer targeting people for interventions on the basis of their actual or perceived race. More broadly, this demonstrates that the NYPD is not adequately intervening for any such cases to deter future misconduct – and further stains the efficacy of the disciplinary system of the Department.

X. CLEAR "VARIANCE" COMMUNICATIONS FOR DEPARTURES

The Panel also recognizes the need for improved and standard communications by the NYPD Commissioner in his execution of his disciplinary authority and discretion, particularly as it is employed in overturning findings of guilt or modifying or departing downwards from recommended penalties by the CCRB and other entities.

Currently, written explanations are only mandated for CCRB cases.²⁵ At the outset, the NYPD must ensure that the CCRB is furnished adequate and sufficient written explanations unique to the case at hand, and that the Commissioner does not fail to provide such recommendations.²⁶

²³ New York Police Department Patrol Guide Procedure No. 206-02.

²⁴ Ninth Status report, also see Monitor's Seventh Status Report (December 13, 2017, Dkt # 576 at 45-46)

²⁵ As per the 2012 MOU and Rules of the CCRB, the NYPD Commissioner must provide written explanations in cases in which the CCRB recommends the penalty of 'Charges and Specifications' for the Member of Service (MOS) and where the NYPD departs from this penalty. 2012 MOU at ¶ 2 noting "in those limited instances where the Police Commissioner determines that CCRB's prosecution of Charges and Specifications in a substantiated case would be detrimental to the Police Department's disciplinary process, the Police Commissioner shall so notify CCRB." See also Rules of the City of New York, Title 38A, Chapter 1, § 1- 46(f).

²⁶ We do know of at least some instances in which the NYPD has failed to provide this explanation. For instance, in 2013, the NYPD OIG identified a 100 percent failure rate for providing this written obligation in 6 of the cases where it departed downwards from 'Charges recommendations' by the Board and was mandated to do so. See NYPD OIG, *POLICE USE OF FORCE IN NEW YORK CITY: FINDINGS AND RECOMMENDATIONS ON*

The NYPD should publish the Commissioner’s explanations to CCRB for each deviation from disciplinary outcome, particularly those in which the Commissioner is declining or reducing discipline. Particularly we believe it is crucial for the NYPD to enumerate why they believe CCRB recommendations must be reconsidered, before the public.²⁷

Second, Commissioner must provide a written explanation to *any* entities involved in the Department’s internal disciplinary processes from which the Commissioner departs from recommended penalties or overturns trial decisions. Notably, the Panel recommends a consistent “variance memorandum” for all bodies implicated, with certain information included therein, which would address perceptions of arbitrary or exhibit favoritism.²⁸

XI. CONCLUSION

The NYPD’s systemic lack of discipline and accountability for misconduct must end, and we urge the Department to take concrete steps towards holding its officers accountable when they violate peoples’ rights and for improving systems as necessary. We thank you for hearing our testimony today.

NYPD’S POLICIES AND PRACTICES, OCTOBER 2015, available at:

https://www1.nyc.gov/assets/oignypd/downloads/pdf/oig_nypd_use_of_force_report_-_oct_1_2015.pdf at 55-6.

²⁷ While we appreciate the APU’s report from June 2018 discussing for example, the use of Section 2s by the NYPD and hope will be a permanent feature of the Board going forward, the Board’s reporting does not prevent the NYPD from also publishing the Commissioner’s explanations. NYC Civilian Complaint Review Board, Report on the Administrative Prosecution Unit (“APU”) Third Quarter 2016 – Fourth Quarter 2017, June 29, 2018, (hereinafter APU Report), available at:

https://www1.nyc.gov/assets/ccrb/downloads/pdf/prosecution_pdf/apu_quarterly_reports/apu_2016q3-2017q4.pdf

²⁸ Independent Panel Report at 27-28 and 48-49.