

THE CITY ATTORNEY  
CITY OF SAN DIEGO

Jan I. Goldsmith  
CITY ATTORNEY

**MEMORANDUM OF LAW**

**DATE:** March 17, 2010

**TO:** Danell Scarborough, Executive Director, Citizens Review Board on Police Practices

**FROM:** City Attorney

**SUBJECT:** Case Comments by the Citizens Review Board

**INTRODUCTION**

Under San Diego Charter section 43(d), the Mayor has the authority to establish rules for the Citizens Review Board on Police Practices [CRB]. Historically, the duty has been delegated to the CRB and the Mayor has final authority to approve or disapprove the bylaws. Previous bylaws included four categories of responses the CRB members could make following their review of a complaint. They were:

1. Agree with Internal Affairs [IA] findings/no comment.
2. Agree with IA findings/with comment.
3. Disagree with IA findings/with comment.
4. Request additional information.

In 2008, the bylaws were amended and the categories of “agree with comment” and “disagree with comment” were removed. The available categories are now:

1. Agree with IA findings.
2. Disagree with IA findings/with comment.
3. Request additional information.

The change in the bylaws has created some issues for the CRB members because there are cases in which IA findings may be technically correct, but do not accurately reflect the review team’s opinion of the case. For example, IA may make a not-sustained finding because there is only the officer’s version of events and the complainant’s version of events and no additional evidence to corroborate either side, but the review team feels that some of the actions of one or both of the parties were inappropriate or misconstrued. Under the current bylaws, the

only recourse the review team has in this scenario is to request further information. This can result in a protracted back and forth between the CRB members and IA; a backlog of cases; and if there is no additional information that can resolve the inconsistencies or disputes, an impasse that leaves CRB members frustrated because they feel unduly constrained by the rules. IA is often equally frustrated because it, too, is constrained by its own rules and regulations.

To help overcome this stumbling block, CRB members would like to amend the bylaws to again allow them to agree or disagree with comments on appropriate cases. They are, however, concerned about the potential ramifications of adding comments to officers' files, particularly if the comments are adverse. The concerns are generally how the comment would be interpreted under the Public Safety Officers Procedural Bill of Rights Act [POBR] and whether there is any potential for personal liability for CRB members if an officer disagrees with the comment.

### **QUESTIONS PRESENTED**

1. May the CRB add comments to a completed complaint review if the CRB members agree the IA findings are correct, but nevertheless feel there are issues that need to be addressed?
2. How is "adverse comment" defined for purposes of the POBR, California Government Code sections 3300 through 3313, and what affect would an adverse CRB comment have for the officer and the CRB members?

### **SHORT ANSWERS**

1. There are no legal restrictions that prohibit CRB members from adding comments to IA investigations after the CRB has completed its case review. The only impediment is that the current bylaws do not allow for comments to be made. However, the bylaws can be amended by a vote of the CRB members, subject to the approval of the Mayor.
2. "Adverse comment" is very broadly defined for purposes of the POBR, and can include anything that is in opposition to the officer's interest. An adverse comment by the CRB included in the IA file would be sufficiently punitive to entitle the officer to a hearing before the City's Civil Service Commission. CRB members would not be subject to liability for their actions so long as the actions are within the scope of their duties and are performed without fraud or malice.

## ANALYSIS

### I. MAY CRB MEMBERS ADD COMMENTS TO IA FINDINGS AFTER THEY HAVE COMPLETED THEIR REVIEW OF A CASE?

There are no legal restrictions that prohibit the CRB members from adding comments to any case after they have completed their review and evaluation of a complaint. The Charter provision establishing the CRB is broadly written and says only that the duties of the CRB are “to review and evaluate citizen’s complaints against members of the San Diego Police Department and the San Diego Police Department’s administration of discipline arising from such complaints.” San Diego Charter § 43(d). The only restrictions placed on the CRB’s decision on how it performs its duties is that any rules or bylaws it establishes to carry out its functions “shall be consistent with the laws of the State of California concerning citizens’ complaints against peace officers.” San Diego Charter § 43(d). Those provisions are California Penal Code section 832.5, which provides the procedures for the investigation of peace officers and California Penal Code section 832.7, which provides for the confidentiality of peace officer personnel records. The CRB must also comply with any requirements of the POBR which might be implicated by the CRB actions. However, none of these statutes place any restrictions on civilian oversight panels with respect to comments that a panel may choose to make after it has completed its duties. This is true whether they are adverse or commendatory

Given the underlying basis for the establishment of many civilian oversight panels, including the CRB, such restrictions could severely hamper the credibility and effectiveness of such boards. As one commentator has noted:

The basic models for both civilian oversight and community policing represent mechanisms by which communities might exert control over the police, not only with respect to harmful practices but also with respect to the establishment of local policing priorities. As examples of community control, civilian oversight and community policing are both rooted in a theory of community consent under which communities have a say in the definition of police practices.

Reenah L. Kim, *Legitimizing Community Consent to Local Policing: The Need for Democratically Negotiated Community Representation on Civilian Advisory Councils*, 36 Harv. C.R.-C.L. L. Rev/ 461, 467 (2001).

The CRB was never intended to be a rubber stamp for the police department and over the years, input from the CRB has led to many changes in the department’s policies, procedures and training. Thus, the ability of the CRB to express its concerns and voice its opinions is crucial to the CRB’s ability to maintain its legitimacy. The only constraint is that the CRB stay within the

legal parameters set forth in the statutes and the department's regulations regarding the investigation of citizens' complaints.

## II. QUESTION II

### A. How is Adverse Comment Defined for Purposes of the POBR?

The issue of what is or is not an adverse comment for purposes of the POBR has been litigated numerous times. Perhaps the most straightforward definition is the court's pronouncement in *Aguilar v. Johnson*, 202 Cal. App. 3d 241, 249 (1988), when it said "[a]s relevant here, Webster defines comment as 'an observation or remark expressing an opinion or attitude . . . .' Webster's Third New Internat. Dict. (1981) p. 456. "Adverse" is defined as 'in opposition to one's interest: Detrimental, Unfavorable.' *Id.* at p. 31." In *Aguilar*, a citizen's complaint was made against the officer and the chief of police placed it in a separate file because a criminal complaint was pending against the complainant. *Aguilar* was never advised of the complaint or allowed to respond to it until after a *Pitchess*<sup>1</sup> motion. The chief argued that it was not an adverse comment because the complaint was never placed in *Aguilar*'s personnel file. The court summarily rejected that argument and said "Logic and general rules of statutory construction suggest that a citizens' complaint that contains allegations of police brutality is a 'comment adverse to [the officer's] interest.'" *Aguilar*, at 249. The chief also implicitly argued that the term "adverse comment" referred only to comments made by law enforcement personnel. Again, the court rejected the chief's argument and noted:

The statutes make no such distinction between adverse comments made by law enforcement personnel and adverse comments made in the form of citizens' complaints. Rather, both sections refer to *any* adverse comment. In construing a statute, a court is "not authorized to insert qualifying provisions not included and may not rewrite the statute to conform to an assumed intention which does not appear from its language.

*Aguilar* at 250.

Similarly, the courts have concluded that negative reports and comments made by civilian oversight boards are adverse comments and may actually rise to the level of punitive action giving the police officer the right to respond to the comment and in some cases, the right to an appeal. In *Hopson v. City of Los Angeles*, 139 Cal. App. 3d 347, 352-353 (1983), the court held that placing a derogatory police commission report in the personnel files of two police officers amounted to punitive action. In *Hopson*, the commission report was prepared in the aftermath of a highly publicized police shooting of a private citizen. The commission acted after

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<sup>1</sup> A "Pitches" motion is a motion brought by a litigant to obtain the records contained in a police officer's confidential personnel file. *Pitchess v. Superior Court*, 11 Cal. 3d 531 (1974).

the chief of police had decided no discipline should be imposed on the officers. The commission concluded that the two police officers made serious errors in judgment and violated departmental policy concerning the use of firearms and deadly force. But the commission also concluded that any attempt to impose discipline upon the officers after the chief's decision was final would violate due process. Accordingly, the commission directed that a copy of the report be placed in the officers' personnel files. The court held that even though the chief had said no discipline would be imposed, placing the report in the officer's files could affect their ability to promote or earn special assignments and was, therefore, punitive.

**B. What Affect will an Adverse Comment Placed in an Officer's File by the CRB have on the Officer?**

Findings similar to those in *Hopson* and *Aguilar* have been made by the courts with respect to San Diego review boards. In *Caloca v County of San Diego*, 72 Cal. App. 4th 1209 (1999), the County Law Enforcement Review Board [CLERB] sustained findings of misconduct arising from citizen complaints against four deputies. The Sheriff's Department investigated the same allegations and found no misconduct. The deputies petitioned for a writ of mandate asserting that the CLERB report amounted to punitive action against them and they were, thus, entitled to an administrative appeal.

In deciding the CLERB report was, in fact, punitive action, the 4th District Court of Appeals cited the language of the POBR, specifically California Government Code section 3303 which states in pertinent part "punitive action is 'any action that may lead to dismissal, demotion, suspension, reduction in salary, written reprimand or transfer for purposes of punishment.'" *Caloca* at 1220 (emphasis in original). The head of the Sheriff's Department's Human Resource Services Bureau opined that the Sheriff's Department was very competitive and any blemish on a deputy's record could result in a denial of promotion. He added that a report issued by a "credible source" (the CLERB) sustaining findings of misconduct would be given consideration in personnel decisions. *Caloca* at 1220. Based on these statements, the court found that "a negative report by a citizens review board in the aftermath of a highly publicized police shooting of a private citizen and placed in the officer's personnel file is punitive action entitling the officer to an administrative appeal." *Caloca* at 1222.

In *Keating v. San Diego Civil Service Commission*, 2002 WL 472649 (Cal.App.4 Dist.), an unpublished case also in the 4th District Court of Appeals, the court's holding remained consistent with *Caloca*, even though the underlying facts were markedly different. The *Keating* case arose from the fatal shooting of Demetrius Dubose. IA and the District Attorney's Office both conducted investigations and determined the officers acted reasonably and the shooting was legally justified. The CRB, unlike the CLERB in *Caloca*, agreed with IA that the officers "conducted themselves within the bounds of existing policy regarding detainment . . ." *Keating* at 1. However, the CRB went on to say "they did not exercise sufficient discretion within this policy." *Id.* The CRB also made several suggestions regarding alternatives the officers might have used to avoid the shooting. The comments concluded with the statement that "[f]rom the

officer's perception, the potential for trouble existed which motivated their action, which is the crux of whether good judgment was used in this case." *Id.*

The City argued this case was distinguishable from *Caloca* because the CRB did not make an adverse finding. Instead, the CRB agreed the officers' actions were within policy and did not recommend any action be taken against the officers. Consequently, the City argued, there was no punitive action. The court disagreed and said,

We reject the City's contention that the CRB report did not make an adverse finding because it stated Keating and Wills acted within policy. The CRB report stated that the officers 'did not exercise sufficient discretion within this policy . . . .' By implication, the report blamed DuBois's [sic] death on the officers' lapse of discretion and good judgment."

*Keating* at 3.

The court also rejected the City's argument that punitive action requires more serious criticism than that directed at Keating and Wills. Relying on a statement by former Police Chief Jerry Sanders, who said the police department seriously considers CRB reports when making policy and personnel decisions, the court said it would be unreasonable to assume "that a report that questions an officer's discretion and good judgment will not impede that officer's career." *Keating* at 4. The court, therefore, followed its decision in *Caloca* and ordered that the officers be granted an administrative hearing before the City's Civil Service Commission.

Although *Keating* is an unpublished case and, therefore, not binding on any other jurisdiction, it is still binding on the City. If the CRB were to make adverse comments regarding an officer's actions, the officer would be able to request a Civil Service appeal on the matter. One other distinction is that both *Caloca* and *Keating* involved highly publicized shootings and the court did not address the question of whether an officer would be entitled to a Civil Service appeal on a lesser allegation. However, in the absence of a contrary ruling, the City must comply with the court's decision in *Keating*.

### C. Liability

Pursuant to San Diego Charter section 117(a)2, members of all Boards and Commissions are considered employees in the unclassified service of the City of San Diego. As employees, CRB members are extended the protection of the California Tort Claims Act, California Government Code sections 810 et seq. Specifically, California Government Code section 825 provides that the public entity shall defend an employee against any claim or action against the employee for an act or omission occurring within the scope of his or her employment as an employee of a public entity. It further provides that the public entity shall pay any judgment based on any claim or action against the employee or any compromise or settlement of the claim

or action to which the public entity has agreed. Such protections, however, are not unlimited. California Government Code section 825.6 provides that the public entity may recover the cost of a judgment from an employee where the injury occurred because the employee acted or failed to act because of actual fraud, corruption or malice.

The court in *Stanson v. Mott*, 17 Cal. 3d 206, 225 (1978) explained the protection of the California Tort Claims Act of 1963 by saying “the public employee faces only a slim danger of ultimate personal liability; such liability attaches only in the rare instances of injuries arising from acts either outside the scope of employment or performed with actual fraud, corruption or malice.” *Stanson* at 225. The court went on to examine the numerous considerations relevant to the determination of whether a public employee has acted with due care. For example, the court considered whether the act’s impropriety was obvious, whether the employee was alerted to the possible impropriety of the act, and whether the employee relied upon legal advice or on the presumed validity of an existing legislative enactment or judicial decision in performing the act. *Stanson* at 227. Although the facts in the *Stanson* case concerned the expenditure of public funds by a public official, the same considerations would be applied to acts or omissions by CRB members in their capacity as employees.

Therefore, as long as CRB members are performing acts within the scope of their duties as delineated in San Diego Charter section 43(d), and are acting without fraud or malice, they will be defended and indemnified by the City for any suit that might be filed by a police officer regarding actions taken by the CRB. However, it is also important to remember that the likelihood of a suit against an individual CRB member for actions taken while performing his or her duties is virtually nonexistent. To date, every published case questioning the actions of a police oversight board have been brought against the board or the public entity that established the board.

## CONCLUSION

The CRB may amend its bylaws to allow the CRB to comment on cases. The only restrictions are that any amendments comply with the requirements of San Diego Charter section 43(d) and any applicable statutes.

Adverse comments made by CRB members and included in the IA file have been determined by the courts to be punitive action. Consequently, an officer who has had an adverse comment added by the CRB may request an appeal before the City’s Civil Service Commission.


Danell Scarborough,  
Executive Director

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March 17, 2010

Pursuant to San Diego Charter section 117, CRB members, as volunteers, are employees of the City for purposes of the California Tort Claims Act. As employees, they will be defended and indemnified in any suit so long as they acted within the course and scope of their employment and without fraud, corruption or malice.

JAN I. GOLDSMITH, City Attorney

By  \_\_\_\_\_  
Sharon A. Marshall  
Deputy City Attorney

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