

**Office of  
The City Attorney  
City of San Diego**

**MEMORANDUM  
MS 59**

(619) 236-6220

**DATE:** April 12, 2017  
**TO:** Community Review Board on Police Practices  
**FROM:** City Attorney  
**SUBJECT:** Community Review Board on Police Practices' Operational Standing Rule on Case Review Procedure

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**INTRODUCTION**

This memorandum confirms the legal concerns the Office of the City Attorney orally raised at the Community Review Board on Police Practices' (CRB) open meeting on January 24, 2017, related to the CRB's approval of one of its amendments to its Operational Standing Rules on Case Review Procedure.

**BACKGROUND**

On January 24, 2017 in open session, the CRB approved various amendments to its "Operational Standing Rule: CRB Case Review Procedure," including the following amendment (in italics):

Following a final vote on a case with sustained finding(s), the Board can act to recommend the case for special follow up processing due to a particularly serious or dangerous violation of policy or procedure attributable to (1) the actions of the officer(s) involved or (2) the track record of the officer(s) or (3) other circumstances surrounding the case or the officer(s) involved. *A recommendation action by the Board will be recorded in the transmittal document sent to the Commanding Officer(s) responsible for imposing discipline when these forms are prepared by IA. In this way, the concerns of the Board will be considered.*

(Emphasis added.)

At this meeting and prior to CRB's adoption of this Amendment, this Office orally advised CRB of the legal concerns raised by this Amendment. Specifically, because the Amendment would allow CRB to transmit comments for consideration in the institution of discipline, we advised that the Amendment would likely violate San Diego Charter (Charter) sections 43(d) and 57, and possibly the Memorandum of Understanding (MOU) between the City and Police Officers' Association (POA). Further, we advised the CRB that the Amendment could not be adopted by the City without satisfying the City's meet and confer obligation under the Meyers-Milias-Brown Act (MMBA). Cal Gov't Code §§ 3500-3511. Moreover, we advised the CRB that transmitting comments for consideration in the institution of discipline, and the inclusion of these comments in the officer's personnel or other police department file, would implicate the police officer's notice and appeal rights under the Public Safety Officers Procedural Bill of Rights Act (POBAR). Cal. Gov't Code §§ 3300-3312.

## LEGAL ISSUES

### A. Charter section 43(d)

The role and duties of the CRB are set forth in Charter section 43(d). That section provides that the CRB is solely charged with the "review and evaluation" of citizen complaints against members of the Police Department (Department) and the Department's administration of discipline arising from such complaints. As we have opined in the past,<sup>1</sup> the term "review and evaluate" on its face requires no interpretation as its meaning is clear: police officer discipline arising from citizen complaints is brought to the CRB for review and evaluation after the Department imposes discipline. This allows the CRB, with or without comment, to agree or disagree with the discipline imposed by the Department. The Charter language does not authorize the CRB to engage directly in the decision to discipline an officer in the first instance, or to influence the level of discipline to be imposed by the Department. The Amendment allowing the CRB to transmit comments directly to the Commanding Officer given the authority to institute or impose discipline on a police officer would thus likely exceed the CRB's role as set forth in Charter section 43(d).

### B. Charter section 57

Charter section 57 provides that the Chief of Police has the exclusive authority to appoint, direct and supervise Department personnel, and has all the power and authority necessary for the operation of the Department. This gives the Police Chief (and his or her designees) the exclusive authority over the discipline process of Department personnel, including police officers. The CRB's Amendment would allow it to directly participate in this disciplinary process by influencing the imposition of discipline and level of discipline, thus likely conflicting with Charter section 57.

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<sup>1</sup> 2010 City Att'y MOL 360 (2010-18; Sept. 21, 2010).

### **C. MOU Between the City of San Diego and the POA**

The MOU between the City of San Diego and the POA governs the terms and conditions of a police officer's employment with the City, including the disciplinary process. On July 1, 2015, the City and the POA entered into a MOU. This MOU is effective until June 30, 2020. The MOU was ratified by the City Council. This MOU was entered into after extensive negotiations, as required by the MMBA. In this MOU, the City recognizes POA as the exclusive representative for all employees in the Police Unit and Police Management Unit.<sup>2</sup> Consistent with Charter section 57, the MOU reiterates the rights of management including the taking of disciplinary action. MOU at Article 9. It does not provide for or contemplate the CRB's involvement. Accordingly, the Amendment likely would violate the terms of the MOU.

### **D. MMBA**

The MMBA requires the City to engage in the meet and confer process with its recognized labor organizations on wages, hours and other terms and conditions of employment. Cal. Gov't Code § 3505. The disciplinary process is a term and condition of employment. *Vernon Fire Fighters, Local 2312 v. City of Vernon*, 107 Cal. App. 3d 802, 815-17 (1980). The Amendment allows the CRB to participate in the disciplinary process of police officers represented by the POA, a change of past practice, and necessarily impacting the terms and conditions of employment of police officers. Therefore, the Amendment could not be adopted without satisfying the City's duty to meet and confer as required under the MMBA.

### **E. POBAR**

The placement in personnel (or other Department) files and use of "adverse" information pertaining to a police officer for disciplinary purposes triggers a host of police officer rights, including notice and a right of appeal under POBAR. *See* Cal. Gov't Code §§ 3300-3312. First, the placement of "adverse" comments in a police officer's personnel file requires notice to the police officer and an opportunity to respond to the comment. Cal. Gov't Code §§ 3305 and 3306. Courts have liberally defined what an "adverse" comment is to include both complaints about an officer and negative reports or comments made by civilian oversight boards that are placed in police department files. *See Aguilar v. Johnson*, 202 Cal. App. 3d 241, 249-250 (1988); *Sacramento Police Officers Association v. Venegas*, 101 Cal. App. 4th 916 (2002); *Hopson v. City of Los Angeles*, 139 Cal. App. 3d 347 (1983); and *Caloca v. County of San Diego*, 72 Cal. App. 4th 1209 (1999).

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<sup>2</sup> These units include the classifications of: Police Recruit, Police Officer I, Police Officer II, Police Officer III, Police Detective, Police Agent, Police Sergeant, Community Relations Assistant to the Police Chief, Police Lieutenant and Police Captain. MOU at Article 2.

The CRB Amendment is intended to authorize the transmittal of negative or critical comment about a police officer to the Department to be considered in conjunction with disciplinary proceedings. They therefore would be classified as “adverse,” requiring notice to the subject police officer and providing an opportunity for that officer to respond.

Second, under POBAR, a police officer is entitled to an administrative appeal whenever there is a “punitive action” taken. Cal. Gov’t Code § 3304(b). “Punitive action” is defined as any personnel action “that may lead to dismissal, demotion, suspension, reduction in salary, written reprimand, or transfer for purposes of punishment.” Cal. Gov’t Code § 3303. Like the term “adverse,” courts have been very liberal in defining “punitive action” to include any negative or critical comment that is placed in a police department file because it would or could affect the police officers’ career. *See Hopson*, 139 Cal. App. 3d 347 (the placement of a negative shooting review report in personnel file); *Gordon v. Horsley*, 86 Cal. App. 4th 336 (2001) (letter from Sheriff to deputy expressing concerns about deputy’s judgment and decision-making ability even though not placed in personnel file); *Otto v. Los Angeles Unified School District*, 89 Cal. App. 4th 985 (2001) (summary of conference prepared by officer’s supervisor critical of officer’s performance); and *Caloca*, 72 Cal. App. 4th 1209 (independent CLERB report sustaining findings of misconduct).

Negative or critical comments by the CRB about a police officer transmitted to the Department may or could be used against that officer presently or in the future. Therefore the transmittal of those comments to the Department would likely be considered a “punitive action” triggering the right of the officer to an administrative appeal.

### CONCLUSION

Although we advised CRB that the proposed Amendment raises significant legal concerns, it subsequently voted to approve the Amendment. As explained above, we believe that the Amendment likely exceeds the authority of the CRB as set forth in Charter section 43(d), and also likely infringes on the exclusive powers of the Police Chief in administering and managing the Department pursuant to Charter section 57. The Amendment also likely violates the terms of the governing MOU between the City of San Diego and the POA.

Assuming the Amendment is not legally precluded under the Charter and the MOU, the City is required to engage in the meet and confer process with the POA prior to its adoption and implementation. Further, if the amendment is adopted either through agreement with POA or through imposition after impasse, the transmittal of adverse information about an officer to his or her commanding officer would trigger the notice and appeal provisions of POBAR.

Practically speaking, the CRB already has a role in advising the Police Department in its administration of discipline of police officers. It already reviews the administration of discipline by the Department and agrees with or disagrees with the discipline after it is imposed. Further, it has the ability to comment on such discipline. These comments are presented to the Executive Assistant Police Chief, who can address CRB concerns regarding discipline within the

