
CITY OF BALTIMORE

BERNARD C. "JACK" YOUNG
Mayor



DEPARTMENT OF LAW
DANA P. MOORE, ACTING CITY SOLICITOR
100 N. HOLLIDAY STREET
SUITE 101, CITY HALL
BALTIMORE, MD 21202

June 22, 2020

BY ELECTRONIC MAIL

Peter Keith, Esquire
Meghan K. Casey, Esquire
Gallagher Evelius & Jones LLP
218 N. Charles Street, Suite 400
Baltimore, MD 21201

RE: Possible Amendments to the Law Enforcement Officer's Bill of Rights for Consideration by the Commission to Restore Trust in Policing

Dear Mr. Keith and Ms. Casey:

Thank you for taking the time to speak with Deputy Commissioner Brian Nadeau, Lisa Walden, Chief of Legal Affairs, and myself on May 27, 2020 regarding the Baltimore Police Department's suggestions for amendments to the Law Enforcement Officer's Bill of Rights ("LEOBR"), codified at Md. Code Ann., Public Safety ("PS") §§ 3-101 *et seq.* As requested, the purpose of this letter is to provide you with examples in support of the suggestions discussed in our meeting.

The Baltimore Police Department ("BPD" or "the Department") supports expanding PS § 3-107(a)(2) to include a conviction or probation before judgment for a misdemeanor or a felony. Currently, this section denies the right to a hearing in a disciplinary matter only when an officer has been convicted of a felony. When an officer has been convicted of a misdemeanor, or received probation before judgment for any crime, the officer may still elect a hearing prior to the imposition of discipline, which results in officers remaining on BPD payroll even after criminal sentencing. In the event that a hearing board is unpersuaded about the officer's guilty and finds the officer not guilty in the disciplinary proceeding, the officer then remains employed by the Department. Amending this section to include misdemeanors and a grant of probation before judgment confers greater discretion upon the chief of the law enforcement agency to effectively manage the organization, but does not mandate termination; the chief would have the ability to consider the conviction and the circumstances leading to it in determining the best course of action. In light of the events surrounding the death of George Floyd while in law enforcement custody in Minneapolis, MN on May 25, 2020, the Department recommends taking a further step by allowing the agency head to terminate officers who are charged with a felony or misdemeanor, or are highly likely to be so charged pending a review of the evidence, in the days immediately following a criminal incident, as the chief of the Minneapolis Police Department did last month. Although we did not discuss this proposal in our meeting, we feel it is important to reference it in light of the national conversation about police reform. If this provision was included in amendments to LEOBR, the legislature could specifically

CITY OF BALTIMORE

BERNARD C. "JACK" YOUNG
Mayor



DEPARTMENT OF LAW
DANA P. MOORE, ACTING CITY SOLICITOR
100 N. HOLLIDAY STREET
SUITE 101, CITY HALL
BALTIMORE, MD 21202

provide officers with a mechanism to petition the law enforcement agency to rehire or reinstate them in the event the criminal charges resulted in a not guilty verdict.

Four cases are relevant. W.C. shot a burglary suspect in December 2014 after two fellow officers had already shot and incapacitated the suspect. The initial shots fired by the other officers were determined to be justified; however, W.C.'s shooting of the suspect was deemed not justified and he was charged with felony counts in relation to the incident. Although he was suspended without pay while the criminal case was pending, he was still listed as a member of the police department until after his sentencing for first degree assault, a felony, and use of a handgun in the commission of a felony in November 2016, at which time he was terminated. R.P. was convicted of fabricating evidence and misconduct in office in November 2018. Both charges are misdemeanors. Initially, he elected to have a hearing on the disciplinary charges against him; he is now slated for resignation from the Department on June 20, 2020. Similarly, C.R.-M. was convicted in August 2019 of second degree assault and misconduct in office for use of excessive force; again both charges are misdemeanors. He, too, elected a trial upon being served with disciplinary charges and is now slated for resignation on June 23, 2020. Finally, L.A., who pleaded guilty to malicious destruction of property and was granted probation before judgment in November 2017, elected a hearing on the disciplinary charges related to the criminal prosecution. At trial in December 2019, the hearing board found her not guilty and she is still employed by BPD.

Similarly, and if an amendment to allow the chief to fire officers charged with a crime, regardless of whether it is a felony or misdemeanor fails, the Department supports expanding the ability to suspend officers without pay to include certain misdemeanors or other non-criminal violations that would lead to termination. Currently, § PS 3-112(b)-(c) limits suspension without pay only to officers charged with a felony. When an officer's police powers are suspended with pay, the Department must then find a job in which to place that officer, which often results in a waste of resources. Additionally, when an officer is charged with a crime or serious policy violation where termination will be sought, but is suspended with pay, the officer then has little incentive to cooperate with the administrative process. Officers in this situation will seek any means to lengthen the time between suspension and resolution of the disciplinary process.

For example, after D.N. was convicted of a misdemeanor and recommended for termination for assaulting a store owner who employed his daughter, he went out on stress medical leave for over 12 months, delaying the process. Likewise, J.P. was convicted of Domestic Violence and was recommended for Termination. He also went out on medical and has not returned to work. His case was in 2018.

The Department supports revisions to § PS 3-108 that would give the chief of the law enforcement agency greater discretion in the management of his or her agency post-trial. Currently, PS § 3-108(a)(3) provides that a finding of not guilty terminates the action. The Department cannot challenge an exoneration of an officer by a hearing board that did not follow the evidence.

CITY OF BALTIMORE

BERNARD C. "JACK" YOUNG
Mayor



DEPARTMENT OF LAW
DANA P. MOORE, ACTING CITY SOLICITOR
100 N. HOLLIDAY STREET
SUITE 101, CITY HALL
BALTIMORE, MD 21202

Furthermore, a not guilty finding by a hearing board contradicts the Department's own findings that there was sufficient evidence to charge the officer with misconduct in the first place. The outcome of the disciplinary hearing for L.A., as described above, illustrates this point, as does the case involving A.S. and C.S. In that matter, officers who were married to one another were involved in a domestic incident after consuming alcohol to the point of intoxication. An open line to 911 captured one officer stating that she punched the other because he said he was going to kill her. An outside jurisdiction responded to their home and was unable to make contact with the officers for over an hour. There was significant evidence of a struggle and an assault in the car parked in the driveway. After a three day hearing, which included admissions by the officers that they were intoxicated, the hearing board found them not guilty of all charges. Their stated rationale in support of their finding was that there were gaps in the investigation; however, it was clear that the board members did not focus or analyze the evidence admitted at trial and looked for reasons to reach the not guilty finding.

Additionally, the chief's ability to increase the punishment recommended by the hearing board is currently subject to numerous procedural constraints in § PS 3-108(d), which gives officers who face an increased punishment imposed by the chief numerous grounds to appeal the decision for the slightest technical violation. The Department supports an amendment that significantly reduces or eliminates these procedural requirements. A.R. was charged with failing to submit a pill believed to be controlled dangerous substance as required by Departmental policy; the officer instead gave the pill back to the suspect. This incident occurred in January 2017. After a trial before the hearing board in August 2018, he was found guilty. Police Commissioner Gary Tuggle conducted a hearing to increase the punishment and terminated A.R. from his employment at the end of October 2018. A.R. appealed to the Circuit Court for Baltimore City under § PS 3-109, alleging numerous grounds of error. In a memorandum opinion issued in August 2019, the Circuit Court rejected most of A.R.'s contentions, with the exception of two minor technical violations. The first issue raised was that the Department violated § PS 3-108(d)(1), which requires the chief to conduct a review of the board's recommendation and conduct a hearing to increase the punishment within 30 days of the issuance of the board's report. The second technical violation alleged that the Department did not comply with § PS 3-108(d)(5)(iii), which requires the agency to provide the officer with written or oral communications relevant to the chief's decision that were not considered by the hearing board. At argument in the Circuit Court, the Department argued that these violations were not established by the record and that, even if the Court found them to be supported by the record, they were technical violations that did not result in prejudice to A.R. Instead of weighing whether or how these technical violations prejudiced A.R., and evaluating whether, in light of a lack of prejudice, the agency could correct the technical violations as discussed by the Court of Appeals in *Baltimore City Detention Center v. Foy*, 461 Md. 627 (2018), the Court ordered that BPD reinstate A.R. The Department has appealed this decision to the Court of Special Appeals, which heard oral arguments in this case on June 4, 2020.

The case involving A.R. also supports amending PS § 3-109 to limit judicial review of agency decision subject to the substantial evidence test and eliminate the right to appeal on procedural

CITY OF BALTIMORE

BERNARD C. "JACK" YOUNG
Mayor



DEPARTMENT OF LAW
DANA P. MOORE, ACTING CITY SOLICITOR
100 N. HOLLIDAY STREET
SUITE 101, CITY HALL
BALTIMORE, MD 21202

grounds. An officer who has been terminated for such egregious wrongdoing should not be granted reinstatement due to minor, technical violations of a statute governing post-trial procedure. This statute could also be amended to permit an agency to appeal a not guilty finding, in lieu of allowing the chief to reverse such a finding as discussed above.

The Department supports changes to the procedures governing who serves as the fact finder in a contested hearing. Specifically, eliminating all collective bargaining options for formation of hearing boards as currently provided in PS § 3-107(c)(5) would increase the perception of independence of the hearing board. Secondly, we recommend that the statute provide for one or more civilian hearing examiner(s), to be appointed by the agency's chief, to establish impartiality of the hearing and the hearing process, which currently suffers from the perception and the reality that officers will cover for other officers, no matter how egregious the conduct. Two of the cases discussed above, the case involving L.A., and the case against A.S. and C.S., both of which went to trial wherein substantial evidence in support of a guilty finding was presented and admitted, demonstrate the bias inherent in the current process governing the formation of a fact-finding panel.

We also discussed changes to the way investigations are required to be conducted under PS § 3-104. An amendment to PS §3-104(b)(1) to allow for civilian investigators would provide the Department with the ability to co-investigate allegations of misconduct with a civilian oversight body. Such an amendment would also permit the Department to hire former sworn law enforcement members who have retired to conduct misconduct investigations, and increase the number of sworn members available for patrol and criminal investigative functions. Amending PS § 3-104(d)(1) to provide for subpoena power during the investigation would expand the investigator's power to obtain relevant and crucial evidence. Currently, the statute permits subpoenas to be issued only after disciplinary charges have been filed, not during the investigation. Finally, two issues discussed in case law should be included in the statute: (1) expunged criminal records should be admissible in police disciplinary hearings; and (2) there is no exclusionary rule in administrative hearings.

Thank you for the opportunity to share our viewpoints with you. If you have any questions or require additional information, please call or email to discuss.

Very truly yours,

A handwritten signature in blue ink, appearing to read "Kristin E. Blumer".

Kristin E. Blumer
Chief Solicitor

cc: Deputy Commissioner Brian Nadeau
Lisa Walden, Chief Legal Counsel