



666 Broadway, 7th Floor
New York, New York 10012
212-614-6464
ccrjustice.org

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*Via the New York City Police Department's
online public comment submission link*

**Re: New York City Police Department
Disciplinary System Penalty
Guidelines Draft for Public
Comment**

To Whom It May Concern:

We are experienced civil rights attorneys from the Center for Constitutional Rights and the law firm of Beldock, Levine, and Hoffman, LLP who have represented victims of police misconduct in New York state and federal courts for several decades. We have also served for the past 12 years as plaintiffs' counsel in *Floyd v. City of New York*, the landmark civil rights class action that successfully challenged the New York City Police Department's ("NYPD") racially discriminatory and unconstitutional stop, question, and frisk practices and resulted in a federal court injunction that mandated, among other things, reforms 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 yet to fully implement.¹

We write to express our serious concerns with and request changes to various aspects of the New York City Police Department's proposed Disciplinary System Penalty Guidelines ("proposed matrix") as outlined below. Our comments aim to highlight the ways in which the proposed matrix undermines the fundamental goals of a discipline matrix: accountability, consistency, transparency, and fairness. We stress that any discipline matrix employed by the NYPD must seriously contend with its historic and systemic failures to impose meaningful (or in many cases, any) discipline and failure to adequately address police misconduct, particularly against those communities who bear the brunt of police abuses: communities of color, LGBTQI communities, and victims of gender-based violence, among others.² Yet, the NYPD's proposed

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 *Floyd v. City of New York*, 959 F. Supp. 2d 540, 617 (S.D.N.Y. 2013) at 617 ("[W]hen confronted with evidence of unconstitutional stops, the NYPD routinely denies the accuracy of the evidence, refuses to impose meaningful discipline, and fails to effectively monitor the responsible officers for future misconduct."). See also *Uniformed Fire Officers Ass'n, et al. v. de Blasio, et al.*, 20 Civ. 5441 (KPF), Dkts # 131, 150 (S.D.N.Y.)

matrix is designed to fail in this regard by creating a scheme with various mechanisms that enable the NYPD's disciplinary status quo—the imposition of disproportionately low or no disciplinary penalties for conduct that significantly harms New Yorkers, particularly those in marginalized communities and who most come in contact with police.

History of NYPD's Disciplinary Matrix

NYPD's proposed matrix is the result of years-long efforts by the communities most heavily impacted by police violence, abuse, and discriminatory policing to obtain real transparency and accountability through meaningful discipline of officers who violate federal or state laws, NYPD policies, and the rights of New Yorkers. 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 2018,³ and culminated in the city council bill that resulted in this matrix. However, the NYPD's disciplinary guidelines give short shrift to this important context and the concerns and priorities of the most impacted communities by providing various means by which an officer and the department can evade meaningful accountability.

Global Issues

In addition to lacking any acknowledgment of the NYPD's history of misconduct and impunity, the proposed matrix fails to account for the complex trajectory an allegation of misconduct takes to even reach the disciplinary penalty stage. The NYPD has a historically low substantiation rate for allegations of misconduct that encompass the issues that New Yorkers care most about, including racial profiling, sexual abuse and harassment, and use of force.⁴ This is in large part due to systemic issues that signal a lack of adequate and fair investigatory methods and a harmful bias against complainants.⁵ Given this context, it is even more important to ensure that the penalties in cases that do reach the disciplinary stage are meaningful and truly proportionate. More importantly, proportionality must necessarily be informed by and measured against the values and priorities of public that the department is policing. Yet, the proposed matrix flouts the interests of the communities most harmed by the NYPD, who have long called for a department that takes seriously their calls for accountability and the countless examples of abuse, violence, and harm that they have suffered for decades.

Inadequate Presumptive Penalties for Serious Categories of Misconduct

³ See Hon. Ariel Belen, *et al.*, New York City Joint Remedial Process: Final Report and Recommendations, *Floyd v. City of New York*, 08 Civ. 1034, Dkt # 597 at 224-25 (May 15, 2018).

⁴ See NYC DEP'T OF INVESTIGATION, OFF. OF THE INSPECTOR GEN., COMPLAINTS OF BIASED POLICING IN NEW YORK CITY: AN ASSESSMENT OF NYPD'S INVESTIGATION, POLICIES, AND TRAINING (2019) ("OIG Biased Policing Report"), https://www1.nyc.gov/assets/doi/reports/pdf/2019/Jun/19BiasRpt_62619.pdf. See also *Uniformed Fire Officers Ass'n, et al. v. de Blasio, et al.*, 20 Civ. 5441 (KPF), Dkt # 136, Declaration of Andrea Ritchie, at 3-4; HUMAN RIGHTS WATCH, "KETTILING" PROTESTERS IN THE BRONX: SYSTEMIC POLICE BRUTALITY & ITS COSTS IN THE UNITED STATES 63-73 (2019) (HRW Report), https://www.hrw.org/sites/default/files/media_2020/09/us_mott%20haven0920_web_0.pdf.

⁵ See OIG Biased Policing Report, *supra* note 4; see also HRW Report, *supra* note 4, at 63-74.

The NYPD should have zero-tolerance for the misconduct that the most impacted communities identify as priorities. To be sure, the proposed matrix recognizes the seriousness of racial profiling and biased policing allegations, which are undoubtedly issues of high importance for New Yorkers, by assigning termination as a presumptive penalty. However, the NYPD fails to give this same importance to issues of excessive force, sexual abuse and harassment, and domestic violence, which are of equal import to New Yorkers, particularly the communities most impacted by policing and officer misconduct. Instead of taking a similar hardline approach to these categories of misconduct, they are delineated into numerous subcategories, most of which have inadequate presumptive penalties. For example, *any* instance of domestic violence, be it a violation of a protective order or one involving a physical act without an aggravating factor should result in presumptive termination. That the NYPD takes a hardline approach on some categories like drug offenses and driving while intoxicated, but not these, demonstrates a significant misalignment with community standards and values, which call for these serious offenses to be met with stricter penalties, including termination.

Use of Improper Factors to Determine Presumptive Penalties

When presumptive penalties do adequately reflect the priorities and values of communities most impacted by police misconduct, the NYPD must ensure that disciplinary penalties do not unnecessarily depart from these presumptive penalties. Yet, the proposed discipline matrix guidelines are replete with ways that will lead to systemic downgrading of presumptive penalties, rendering them meaningless and undermining true accountability. For example, the proposed matrix states,

[T]he weight of the evidence must be assessed and the availability of witnesses must be considered when contemplating the appropriate penalty in a case. Factors that are likely to impact the ability to sustain a violation on the merits of the case during an administrative trial may be considered when evaluating the presumptive penalty and any potential departures from that penalty.

This is an improper method for calculating a disciplinary penalty, particularly in light of the department's documented refusal to discipline many officers who have already been found, by a preponderance of the evidence, to have committed misconduct. The *Floyd* court found that the department's refusal to discipline officers against whom the Civilian Complaint Review Board had substantiated misconduct allegations by a preponderance of the evidence because of an absence of corroborating physical evidence and disagreements with CCRB's credibility determinations and weighing of witness testimony was evidence of the NYPD's deliberate indifference to the unconstitutional conduct of its officers.⁶ Using the weight of the evidence as a basis to decrease or eliminate a disciplinary penalty, even after culpability for the misconduct has been found by a preponderance of the evidence by the CCRB and/or after an administrative trial, would therefore perpetuate a continued, deliberate indifference to misconduct. Thus, the weight of the evidence should play no role in determining the disciplinary penalty for an officer whose misconduct has already been substantiated by a preponderance of the evidence by the CCRB and/or at a Department disciplinary trial.

⁶ See *Floyd v. City of New York*, 959 F. Supp. 2d 540, 618–19 (S.D.N.Y. 2013).

Yet another design flaw in the proposed matrix's presumptive penalties is its incorporation of the legal standard from federal court-created qualified immunity doctrine. In its list of presumptive penalties for various categories of "Abuse of Authority" misconduct, the proposed matrix lists "training" (i.e., no discipline) as the presumptive penalty for improper pedestrian, vehicle, and property stops, frisks, searches and seizures that are based on a so-called "objectively reasonable mistake of fact or law." This term, which is defined nowhere in the proposed matrix, mirrors the standard used by federal courts under qualified immunity doctrine to frequently shield police officers from civil liability for otherwise serious violations of civilians' constitutional rights.⁷ Because civil rights and police misconduct legal experts now widely agree that qualified immunity doctrine is a serious obstacle to real police accountability,⁸ these "objectively reasonable mistake of fact or law" provisions have no place in the NYPD's proposed matrix. Like many aspects of the proposed matrix, they are too ambiguous and vague, and without guidance on what criteria would fit these factors, they leave too much room for abuse and unnecessarily and unjustifiably diminished penalties.

Vague, Overbroad, and Improper Mitigating Factors

Additionally, the absence of a prior disciplinary history should not be a mitigating factor, because the NYPD designed each presumptive penalty to apply to the first offense, with higher presumptive penalties for repeat offenses, as is done in the Denver Sheriff Department's disciplinary matrix, which is regarded as the current model disciplinary matrix in the law enforcement context. Officers are already duty-bound to not violate department policy or the law and to always treat civilians with courtesy, professionalism and respect while performing their jobs. They should not be afforded special treatment for doing something that is already a mandatory requirement of their jobs. Thus, every presumptive penalty in the matrix should be based on both the category of misconduct at issue and the subject officer's disciplinary history, so that for each misconduct category, there is a presumptive penalty for a first-time offense, a higher presumptive penalty where it is the subject officer's second misconduct incident in the same category in a specific number of years, and the highest presumptive penalty when the officer has committed this category of misconduct 3 or more times in the last specific number of years. This is the basic framework of the Denver Sheriff's Department matrix and a core characteristic of progressive discipline.

⁷ See, e.g., *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.") *Saucier v. Katz*, 533 U.S. 194, 205 (2001) ("If the officer's *mistake* as to what the law requires is *reasonable*, however, the officer is entitled to the immunity defense."); *Gorman*, 306 F.3d 1271, 1282 (2d Cir. 2002) ("[W]e analyze the *objective reasonableness* of the officer's belief in the lawfulness of his actions. . . If the officer *reasonably* believed that his actions did not violate the plaintiff's rights, he is entitled to qualified immunity even if that belief was *mistaken*.").

⁸ 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>; Hon Lynn Adelman, *The Erosion of Civil Rights and What to Do About It*, 2018 WISC. L.REV. 1, 11 (2018).

The proposed matrix also provides a plethora of vague and overbroad mitigating factors that will lead to further departures from the presumptive penalties, in addition to inconsistent and disproportionate discipline. Though a disciplinary matrix is intended to limit the level of discretion that can lead to arbitrary penalties or large discrepancies in discipline, the proposed matrix's inclusion of a large range of unclear and overreaching mitigating factors reinserts a high level of discretion that will lead to abuse and unnecessarily or unjustifiably diminished penalties. This also implicates the issue of transparency and predictability. By designing a matrix with a myriad of irrelevant or inappropriate ways in which a penalty can be lessened, the public has no way to predict whether an offending officer will receive the presumptive penalty they come to expect, further undermining transparency and the public's trust.

Examples of such factors include:

- “Relevant extraordinary circumstances or hardships.” There is no clear guidance on what this would entail and thus could encompass a range of circumstances that lend themselves to abuse.
- Factors about an officer's memory, lack of intent to harm, or efforts of an officer to engage in misconduct as means to avoid embarrassment, as well as the veracity of a respondent's and their level of cooperation. Every officer has a duty to fully cooperate in investigations without question or exception and should not be given special treatment for doing so. In addition, factors about an officer's memory or intent, run the risk of unduly excusing bad behavior that causes real harm.
- Lack of prior disciplinary history; the use of this as a mitigating factor in a *progressive* discipline matrix is inappropriate because of the potential for double counting and unnecessary downward departures of discipline. All members of service are duty-bound to not violate department policy or the law and to always treat civilians with courtesy, professionalism and respect when performing their jobs. Officers should not be afforded special treatment for doing something that is already a mandatory requirement of their jobs. Indeed, the department itself notes, “A presumptive penalty is the assumed penalty generally deemed appropriate for the first instance of a specific proscribed act.” Therefore, if this is the baseline, “lack of low-level of [sic] prior disciplinary history” should not be a mitigating factor.
- Similarly, an officer's “positive employment history including any notable accomplishments,” “positive service record, and positive evaluations and/or commanding officers' reviews” have no bearing on the misconduct at hand and should not be utilized as a mitigating factor.
- Factors that place undue emphasis on the conduct or characteristics of civilians is disturbing and improper. In some cases, they may lead to double counting. For example, if the use of “escalation of tension in encounter by the involved civilian” is used as a mitigating factor when “respondent attempted to de-escalate encounter” is also a mitigating factor. Other factors, such as “malice or provocation of others,” should have no bearing on the conduct of an officer, who should be held to a high standard of conduct in all sorts of

circumstances. Most disturbing are factors that set a dangerous precedent, such as a civilian's presumed intoxication, their size, or their "known" history.

- "The area of law or policy implicated in the matter is novel or complex." This too is unclear and ambiguous. This factor would also be inappropriate to the extent it will be used to incorporate legal standards in the qualified immunity context to mitigate penalties for the same reasons noted above.
- The presence of supervisors should only be a mitigating factor if the supervisor is also, or instead, held responsible for misconduct.

Without public and published guidelines specifically addressing how the mitigating factors will be used, as well as the rationales behind why mitigation is warranted, there will be an excess of discretion that will maintain the current status quo. The NYPD should also publish guidance on what safeguards it plans to implement to address these potential issues.

Written Justifications for Departures from Presumptive Penalties

As noted above, the proposed matrix is silent on guidelines and criteria that will be used by the department when factoring in mitigating or aggravating factors and when conducting the "totality of the circumstances" analysis. The proposed matrix should also require written justifications for departures from the presumptive penalties, especially when they result in diminished penalties. This is already required in some cases handled by the CCRB and should be employed as a matter of course.

The proposed matrix will fail to remediate the core issues it was intended to address—true accountability for the harm communities of color and other marginalized communities have suffered for decades due to police violence and misconduct, abuse, and discrimination—if it does not eliminate the mechanisms that will lead to continued diminished penalties, an excess of discretion, or a complete disregard of the goals of disciplinary matrices. Additionally, the NYPD's proposed matrix must reflect an understanding of the department's history of abuse, impunity, and the decades of conduct that resulted in a movement that successfully advocated for this matrix. A full understanding of this history would require stricter disciplinary penalties for the misconduct, including excessive force, sexual abuse and harassment, and domestic violence, as well as mechanisms in the proposed matrix that will dramatically reduce, if not completely eliminate, misconduct through deterrence and/or termination of officers that cause harm.

In addition to the global issues outlined above, we note several additional, specific components of the proposed metrics that need clarification, additional public guidelines, and/or revision.

Concurrent Penalties

It is unclear whether the department will impose concurrent penalties for separate and distinct misconduct or when different aspects of, or different harm arising from, the same misconduct are found. If not, this should be an aspect of the matrix and is the approach taken by the Denver Sheriff's Department.

Penalty, Vacation, and Suspension Days

The proposed matrix uses these terms inconsistently from one section to the next. Initially, the matrix defines “penalty days” as including both “vacation” and “suspension” days. However, in the section on presumptive penalties for use of force, several categories of use of force violations list presumptive penalties that include both “penalty” and “suspension” days. The proposed matrix should make clear what this entails and how this will be decided and justified. The proposed matrix should also clarify and publish the criteria that will be used to determine if those “penalty days” will be imposed as suspension days, lost vacation days, or some combination of both.

Probationary Periods for Supervisors

Supervisors have a critical role in addressing systemic issues in the department and was highlighted by the *Floyd* court. Thus, the proposed time period for “Promotion Probation” for sergeants, lieutenants, and captains is insufficient at one year. Rather, it should mirror the length for detectives, which stands at three years. Alternatively, it could be staggered, with sergeants at three years, lieutenants at two years, and captains remaining at one year.

Use of Excessive Force

In recognition of the common ability for encounters to escalate, and the historic use of stop-question-and-frisk for abusive policing, a finding of a bad stop, search, or frisk should serve as an aggravating factor in disciplining officer misconduct, particularly in instances of excessive force.

Intentionally Interfering with Recording Devices and Deletion of Information

The severity of this type of conduct, as well as the potential for abuse or covering up of abuse, warrants a presumptive penalty of termination, or at a minimum, dismissal probation.

Hate Speech

In the case of off-duty conduct, the presumptive penalty for “Hate Speech” is termination. The proposed matrix should clarify how it defines the term “hate speech” and whether it includes racial slurs directed at another person, or whether it implies an element of advocating conduct against a group. Additional clarification is needed on what the department intends to do about hate speech in other contexts, including while on-duty, made to another member of service, or a civilian not the subject of an encounter.

Body Worn Camera-related Issues

While the proposed matrix includes presumptive penalties for negligent and purposeful failure to record a prescribed event on a body-worn camera (BWC), it does not address a myriad of body worn camera (BWC) policy-related violations that 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 NYPD 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,⁹ and the matrix should also include separate presumptive penalties for them.

Additionally, "Any failure to turn on body-worn camera or failure to prepare a required report or otherwise document an incident, in an effort to obfuscate misconduct" should be corrected to include any failure to properly follow body worn camera (BWC) procedure. In addition, the word "activate" should replace the word "turn on", as a BWC is always on, but must be activated by an officer for proper recording and documentation. Covering the camera, turning the body away while conducting a search so it is not caught on camera, beginning a recording late, and ending a recording early are all issues that implicate misconduct. Adding these acts as aggravating factors, in addition to carrying their own penalties, can be a useful deterrent. Moreover, the presumptive penalty for negligent failure to activate a BWC should be much higher than 3 days given the potential for abuse and NYPD issues with BWC activation. Failure to maintain an operable BWC, or failure to notify in a timely manner that a BWC is malfunctioning should also carry a penalty.

Misconduct Adjudicated by Command Discipline

The proposed matrix should clarify how cases will fall into the command discipline categories, how mitigating or aggravating factors will be implemented in these cases, and whether those cases that are handled as command disciplines can bypass the proposed matrix.

Conclusion

The NYPD's proposed matrix requires significant changes to ensure that both NYPD officers and the department as a whole are held accountable for its abuse, misconduct, and history of impunity. Critical among these changes is eliminating any means by which the proposed discipline will result in systemic and unwarranted diminished penalties. The proposed matrix is the result of years of advocacy by New York's most impacted residents, thus any discipline matrix employed by the NYPD must hold true to the values and priorities of the public.

Sincerely,

Center for Constitutional Rights
Lupe V. Aguirre
Darius Charney
Ian Head
Samah Sisay

Beldock, Levine, & Hoffman, LLP
Jonathan C. Moore
Luna Droubi
Marc Arena
Katherine Q. Adams

⁹ See NYPD Patrol Guide § 212-123 ¶¶ 4, 16-19.