

**Comments of Michael Sisitzky  
On Behalf of the New York Civil Liberties Union  
Before the Civilian Complaint Review Board  
Regarding the NYPD Disciplinary Matrix**

**January 29, 2021**

The New York Civil Liberties Union respectfully submits the following comments regarding the New York Police Department's final 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, including the right to be free from discriminatory and abusive policing.



1 Whitehall Street, 3<sup>rd</sup> Fl.  
New York, NY 10004  
[nyclu.org](http://nyclu.org)

Donna Lieberman  
*Executive Director*

Olivier Sylvain  
*President*

Because of our longstanding concerns regarding the NYPD's approach to discipline, the NYCLU has historically called for the creation of a disciplinary matrix, which could provide for more objective standards and, in theory, place guardrails around the unrestrained exercise of discretion in disciplinary decision-making. A disciplinary matrix can be an important tool for increasing public understanding of opaque disciplinary rules and processes, and it can serve as a metric by which to hold public officials accountable to the rules they purport to follow. To that end, the fact that this long-overdue document now exists is an important step, but one that must be viewed in the proper context.

The NYPD lacks the commitment to accountability that is a necessary precursor to this or any matrix operating effectively. The Civilian Complaint Review Board should not put stock in assurances from the Police Commissioner that he will limit his legally-unlimited discretion, nor should the CCRB rush into any agreement that limits its own ability to make independent recommendations for cases within its jurisdiction. Simply accepting rules that were written by the NYPD and subject to the Commissioner's unilateral ability to apply, reject, or modify would undercut the independence and credibility of the CCRB as an oversight agency. The NYCLU urges the CCRB to take seriously the criticisms of this matrix from the communities most directly impacted by police violence and to respond with public advocacy for a stronger matrix. Rather than simply accept an NYPD-generated formula, the CCRB must demand stronger accountability mechanisms and aggressively counter any efforts by the NYPD to use this or any matrix to justify their continued unwillingness to hold officers accountable.

## **The Creation of a Disciplinary Matrix Does Not Signal a Shift in the NYPD's Current Approach to Discipline**



In recent weeks, the de Blasio Administration and NYPD leadership have been touting the final disciplinary matrix as constituting a sea change in the Department's approach to discipline, with the administration claiming that the development of the matrix is the culmination of the mayor's commitment to the Obama Foundation Reimagining Policing Pledge and the NYPD's commitment to implementing recommendations from a 2019 independent panel review of the disciplinary system.<sup>1</sup> Mayor de Blasio has referred to the matrix's provisions as constituting the new "law of the land" for officers found to have committed misconduct.<sup>2</sup> Commissioner Shea has similarly presented the matrix as a landmark reform and has said that he would go above and beyond in terms of transparency by informing the public whenever he utilizes his discretion to deviate from the recommended penalties set forth in the document.<sup>3</sup>

Unacknowledged in the administration's public messaging is the simple fact that the NYPD no longer had any choice as to whether to develop a disciplinary matrix and report on its usage. In June 2020, the New York City Council passed legislation requiring that the Department issue a disciplinary matrix and inform the public on the steps taken toward its development and eventual application.<sup>4</sup> While the Commissioner's commitment to inform the public on departures from the matrix guidelines is a welcome one, the same law also requires that the Department report on whether such departures take place.<sup>5</sup> The Commissioner can of course provide more detailed information than required by law on the specific factors that justify departures from the matrix, and to the extent that the Commissioner is truly expressing a commitment to do more than simply comply with the Council's mandate, it is one that the public and City officials must hold him to.

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<sup>1</sup> Yasmeen Khan, *NYPD Releases New Disciplinary Guidelines, But Commissioner Still has Final Say on Penalties*, Gothamist, Jan. 16, 2021, <https://gothamist.com/news/nypd-releases-new-disciplinary-guidelines-commissioner-still-has-final-say-penalties>.

<sup>2</sup> Office of the Mayor, *Transcript: Mayor de Blasio Holds Media Availability*, Jan. 27, 2021, <https://www1.nyc.gov/office-of-the-mayor/news/060-21/transcript-mayor-de-blasio-holds-media-availability>.

<sup>3</sup> Graham Rayman & Thomas Tracy, *NYPD Commissioner Vows to Alert Public if he Deviates from New Disciplinary Guidelines for Rogue Cops*, N.Y. Daily News, Jan. 26, 2021, <https://www.nydailynews.com/new-york/nyc-crime/ny-nypd-commissioner-alert-public-discipline-guidelines-20210126-ratga72bpjcbjif6tuad5h4tzi-story.html>.

<sup>4</sup> See N.Y.C. Admin. Code § 14-186.

<sup>5</sup> *Id.*

Indeed, because New York law vests the Police Commissioner with complete control to make final decisions in disciplinary matters, the disciplinary matrix as a whole largely functions as a commitment to which those in leadership must be held. The CCRB has a critical role to play in holding the NYPD accountable to such commitments, and that role must include pushing back on any notions that a disciplinary matrix, by itself, will lead to a fundamental shift in policing culture when it comes to responding to misconduct.

### **Promises of Accountability from this Administration and NYPD Leadership are Illusory**



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. In an administration where the Mayor and police leadership were truly invested in and committed to accountability, a disciplinary matrix could have much more practical value in pushing meaningful change.

New York City does not currently have an administration or police leadership that truly prioritizes accountability. For this or any matrix to be useful, a culture change must first occur. Under this administration, the NYPD pushed for a dramatic expansion of section 50-a, compounding the secrecy of the Department's disciplinary system, which was only undone due to the unprecedented mobilization of thousands of New Yorkers last summer demanding the law's repeal.<sup>6</sup> Following historic bail reform measures passed by the State Legislature in 2019, New Yorkers witnessed obvious disregard for rules against political advocacy while in uniform by NYPD officials who spoke, without consequence, at public forums calling for legislative rollbacks.<sup>7</sup> And crucially, we have seen a complete unwillingness to hold officers accountable for egregious misconduct, from the five years that it took to fire the officer who killed Eric Garner to the repeated failures to take responsibility for the unprecedented violence directed at protesters last summer.<sup>8</sup>

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<sup>6</sup> See Nick Pinto, *After Opposing NYPD Transparency for Years, de Blasio's Promise of Reform Rings Hollow*, Gothamist, June 2, 2020, <https://gothamist.com/news/after-opposing-nypd-transparency-years-de-blasio-promise-reform-rings-hollow>.

<sup>7</sup> Christopher Robbins, *Cops aren't Supposed to Talk "Public Policy," But Bail Reform is a Different Matter*, Gothamist, Feb. 4, 2020, <https://gothamist.com/news/cops-arent-supposed-talk-public-policy-bail-reform-different-matter>

<sup>8</sup> See Ashley Southall, *Daniel Pantaleo, Officer Who Held Eric Garner in Chokehold, Is Fired*, N.Y. Times, Aug. 19, 2019, <https://www.nytimes.com/2019/08/19/nyregion/daniel-pantaleo-fired.html>; Dana



Any promises of accountability premised on the application of this new matrix are illusory absent a culture that prioritizes accountability and that aggressively pursues misconduct charges. A document that says officers who unjustifiably use deadly force, engage in racial profiling, or make false official statements will presumptively be terminated is meaningless if the NYPD refuses to ever pursue or substantiate allegations of such misconduct.

The NYPD's current approach to discipline suggests that many of the promises of accountability offered up in recent weeks will ultimately ring hollow. Questioned by the New York State Attorney General as to whether the officers filmed driving their patrol cars into crowds of demonstrators during last summer's racial justice protests had violated NYPD policy, the NYPD commissioner said that they did not.<sup>9</sup> 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.<sup>10</sup> And 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.<sup>11</sup>

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

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Rubinstein & Jeffery C. Mays, *De Blasio Denounced after Police Forcefully Clash with Protesters*, N.Y. Times, June 4, 2020, <https://www.nytimes.com/2020/06/04/nyregion/De-blasio-protests-curfew.html>; Jake Offenhartz, et al., *NYPD's Ambush of Peaceful Bronx Protesters was "Executed Nearly Flawlessly," City Leaders Agree*, Gothamist, June 5, 2020, <https://gothamist.com/news/nypds-ambush-of-peaceful-bronx-protesters-was-executed-nearly-flawlessly-city-leaders-agree>.

<sup>9</sup> 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/>.

<sup>10</sup> 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](https://www1.nyc.gov/assets/doi/reports/pdf/2019/Jun/19BiasRpt_62619.pdf).

<sup>11</sup> *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>.

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 CCRB's Independence and Credibility will be Undermined if it Does Not Advocate for a Stronger Matrix**



The CCRB has so far been publicly welcoming of the new disciplinary matrix.<sup>12</sup> While this may be understandable given the longstanding calls for such a matrix, it is essential to the CCRB's credibility as an independent oversight agency to not give undue credit to the NYPD for doing the bare minimum: publishing a set of non-binding guidelines after years of inaction and after a City Council mandate to produce something. At the end of the day, the disciplinary matrix represents the NYPD's approach to policing themselves, all of course subject to the police commissioner's ultimate discretion.

Limited as its ultimate authority may be, the CCRB exists because we know that the police are fundamentally incapable of policing themselves. The Board's ability to act independently and make its own recommendations must be guided by what the CCRB views as appropriate, not simply what the police commissioner will agree to. The CCRB must respond to criticisms of this matrix from communities most impacted by police violence by advocating for a stronger matrix and further mechanisms to prevent the abuse of discretion in favor of officers who engage in serious misconduct. Simply endorsing this document as is, divorced from the realities of the police department culture in which it was created, provides only for the illusion of progress.

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We thank the CCRB for the opportunity to provide comments on the disciplinary matrix and we urge the Board to advocate for a stronger matrix that better addresses the concerns and criticisms of the communities most impacted by discriminatory and abusive policing.

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<sup>12</sup> Anna Lucente Sterling & Gloria Pazmino, *De Blasio Touts New NYPD Disciplinary Guidelines, but Critics Say it Lacks Legally Binding Power*, Spectrum News NY1, Jan. 21, 2021, <https://www.ny1.com/nyc/all-boroughs/news/2021/01/21/nypd-launches-public-disciplinary-matrix>.