

Comments of the New York Civil Liberties Union Regarding the New York Police Department's Proposed Disciplinary Matrix

October 9, 2020

The New York Civil Liberties Union respectfully submits the following comments regarding the New York Police Department's proposed disciplinary matrix. The NYCLU, the New York affiliate of the American Civil Liberties Union, is a not-for-profit, non-partisan organization with eight offices throughout the state and more than 180,000 members and supporters. The NYCLU's mission is to promote and protect the fundamental rights, principles, and values embodied in the Bill of Rights of the U.S. Constitution and the New York Constitution.



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Defending New Yorkers' right to be free from discriminatory and abusive policing is a core component of the NYCLU's mission. Protecting this right requires robust systems for investigating abusive officers and holding them accountable for misconduct. Unfortunately, those systems have long been broken in New York City.

The NYCLU has long documented the failures of NYPD leadership to hold officers accountable for misconduct as well as the shortcomings of the city's Civilian Complaint Review Board in guaranteeing effective, independent oversight. Those failures and shortcomings have become even more evident in recent months, in which we have witnessed widespread police violence against racial justice protesters, the active stonewalling of CCRB investigations, and the stubborn defense of obvious acts of misconduct – from the use of excessive force against protesters to the pervasive practices of officers covering their badge numbers to the persistent refusal of officers to wear face masks – by city and NYPD leadership.

This is the backdrop against which the NYPD's proposed disciplinary matrix must be judged. The NYCLU has historically called for the implementation of a disciplinary matrix, but it is important to note at the outset that merely having a set of guidelines is not enough. That's because at the end of the day, the utility of any set of disciplinary guidelines is only as strong as the NYPD's willingness to actually follow those guidelines and to commit to holding officers accountable for misconduct. While we offer comments and suggestions related to the current draft below, the NYCLU notes that a culture change – not simply a set of guidelines – must occur within the

Department if the NYPD is to credibly argue that it is committed to holding officers accountable for misconduct.

The Proposed Matrix Reinforces the Police Commissioner's Overbroad Discretion

Without more objective standards and a clear commitment to actually imposing discipline on officers found to have engaged in misconduct, this matrix reinforces the already too-broad discretion of the police commissioner. This is fundamentally at odds with what should be the core purpose of any such matrix: namely, prescribing predictable, objective penalty ranges at the outset in order to place guardrails around the improper exercise of that discretion.



At several points, the proposed matrix notes the fact that the Police Commissioner is the only one with legal authority to make final decisions. But what the proposed matrix fails to do is inspire confidence that those final decisions will be made with any consistency, nor does the document provide any clear sense of how that incredible amount of discretion will be applied in practice. The draft matrix presents long lists of presumptive penalties as well as potential aggravating and mitigating factors. It does not, however, describe how these (sometimes duplicative) factors interact with and influence each other to produce a final disciplinary outcome. It is incomplete without that analysis.

Reading this document, the public will have no real understanding of what the NYPD generally views as an appropriate penalty in cases where there are mitigating factors, and the public is similarly at a loss for understanding what the NYPD generally views as an appropriate penalty where there are aggravating factors.¹ That's because this proposed matrix does not provide any sense of how the presumptive penalties should substantively be modified based on mitigating or aggravating factors, nor does it set forth any minimum or maximum penalty amounts based on the application of those factors.

To take one example, the proposed matrix lists 13 separate potential mitigating factors when considering the appropriate penalty for an officer who is found to have engaged in an improper use of force. The matrix does nothing, however, to explain the substantive import of

¹ The proposed matrix does, however, provide presumptive additional penalty amounts for "unique aggravating factors" related to domestic violence and driving while ability impaired/intoxicated incidents. Why such amounts are not listed for other categories of misconduct is not explained anywhere in the document.



those mitigating factors in terms of how they could actually alter the presumptive penalties listed in that section. Indeed, it is unclear from this matrix whether, in applying the mitigating factors, the NYPD thinks that there should be *any* penalty for an officer who is found guilty of using improper force if mitigating factors exist. If the commissioner is to consider mitigating and aggravating factors, the matrix must provide some metrics by which to apply them; otherwise this document provides no means by which to objectively evaluate the police commissioner’s ultimate exercise of discretion.

Confusingly, the draft matrix also purports that its presumptive penalties constitute the presumptive penalty “generally deemed appropriate for the first instance of a specific proscribed act,”² yet an officer’s lack of prior discipline is also described as a potential mitigating factor that could reduce the presumptive penalty amount.³ The matrix therefore fails to actually describe the presumptive penalty for a first time offense and fails to offer any concrete measure of what an “appropriate” penalty would be in such cases.

The absence of penalty ranges or objective metrics tied to mitigating and aggravating factors suggests that the final outcome is governed only by the police commissioner’s discretion. While that may be the legal reality, the Department can and should hold itself to higher, clearer standards. This matrix will only be useful if it produces outcomes that the public deems fair and consistent; fairness and consistency require that the document account for the potential misuse of discretion in assigning final penalties. That the law vests in the police commissioner exclusive authority to decide disciplinary outcomes cannot be an excuse for adopting a disciplinary matrix that effectively equivocates on whether officers found to have engaged in misconduct will actually face meaningful accountability. And to the extent that the matrix’s presumptive penalties do not accurately predict final outcomes because the matrix fails to account in real terms for the impact of other factors, it will rightly be criticized as little more than smoke and mirrors.

The NYPD Must Provide More Detailed Information on its Process for Creating the Matrix and on its Application of its Presumptive Penalties Going Forward

² NYPD, Disciplinary System Penalty Guidelines: Draft for Public Comment, 6, https://www1.nyc.gov/assets/nypd/downloads/pdf/public_information/nypd-discipline-matrix-draft-for-public-comment-2020-08-31-w-message.pdf.

³ *Id.* at 7.



In its presentation of the proposed matrix, NYPD officials noted that the document was created following a review of five years of internal NYPD precedent – evaluating department trial room decisions to determine the appropriate presumptive penalties and to identify relevant mitigating and aggravating factors. The NYPD also noted that there were a number of areas, including use of force and false statements, where the proposed matrix represents a move toward imposing harsher penalties than in the past.

The NYPD should provide a full accounting of this survey, including by making available the decisions upon which the Department relied and by providing a detailed explanation of each area in which the matrix represents a change in practice. Because so much of the NYPD disciplinary process had been shrouded in secrecy behind the now-repealed section 50-a, the public has long been denied access to the very information relied on by the NYPD in creating this matrix. If, as the NYPD claims, the proposed matrix represents an improvement over past and current practices, it should provide the public with the means to evaluate those claims and to judge for themselves whether the NYPD is making actual progress towards more accountability. The NYPD will already be required by local law to submit a report on its process for developing a disciplinary matrix, in which a discussion of its survey process would logically fit.⁴

Going forward, to the extent that same local law will also require an annual report that “includes the number and percentage of instances within the preceding calendar year in which the commissioner imposed a discipline penalty that is different from the disciplinary matrix penalty,”⁵ the commissioner should also be required to document specifically which factors were applied and provide detailed justifications for any such departure from the presumptive penalty amount. As discussed above, the success or failure of this matrix will hinge on whether the public views its ultimate application as fair and consistent. This level of reporting will be essential to that analysis.

Any Promises of Accountability Are Illusory Absent a Culture that Aggressively Pursues Misconduct Charges

The proposed matrix lists 38 types of misconduct for which a non-probationary officer can be presumptively terminated. These include instances where an officer has been found guilty of racial

⁴ N.Y.C. Admin. Code § 14-186.

⁵ *Id.*



profiling/biased-based policing or intentionally making a false official statement. While termination is certainly warranted for such serious misconduct, there is ultimately little reason to suspect that officers will actually face such punishment, given the Department's documented failures to substantiate and aggressively pursue these types of charges.

According to a report from the Office of the Inspector General for the NYPD, the NYPD received 2,495 complaints of bias-based profiling between 2014 and 2018, none of which were substantiated by Internal Affairs investigators.⁶ Considering the Department's troubling history of racially-discriminatory, unconstitutional stops and the persistent racial disparities across nearly all categories of NYPD enforcement, the failure to substantiate even one such allegation casts serious doubt on the NYPD's process for investigating these complaints. Crucially here, it also makes the proposed matrix's promise of termination for such misconduct ring hollow.

Regarding false statements, a report from the independent panel tasked with reviewing the NYPD disciplinary system noted that the Department has been reluctant to charge officers accused of making false statements under the Patrol Guide provisions mandating termination, instead opting to pursue charges that do not presumptively require termination upon conviction.⁷ A revised matrix cannot fix this problem; it requires changes to the ways in which disciplinary charges are prepared at the outset.

In recent months, NYPD officers have engaged in egregious acts misconduct against racial justice protesters. According to Human Rights Watch, in at least some cases, that misconduct rose to the level of international human rights violations.⁸ The NYPD, however, has repeatedly defended the conduct of its officers as consistent with departmental policy. Questioned by the New York State Attorney General as to whether the officers filmed driving their patrol cars into crowds of demonstrators on a Brooklyn street had violated NYPD

⁶ Office of the Inspector General for the NYPD, *Complaints of Biased Policing in New York City: An Assessment of NYPD's Investigations, Policies, and Training*, 2 (2019), https://www1.nyc.gov/assets/doi/reports/pdf/2019/Jun/19BiasRpt_62619.pdf.

⁷ The Report of the Independent Panel on the Disciplinary System of the New York City Police Department, 39 (2019), <https://www.independentpanelreportnypd.net/assets/report.pdf>.

⁸ Human Rights Watch, "Kettling" Protesters in the Bronx: Systemic Police Brutality and Its Costs in the United States (2020), https://www.hrw.org/sites/default/files/media_2020/09/us_mott%20haven0920_web_0.pdf.



policy, the NYPD commissioner said that they did not.⁹ If, in the NYPD's view, driving a vehicle into pedestrians violates no policy, it stands to reason that the Department will not consider charging the driving officer with any misconduct; thus any assurances that the matrix purports to offer that improper use of force will result in serious consequences are entirely illusory.

It is one thing for a disciplinary matrix to state that officers will face termination for serious misconduct. But such statements are meaningless if obvious acts of misconduct are not even considered violations of NYPD policy, if investigators never substantiate fireable charges in the first place, or if investigators consistently recommend lower-level charges that cannot actually result in termination. These problems cannot be fixed through simply adopting a disciplinary matrix; they require a change in the very culture and practices of NYPD officials responsible for investigating misconduct and carrying out discipline. And they require a culture change at the highest levels of department leadership in order to make sure that officers who harm the public and who engage in obvious and egregious acts of misconduct actually face charges consistent with the seriousness of their actions.

The NYCLU appreciates the opportunity to provide comments on the draft matrix and hopes to continue to engage with the Department as it incorporates public feedback and works to create a final document. The NYCLU also strongly encourages the NYPD to directly engage with and incorporate feedback from communities most directly impacted by police misconduct as part of this process.

⁹ Tamar Lapin, NYPD Commissioner Says Cops Who Drove into Group of Protesters Didn't Violate Policy, N.Y. Post, June 22, 2020, <https://nypost.com/2020/06/22/nypd-commissioner-says-cops-were-not-wrong-to-drive-into-protesters/>.