SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. LAURENCE LOVE** **PART** **63M**

Justice

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PATRICK LYNCH, POLICE BENEVOLENT ASSOCIATION OF THE CITY OF NEW YORK, INC., ED MULLINS, SERGEANTS BENEVOLENT ASSOCIATION OF THE CITY OF NEW YORK,

Petitioners,

- v -

NEW YORK CITY CIVILIAN COMPLAINT REVIEW BOARD, FREDERICK DAVIE,

Respondents.

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INDEX NO. 154653/2021

MOTION DATE 9/13/2021

MOTION SEQ. NO. 001 002 003 004 005

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 19, 24, 25, 26, 27, 29, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 69, 70, 71, 72, 73, 74, 75, 76, 77

were read on this motion to/for ARTICLE 78 (BODY OR OFFICER).

The following e-filed documents, listed by NYSCEF document number (Motion 002) 21

were read on this motion to/for LEAVE TO FILE.

The following e-filed documents, listed by NYSCEF document number (Motion 003) 31, 32, 33

were read on this motion to/for LEAVE TO FILE.

The following e-filed documents, listed by NYSCEF document number (Motion 004) 63, 64, 65

were read on this motion to/for LEAVE TO FILE.

The following e-filed documents, listed by NYSCEF document number (Motion 005) 66, 67, 68

were read on this motion to/for LEAVE TO FILE.

Upon the foregoing documents, and after oral argument held September 13, 2021, the decision on Petitioner's Petition, Respondents' cross-motion to dismiss, the parties' three applications to file oversize briefs (motion seq 002, 003, and 005) and the New York Civil Liberties Union and American Civil Liberties Union's motion for leave to appear as *Amici Curiae* (seq 004) is as follows:

Motion sequences 002, 003, 004, and 005 are GRANTED in their entirety and all said papers were considered by this Court as they relate to motion sequence 001.

Petitioners Patrick J. Lynch, as President of the Police Benevolent Association of the City of New York, Inc. ("PBA"), on behalf of himself and all officers with the rank of police officer employed by the City of New York, the PBA, Ed Mullins, as President of the Sergeants Benevolent Association of the City of New York ("SBA"), on behalf of himself and all officers with the rank of sergeant employed by the City of New York, and the SBA ("Petitioners") filed the instant article 78 Petition against defendants-respondents the New York City Civilian Complaint Review Board ("CCRB") and its Chair, Frederick Davie (collectively, "Respondents"), seeking an Order Declaring that CCRB violated the Open Meetings Law, declaring that the changes to CCRB's rules that CCRB approved by vote on February 10, 2021 (the "2021 Rules") are void in their entirety pursuant to Public Officers Law §107(1); Declaring that CCRB's Statement of Basis and Purpose for the 2021 Rules was defective; striking the definition of "abuse of authority" in Rule 1-01 in its entirety; striking the CCRB's jurisdiction in Rule 1-01 over complaints alleging "sexual misconduct" against officers; striking CCRB's jurisdiction in Rule 1-01 over complaints alleging "intentionally untruthful testimony and written statements made against members of the public in the performance of official police functions;" reinstating Rule 1-52(b) as it existed prior to the adoption of the 2021 Rules; striking the new language of Rule 1-52(b) in its entirety; striking the revisions to Rule 1-36(d); reinstating the deleted language in Rule 1-23(e); striking the definition of "Complaint" in Rule 1-01; striking the new case disposition category in Rule 1- 33(e)(15); striking the revisions to Rule 1-51(b); and seeking costs and attorneys' fees, pursuant to Public Officers Law §107(2).

The Civilian Complaint Review Board as codified in §440(a) of the New York City Charter was established for the following purpose:

> It is in the interest of the people of the city of New York and the New York City police department that the investigation of complaints concerning misconduct by officers of the department towards members of the public be complete, thorough, and impartial. These inquiries must be conducted fairly and independently, and in a manner in which the public and the police department have confidence. An independent civilian complaint review board is hereby established as a body comprised solely of members of the public with the authority to investigate allegations of police misconduct as provided in this section.

Pursuant to §440(c)(1):

> The board shall have the power to receive, investigate, hear, make findings and recommend action upon complaints by members of the public against members of the police department that allege misconduct involving excessive use of force, abuse of authority including bias-based policing and racial profiling, discourtesy, or use of offensive language, including, but not limited to, slurs relating to race, ethnicity, religion, gender, sexual orientation and disability. The board shall also have the power to investigate, hear, make findings and recommend action regarding the truthfulness of any material official statement made by a member of the police department who is the subject of a complaint received by the board, if such statement was made during the course of and in relation to the board's resolution of such complaint. The findings and recommendations of the board, and the basis therefor, shall be submitted to the police commissioner. No finding or recommendation shall be based solely upon an unsworn complaint or statement, nor shall prior unsubstantiated, unfounded or withdrawn complaints be the basis for any such finding or recommendation.

Pursuant to §440(c)(2), the CCRB is authorized to promulgate rules of procedure in accordance with the City Administrative Procedure Act ("CAPA"). Said rules are codified in RCNY Title 38A, Chapter 1. The CCRB promulgated certain rules in 2018 which were thereafter challenged by the Petitioners herein. Several of said rules were struck down as more fully discussed in

Lynch v. New York City Civilian Complaint Rev. Bd., 64 Misc. 3d 315 (Sup. Ct. NY Cty, Index No. 152235/2018) and *Lynch v. New York City Civilian Complaint Rev. Bd*., 183 A.D.3d 512 (1st Dept. 2020), leave to appeal denied, 36 N.Y.3d 901 (2020). As relevant to the instant action, the Appellate Division ruled that

> …the CCRB passed a resolution to begin investigating allegations of sexual misconduct. The resolution to begin investigating allegations of sexual misconduct announced a change from the CCRB's historic practice of referring such allegations to the NYPD, on the ground that "sexual misconduct by a police officer is, at its core, an abuse of authority" (which is included in the CCRB's FADO jurisdiction)…
>
> By declaring that the CCRB would assert jurisdiction over an entire category of misconduct that it had historically referred as a matter of policy, the resolution announced a sweeping policy change that materially affected the rights of all alleged victims of sexual misconduct and allegedly offending police officers "equally and without exception," and thus amounted to the adoption of a new "rule" (*Matter of Singh v Taxi & Limousine Commn. of City of N.Y.*, 282 AD2d 368, 368 [1st Dept 2001], citing, inter alia, NY City Charter § 1041 [5] [a] [iii], lv denied 96 NY2d 720 [2001]). However, because the CCRB undisputedly did not follow the public vetting process required by CAPA for adopting a new rule, the sexual misconduct resolution is a nullity (NY City Charter § 1043; see *Callahan v Carey*, 2012 NY Slip Op 30400 [U] [Sup Ct, NY County 2012], affd for reasons stated below 103 AD3d 464 [1st Dept 2013], affd sub nom. *Matter of Council of the City of N.Y. v Department of Homeless Servs. of the City of N.Y.*, 22 NY3d 150 [2013]). (*Lynch*, 183 A.D.3d at 518)

Following said ruling, in November 2020, the CCRB issued a "Notice of Public Hearing and Opportunity to Comment on Proposed Rules," which was reissued in December 2020 to correct an error. The complete proposed text of all of the above challenged rules was included in said notice. On January 13, 2021, the CCRB held a public meeting regarding the proposed rule changes. Thereafter, at its February 10, 2021 meeting, the CCRB voted to approve the 2021 Rules

in their entirety, which were published in The City Record on February 24, 2021 and became effective thirty days thereafter.

Open Meetings Law

Petitioners challenge the entire slate of 2021 Rules as violative of Public Officers Law §103 (the "Open Meetings Law") alleging that the CCRB conducted proceedings relating to the 2021 Rules in secret that were required by statute to be conducted publicly. Petitioners further challenge the above noted rule sections pursuant to CPLR Article 78 and N.Y. City Admin. Proc. Act §1043.

Pursuant to Public Officers Law § 103(a), Every meeting of a public body shall be open to the general public, except that an executive session of such body may be called and business transacted thereat in accordance with section ninety-five of this article. Pursuant to Public Officers Law § 107(1):

> Any aggrieved person shall have standing to enforce the provisions of this article against a public body by the commencement of a proceeding pursuant to article seventy-eight of the civil practice law and rules, or an action for declaratory judgment and injunctive relief. In any such action or proceeding, if a court determines that a public body failed to comply with this article, the court shall have the power, in its discretion, upon good cause shown, to declare that the public body violated this article and/or declare the action taken in relation to such violation void, in whole or in part, without prejudice to reconsideration in compliance with this article. If the court determines that a public body has violated this article, the court may require the members of the public body to participate in a training session concerning the obligations imposed by this article conducted by the staff of the committee on open government.
>
> An unintentional failure to fully comply with the notice provisions required by this article shall not alone be grounds for invalidating any action taken at a meeting of a public body. The provisions of this article shall not affect the validity of the authorization, acquisition, execution or disposition of a bond issue or notes.

Not all breaches of Public Officers Law § 103(a) automatically trigger sanctions, see, *New York University v. Whalen*, 46 N.Y.2d 734, 735 (1978). Petitioners must also show good cause for relief, which turns on factors such as whether there is "obvious prejudice to plaintiffs as a result of defendants' intentional and deceitful conduct," *Gordon v. Vill. of Monticello*, 87 N.Y.2d 124, 128 (1995) and whether violations were merely negligent or non-prejudicial when viewed in light of the public process as a whole. See, e.g., *Chenkin v. N.Y.C. Council*, 72 A.D.3d 548, 549 (1st Dep't 2010) "It is the challenger's burden to show good cause warranting judicial relief." (*Whalen*, 46 NY2d, at 735.

Petitioners contend that Respondents violated Public Officers Law § 103 by proceeding to executive sessions at the close of their meetings without publicly stating the reason for said executive sessions and establishing that same falls within an exception enumerated in Public Officers Law § 105. Petitioners further contend that the CCRB deliberated over the proposed rule changes in secret and privately made the determination of what proposed rule changes to include in the 2020 Notice and in what form and that such private deliberations constituted meetings in violation of the Open Meetings Law. Said violations allegedly occurred when the CCRB went into executive session at the close of its May, June, July, August, October, November and December 2020 public meetings as well as at the close of the January 13, 2021 public meeting. It is undisputed that the Respondents did hold executive sessions at the close of said meetings without explanation. A practice which has apparently since ceased. Petitioners speculate that the Board must have deliberated in secret because the proposed rules were not discussed in any of the board meetings between May and November 2020.

The Court can understand Petitioners speculation which was clearly invited by the CCRB's own conduct by proceeding to unexplained executive sessions. Why the CCRB would act

accordingly is beyond comprehension and served only to create issues where none existed. To do so during the time period that the instant issue remained open, especially in light of the First Department's previous ruling only made matters worse.

Nonetheless, contrary to Petitioners' speculation, the proposed rules were drafted by the CCRB's General Counsel's office during said months and there is no indication that the Board discussed said rules in secret at any time. Respondents further submit the affidavit of Fredrick Davie, the Chair of the CCRB, which establishes that there was no discussion of any of the proposed rules at any executive session at the end of the above described Board meetings. Said affidavit further established that at the January 13, 2021 executive session, that a few comments were made about the rule making process but that there was no discussion of the language of the rules.

Petitioners also object to a conference call held on July 1, 2020 wherein Respondent's General Counsel, Matthew Kadushin, shared with the CCRB a draft a Notice of Public Hearing and Opportunity to Comment on Proposed Rules, including a draft set of proposed rule changes and statement of basis and purpose and provided the Board with legal advice regarding the *Lynch* decision, the legal consequences of the decision, and the process for revising CCRB's rules. Thereafter, without discussing the substance of the rules, the Board authorized the General Counsel's Office to commence the rulemaking process. Such a call made for the purposes of obtaining legal advice is exempted from the Open Meetings Law pursuant to Public Officers Law § 108(3). As discussed in *Brown v. Feehan*, 125 A.D.3d 1499 (4th Dept. 2015), "to discuss a matter exempted from the Open Meetings Law, a public body need not follow the procedure imposed by § 105(1) that relates to entry into an executive session."

As such, while Petitioners have established a series of Open Meeting Law violations based upon Respondents' negligent failure to properly describe their reasons for entering an executive session at the close of most meetings, Petitioners have not established any intentionally deceitful conduct on the part of Respondents. Petitioners specifically have not established prejudice to the Petitioners. Further, the Court notes, although Petitioner filed comments regarding the proposed rule changes, a representative on Petitioners behalf failed to even appear at the January 13, 2021 meeting despite ample notice of said meeting raising further doubt to this argument. In sum, although the CCRB should have avoided even the appearance of violating the Open Meetings Law, such conduct in this instant does not rise to the level of a finding of a violation requiring the wholesale dismissal of any and all of the proposed rule changes.

New York City Administrative Procedure Act §1043 and

Pursuant to the New York City Administrative Procedure Act t §1043(f)(1)(c), no rule shall be effective until "the rule and a statement of basis and purpose have been published in the City Record and thirty days have elapsed after such publication."

Petitioners contend that the "CCRB's Statement of Basis and Purpose is defective because, while it provides a meager description of certain of the rule changes, it does not explain the basis or purpose for any of the changes." Said Statement of Basis and Purpose was published as follows:

> As a result of a November 2019 ballot initiative, there were a number of changes to Chapter 18-A § 440 of the New York City Charter, which defines the jurisdiction, composition, duties, and powers of the Civilian Complaint Review Board. Additionally, a May 2020 New York State Appellate Division, First Department ruling invalidated a portion of the Civilian Complaint Review Board's current rules. The purpose of this rule revision process is to incorporate the Charter changes, comply with the court ruling, modify the Board meeting schedule, and clarify certain language to make the rules more understandable.

Petitioners' argument that said Statement is defective is entirely unsupported. § 1043(d)(1) requires only that the Law Department must certify that "to the extent practicable and appropriate," it "provides a clear explanation of the rule and the requirements imposed by the rule." Further, "there is no requirement that [an agency] articulate its rationale" for a rule "at the time of promulgation, provided that the record reveals that the rule had a rational basis." *Tri-City, LLC v. N.Y.C. Taxi & Limousine Comm'n*, 189 A.D.3d 652, 652-53 (1st Dep't 2020). The Court further notes that on January 8, 2021, the CCRB published an online explanatory memo providing a lengthy explanation of the rational basis for investigating both sexual misconduct and untruthful statements made by NYPD Officers against members of the public. While both categories have traditionally been referred to the NYPD, the CCRB is not prohibited from investigating same is, as discussed *infra* it engages in proper rulemaking as required by CAPA.

Rational Basis Review

Where an agency has jurisdiction to adopt a rule, "an administrative regulation will be upheld only if it has a rational basis, and it is not unreasonable, arbitrary or capricious" (*New York State Assn. of Counties v Axelrod*, 78 NY2d 158, 166 [1991]; see CPLR 7803 [3]). An agency rule is invalid as arbitrary and capricious where: (1) the agency fails to identify a rational basis for the rule (see *Metropolitan Taxicab Bd. of Trade v New York City Taxi & Limousine Commn.*, 18 NY3d 329, 333-334 [2011]; (2) the agency does not establish a rational relationship to the agency's stated purpose; (3) the agency does not demonstrate the rule is based on a rational, documented, empirical determination; (4) the agency fails to identify objective standards for implementing the program (see *Matter of D.F. v Carrion*, 43 Misc.3d 746, 757 [Sup Ct, NY County 2014; and (5) the agency allows for uneven enforcement against those to whom it applies (see *New York State Assn. of Counties v Axelrod*, 78 NY2d at 168. Further, the agency or body "can act only to implement their

charter as it is written and as given to them" (*Greater N.Y. Taxi Assn. v New York City Taxi & Limousine Commn*., 42 Misc.3d 324, 328 [2013]). The agency or body may not act or promulgate rules contrary to the will of the legislature.

Section 1-01 Definition of "Abuse of Authority"

As codified in § 1-01, "The term 'Abuse of Authority' refers to misusing police powers. This conduct includes, but is not limited to, improper searches, entries, seizures, property damage, refusals to provide identifying information, intentionally untruthful testimony and written statements made against members of the public in the performance of official police functions, and sexual misconduct."

Petitioners contend that "The new definition is so broad that it would effectively eliminate all limitations on CCRB's jurisdiction, in violation of the City Council's intent to create CCRB as an agency of limited jurisdiction while expressly recognizing that other categories of complaints against officers remain the jurisdiction of other bodies." The Court strains to understand how the term "Abuse of Authority" could mean anything other than the misuse of the authority granted to police officers, specifically their police powers. The term "abuse of authority" in and of itself lends itself to a broad definition of what police activities are encompassed, short of charter 440(c)(1) being amended.

The CCRB's interpretation of its "abuse of authority" jurisdiction is entitled to "great weight and judicial deference" (see *Matter of Toys "R" Us v Silva*, 89 NY2d 411, 418 [1996]). Courts must uphold an agency's interpretation of its charter authority and mandate "if it has a rational basis and is supported by substantial evidence," and "so long as the interpretation is neither irrational, unreasonable nor inconsistent with the governing statute" (id. at 418-419). Petitioners contend that based upon the above definition that the CCRB illegally expanded its jurisdiction to

include (i) complaints alleging sexual misconduct, including criminal conduct such as sexual assault and rape (the "Sexual Misconduct Rule"); and (ii) complaints alleging false statements made by officers in the performance of official police functions (the "False Official Statements Rule").

In *Lynch,* 183 A.D.3d 512, the Appellate Division, First Department stuck down the CCRB's rules relating to sexual misconduct "because the CCRB undisputedly did not follow the public vetting process required by CAPA for adopting a new rule." The First Department did not comment on the underlying reasons why the Trial Court upheld the CCRB's ability to promulgate rules on that subject, and the CCRB having now complied with CAPA, the logic underlying said rules remains valid.

In *Lynch*, 64 Misc. 3d at 340-343, Justice Crane opined as follows:

> The International Association of Chiefs of Police defines sexual misconduct by law enforcement as
>
> "any behavior by an officer that takes advantage of the officer's position in law enforcement to misuse authority and power (including force) in order to commit a sexual act, initiate sexual contact with another person, or respond to a perceived sexually motivated cue (from a subtle suggestion to an overt action) from another person" and "any communication or behavior by an officer that would likely be construed as lewd, lascivious, inappropriate, or . . . unbecoming [of] an officer."
>
> Historically, the CCRB referred these claims to the Internal Affairs Bureau. But, as respondents stated on the record:
>
> "[W]e had a decades-long practice of referring cases to the IAB for investigation. We spent years researching the data and the studies and the news articles that were coming up about complaints against NYPD officers regarding sexual misconduct and what this . . . showed us is there is underreporting of sexual misconduct by NYPD Officers. Why? Because they have to go back to the NYPD to complain about it. Of course that would discourage victims from coming forward. That would intimidate civilians from pursuing the investigation or participating in the investigation. If they have to go

back to the precinct where they allege they were sexually assaulted, it will not encourage a full and thorough and complete investigation, and that was part of the Board resolution" (tr dated Aug. 1, 2018, at 41, lines 24-26; at 42, lines 2-14).

Petitioners next argue that the resolution is arbitrary and capricious. They state that the CCRB has provided no rational basis to alter more than two decades of past practice of referring sexual misconduct complaints to the IAB. Further, petitioners assert that it is unreasonable to funnel sexual misconduct complaints to the "inexperienced" CCRB. The CCRB cannot claim that it is filling a void because sexual misconduct complaints against NYPD officers have, for decades, been handled by IAB. Further, petitioners allege CCRB states no evidence to indicate that any change is needed in the handling of these claims.

CCRB's resolution is rational. Respondents have provided ample evidence as to why investigations into sexual misconduct complaints against NYPD officers necessitate a change. As explained in the CCRB's public memorandum and in its motion papers, the CCRB did extensive research in arriving in its decision to investigate sexual misconduct allegations. One reason the CCRB passed a resolution to investigate sexual misconduct allegations independently of the NYPD (and IAB) was to ensure a complete, thorough, and impartial investigation. Studies demonstrated that, as an internal entity of the NYPD, the IAB's investigation of sexual misconduct complaints severely undermined the public confidence in the NYPD. CCRB's investigation into sexual misconduct claims suggests heightened agency consciousness, not arbitrariness.

The IAB is an offshoot of the NYPD. The NYPD's employees investigate the complaints internally. Allegations of police sexual misconduct are exactly the type of complaint that requires an independent investigation. CCRB's review of the complaints, reports, and studies, in conjunction with Ms. Ritchie's testimony, led the Board to conclude that the CCRB should investigate sexual misconduct allegations, instead of referring them to the IAB.

Moreover, studies have shown underreporting of police sexual misconduct allegations. It follows logically that an alleged victim of sexual abuse by an NYPD officer might be intimidated to go back to the very precinct where she or he was abused. The CCRB's resolution promotes impartial investigations. It downplays the power dynamic between an alleged victim of sexual misconduct and the police officer, or a NYPD employee who investigates the misconduct.

> Finally, the carve-outs in the legislative history, that are not within the CCRB's jurisdiction, with respect to police misconduct, are for allegations of corruption and criminal acts. The Board follows these carve-outs. Any complaint alleging sexual misconduct to the CCRB will be immediately referred to the appropriate District Attorney's Office.
>
> Thus, the resolution provides a rational basis to overcome underreporting and intimidation that sexual misconduct victims face.

With the exception of Petitioners' comments, all of the comments received by the CCRB supported the CCRB's expansion of its investigations into sexual misconduct. As such, as articulated by the above excerpt of Justice Crane's analysis, there is substantial rational basis for the regulation, supported by ample evidence and is well within the CCRB's governing statute.

Petitioners also object to the inclusion of complaints alleging false statements made by officers in the performance of official police functions within the CCRB's jurisdiction. Like allegations of sexual misconduct, petitioners argue that such matters are outside of the CCRB's jurisdiction. Petitioners cite numerous examples establishing that the CCRB did not traditionally investigate such matters, it cites no authority establishing that these matters are outside of the CCRB's jurisdiction if, as here, the CCRB has engaged in proper rulemaking.

In its January 8, 2021 memorandum, the CCRB described numerous reasons why untruthful statements made by NYPD Officers against members of the public are abuses of authority and why referring same to IAB is insufficient. One would hope the issue is limited to a handful of individuals; however, it is indisputable that untruthful statements by police officers are clear misuses of their police powers and constitute an abuse of authority. As such there is substantial rational basis for the regulation, supported by ample evidence and is well within the CCRB's governing statute.

Section 1-01 Definition of "Complaint"

As codified in § 1-01, "The term 'Complaint' refers to a report of alleged police misconduct received by the Board." Petitioners contend that this definition exceeds CCRB's jurisdiction because it omits the Charter's requirement that the complaint must be received from a "member of the public." Charter §440(c)(1). Said argument is without merit as § 1-02 Jurisdiction clearly restricts the Board to investigations of complaints by members of the public thus any complaint clearly must originate from a member of the public.

Section 1-23(e)

As codified in § 1-23(e) said section was modified as follows, deleting the bracketed language and adding the underlined language: "The Board may obtain records and other materials from the Police Department which are necessary for [the] investigations [of complaints submitted to] undertaken by the Board, except such records and materials that cannot be disclosed by law. In the event that requests for records or other evidence are not complied with, investigators may request that the Board issue a subpoena duces tecum or a subpoena ad testificandum." Petitioners again argue that this rule change is squarely prohibited by the Charter's express restriction on CCRB's jurisdiction to acting "upon complaints by members of the public." As briefly discussed *supra*, § 1-02 restricts the Board to investigations of complaints by members of the public. The amended rule is a necessary change as the CCRB now investigates both complaints by members of the public and false statements made during CCRB's investigation of such complaints.

Section 1-33(e)(15) – "Other Misconduct Noted" Case Disposition

As codified in § 1-33(e)(15), the case disposition of "Other Misconduct Noted" was added to the list of Case Dispositions defined as "the Board found evidence during its investigation that

an officer committed misconduct not traditionally investigated by the Board, but about which the Police Department should be aware."

Petitioners contend that Rule 1- 33(e)(15)'s reference to "Other Misconduct Noted" fails to include any indication that this is only a notation of "possible" misconduct. As discussed in *Lynch v. New York City Civilian Complaint Rev. Bd*., 183 A.D.3d at 517, "38-A RCNY 1-44 was amended to provide for non-FADO misconduct to 'be noted in case dispositions by categories describing the possible misconduct and the evidence of such misconduct.' Supreme Court properly found the amended rule to be rational based on the CCRB's explanation that the revision codified existing practice and was designed to make a record of the existence of possible non-FADO misconduct, which would likely be referred to another agency, without making any findings or recommendations with respect thereto. Contrary to the dissent's assertion that the revision exceeds the CCRB's FADO jurisdiction because it incorporates non-FADO findings into the case disposition, the amended rule specifies that potential non-FADO misconduct is to be "noted" as "possible misconduct" with a listing of evidence of such misconduct and thus entails neither a finding nor a determination made by the CCRB." Respondents contend that this definition simply codifies the CCRB's existing practice and that this definition does not purport to authorize CCRB to make "findings" about non-FADO misconduct. Petitioners are correct that omitting the word "possible" from "other misconduct noted" impermissibly implies that a finding was made by the CCRB. The First Department specifically ruled that Section 1-44 requires the notation to be "possible non-FADO misconduct" and this Court cannot disturb that finding. A disposition of "Other Possible Misconduct Noted" would be acceptable but without such a modification, the rule conflicts with the holding in *Lynch*. As such, said rule must be stricken.

Section 1-36(d) Reconsideration or Reopening of Cases

As codified in § 1-36(d) said section was modified as follows, adding the underlined language: "If a previously closed Case is reopened or reconsidered: (1) If all members of the previously deciding panel are presently members of the Board and available to meet, then that previously deciding panel will be reconvened to reconsider the Case. (2) If any member of the previously deciding panel is no longer a member of the Board or is unavailable to meet, then the remaining members of the previously deciding panel will be reconvened with a replacement panel member designated by the Chair as required by 38-A RCNY § 1-31(b) to reconsider the Case. (3) If all members of the previously deciding panel are no longer members of the Board, the Chair will select a panel will be convened to reconsider the Case, pursuant to 38-A RCNY § 1-32."

Petitioners contend that "by granting itself the ability to assign the reconsideration of a closed case to a new panel simply because a member of the prior panel is temporarily 'unavailable,' CCRB violated the well-established principle of law that an adjudicator should not modify or overrule a decision of a fellow adjudicator in the same case.," citing *Bansi v. Flushing Hosp. Med. Ctr.*, 15 Misc.3d 215, 219 (Sup. Ct. Queens Cty. 2007); *Prudential Lines, Inc. v. Firemen's Ins. Co. of Newark, N.J.*, 109 Misc.2d 281, 283 (Sup. Ct. N.Y. Cty. 1981); *U.S. Fire Ins. Co. v. Nine Thirty FEF Invs., LLC*, 44 Misc.3d 1213(A) (Sup. Ct. N.Y. Ct. 2013); and *Maggiore v. Maggiore*, 49 A.D.2d 1021, 1022 (4th Dep't 1975). Petitioners further contend that a new panel member will not have the requisite knowledge of the evidence and arguments initially presented in the case and that Respondents have not provided sufficient explanation for such a change. Respondents further contend that the subjective standard of "unavailable" "creates a serious risk for, at best, uneven enforcement or, at worst, manipulation of results."

Respondents contend that this change gives more flexibility to CCRB to ensure timely reconsideration of cases while still maintaining a strong presumption that the original panel will

reconsider the case. However, there is no indication in the amended language that the modification was intended to ensure timely reconsideration of cases. Respondents' analogy to the modified § 1-31(b) is inapplicable as the language at issue here is the undefined standard of "unavailable" which contains no qualifier such as ""interfere with or unreasonably delay" the CCRB's operations. As such, Respondents have not established a reasonable basis for the amendment and the prior rule must be reinstated.

Section 1-51(b) – Number of Board Meetings

As codified in § 1-51(b) said section was modified as follows, deleting the bracketed language and adding the underlined language: [If a Case has been referred to] Notwithstanding the [Full Board] foregoing, the Full Board [may take such action as it deems appropriate, including, but] shall not [limited to: making its own findings] be required to meet in the months of August and [recommendations, remanding the Case to a referring panel for further consideration or action, and remanding the Case for further investigation.] December.

Petitioners contend that the (i) CCRB failed to provide any rational basis to change its longstanding requirement of holding 12 public meetings per year; (ii) the change is not reasonably tailored to any legitimate purpose; and (iii) the change undermines CCRB's accountability and prejudices officers by adding to delays in the CCRB process.

Respondents contend that amendment was made because board member vacation schedules in August and December make it challenging to convene a quorum, but that this change will not cause delays in the Board's resolution of cases and that the Board will still meet in said months if necessary. The need to accommodate board members' vacation schedules is not a rational basis for the rule change. The Board has met monthly for the last twenty-five years and rationally should continue to do so in the interest of resolving matters as expeditiously as possible

and public perception. The police officers, complaint and public at large are entitled to take comfort that the CCRB is working year round to perform their duties. As such, and the prior rule must be reinstated.

Section 1-52(b) Panel and Board Meetings: General Matters

As codified in § 1-52(b) said section was modified as follows, deleting the bracketed language and adding the underlined language: [Board members must be present at a meeting of the Board or a panel in person or, subject to such limitations as the Board may by resolution from time to time determine, by videoconference in order to register their votes.] A Board member may not abstain from voting unless the member is subject to subdivision (a) of this section.

Petitioners allege that with the deletion of the above language that the CCRB removed the requirement that Board members be present at meetings to vote, in direct violation of state statutes prohibiting such secrecy in government, as well as CCRB's Charter requiring accountability to the public and police officers. Respondents counter, "As Petitioners note, the Open Meetings Law and General Construction Law already provide that members of a public body may only attend meetings and vote in person or by videoconference." As such, said provision may rationally be deleted as duplicative, and therefore unnecessary.

Petitioners further contend that the addition of "A Board member may not abstain from voting unless the member is subject to subdivision (a) of this section" in place of the prior Rule 1-52(b) forces Board members to vote even when circumstances exist that may prevent them from voting fairly and independently violates the Charter's requirement that CCRB's activities be "impartial" and "conducted fairly and independently, and in a manner in which the public and the police department have confidence." Charter §440(a). subdivision (a) encompasses only situations where a "Board member has a personal, business or other relationship or association with a party

to or a witness in a Case before a panel." Petitioners correctly highlight that there are myriad reasons why a board member would abstain from voting.

Respondents contend that "the amended rule does not force Board members to sit on a panel for cases that they do not believe they can impartially evaluate. Rather, in such instances, panelists may still request that the Chair or Executive Director exercise their authority under Rule 1-31(d) to reassign the case to a different panel." However, there is no assurance that the Executive Director will reassign the case to a different panel. Further, while the motivation to avoid one-to-one deadlocks on three-member panels and thereby avoid unnecessary referrals of cases to the full Board for resolution, same is not a rational basis to limit CCRB members from abstaining for reasons other than a direct conflict involving the parties. As such, said language must be stricken.

ORDERED that Petitioners' First, Second, Third, Fourth, Fifth, Sixth, Ninth, Tenth, and Thirteenth causes of action are DISMISSED in their entirety; and it is further

ORDERED that the relief demanded in Petitioners' Seventh, Eighth, Eleventh, and Twelfth causes of action is GRANTED in their entirety.

11/8/2021
DATE

LAURENCE LOVE, J.S.C.

CHECK ONE:	[X]	**CASE DISPOSED**		[ ]	**NON-FINAL DISPOSITION**		
	[ ]	**GRANTED**	[ ] **DENIED**	[X]	**GRANTED IN PART**	[ ]	**OTHER**
APPLICATION:	[ ]	**SETTLE ORDER**		[ ]	**SUBMIT ORDER**		
CHECK IF APPROPRIATE:	[ ]	**INCLUDES TRANSFER/REASSIGN**		[ ]	**FIDUCIARY APPOINTMENT**	[ ]	**REFERENCE**