

CITY OF OAKLAND



CITY HALL • 1 FRANK H. OGAWA PLAZA • OAKLAND, CALIFORNIA 94612
Police Commission

June 01, 2020

Re: Supplemental Opinion & Dissent

Dear Oakland City Council,

During the May 28, 2020 meeting of the Oakland Police Commission (Commission) the Commission reviewed two draft resolutions proposing to amend City Charter Section 604. The Commission's majority opinion is expressed in the Commission Opinion Letter dated June 01, 2020. We join in that opinion, except as to the language proposed by the Commission for Section 604, subsection (g)(5), to which we write in dissent.

Background

Circa May 23, 2020, the Oakland Police Commission ("Commission") received two updated draft resolutions proposing to amend City Charter Section 604. The first draft (hereinafter "Resolution One") is sponsored by Council President Kaplan, Council President Pro Tempore Kalb, Councilmember Gallo, and Councilmember Taylor. Resolution One proposes a variety of substantive changes. The second draft (hereinafter "Resolution Two") is sponsored by Council President Kaplan, Council President Pro Tempore Kalb, and Councilmember Gallo. Resolution Two proposes a limited selection of changes, the creation of the Office of the Inspector General (OIG), and language empowering the Commission to hire independent legal counsel. As noted in the majority opinion, the Commission used Resolution One as a reference document for our debate, as it most closely comports with the opinions previously expressed by the Commission in the Commission's April 27, 2020 Opinion Letter.

The original language of Section 604, subsection (g)(5) in Resolution One reads as follows:

The Commission may review the findings and discipline in any investigation of Level 1 use of force, sexual misconduct and untruthfulness, even if the Chief and the Agency agreed on the findings and discipline. The Commission shall conduct such review solely for the purposes of facilitating the Commission's oversight of the Agency, for formulating Agency policy and for making policy recommendations to the Department. The Commission may conduct such review only after the findings are no longer subject to review or modification by a Discipline Committee. The Commission shall not have the authority to reject or modify any findings or discipline. The Commission may delegate its authority to conduct the review described in this Section 604(g)(5) to the Inspector General. Nothing in this Section 604(g)(5) shall limit or modify the authority of a convened Discipline Committee as described in Section

604(g)(2).

The Commission's majority opinion proposes that Section 604, subsection (g)(5) of Resolution One read as follows:

The Commission on its own motion may convene a Discipline Committee for cases when either or both the Agency Director or the Department have not completed an investigation within two hundred and fifty (250) days of the filing of a complaint or when the evidence upon which the findings of either the Department or CPRA do not include required body worn camera footage of the incident in question. The Commission shall adopt additional qualifying criteria for convening a Discipline Committee within its own bylaws. The Discipline Committee may require the Agency to further investigate the complaint by notifying the Agency Director, in writing, of the specific issues that need further investigation. The Commission may convene such a Discipline Committee by a vote of no fewer than five (5) affirmative votes.

Argument

We write in dissent to the majority opinion, and urge Council to preserve the original language of Section 604, subsection (g)(5) as written in Resolution One.

Overview of the Current Disciplinary Framework

Under current law and policy, allegations of police misconduct are subject to investigation by the Internal Affairs Division (IAD) of the Oakland Police Department (OPD) and by the Community Police Review Agency (CPRA). These agencies are mandated to investigate the most serious categories of complaints, and retain limited discretion to administratively close other categories of complaints without a full investigation.¹

Per policy, IAD investigations must be completed, reviewed, and approved within 180 days, and in cases with a sustained finding, the discipline recommendation process must be completed within 30 days of the sustained finding.² CPRA is required by Charter to "make every reasonable effort" to complete its investigations within 180 days, and within 30 days of completion, the Director must issue written findings and proposed discipline to the Commission and the Chief of Police.³

The creation of this dual-track investigation protocol was a direct response to the perception that IAD was unable to conduct impartial investigations. Under the current Charter, CPRA serves as a check, protecting against the potential for IAD to conduct a biased investigation. CPRA's investigatory mandate is designed to produce independently-reached findings and proposed discipline.

This disciplinary framework is analogous to opposing attorneys during litigation. If IAD and CPRA reach similar findings, the Chief of Police will send the subject officer notice of intent to impose

¹ Oakland Police Department General Order M-03: Complaints Against Department Personnel, Section IV: Preliminary Inquiry, and Section VI: Investigation of Complaints [OPD Mandates]; Oakland City Charter, Section 604(f)(1) [CPRA Mandates].

² Oakland Police Department General Order M-03: Complaints Against Department Personnel, Section V: Due Dates And Timelines.

³ Oakland City Charter, Section 604(f)(3).

discipline. In essence, the “parties” have reached an appropriate “settlement”. If IAD and CPRA disagree, each agency submits their investigative files to a Commission Discipline Committee (DC). The DC, by design, acts like a judicial authority; it resolves any dispute between the agencies, and makes a final determination on proposed discipline.

Impartial Adjudicators Cannot Direct Investigative Activities

The framework discussed above creates a quasi-adversarial system where IAD’s findings are presented against CPRA’s findings, and the DC acts as the trier of fact. In order to act as an impartial adjudicator, the DC cannot be permitted to direct anyone to conduct investigative activities. The DC must rely only on the record presented by IAD and CPRA when reaching disciplinary decisions. A reasonable analogy is that of an appellate judge. Appellate courts rely on the record presented to it. It cannot order parties to conduct investigative activities. Doing so would be unconstitutional, as the judge would be assuming the investigatory role properly assigned to a party.

Furthermore, allowing a DC to take on an investigatory role is a dangerous position for a volunteer commission to assume without a substantial restructuring of Commission operations, qualifications, and training. To place this responsibility on the Commission, as currently formed and operated, would be crippling.

Lastly, in the context of police discipline, a DC that can direct further investigative activities invites additional jeopardy on procedural due process grounds. Attorneys for police officers will be able to justifiably question the propriety of a DC’s order for investigations or the propriety of a DC failing to conduct additional investigations. If a DC orders further investigation in one matter, but not in a similarly-situated matter, a competent attorney would challenge the DC’s ultimate decision on grounds of disparate treatment. This jeopardy can be entirely avoided by retaining the current framework, and positioning the DC to act as an impartial adjudicator only.

Commission Oversight of CPRA Can Be Effectively Accomplished by Other Means

Other commissioners and members of the public have referenced the Pawlik litigation as evidence that a DC must be empowered to direct the Agency to conduct certain investigative activities. In that matter, IAD and CPRA initially reached similar findings, but IAD’s findings were rescinded and reissued per the order of Oakland’s Federal Monitor, creating a dispute between the agencies that triggered the creation of a DC. Many members of the public perceived this series of events as evidence that in order to avoid the potential for future CPRA/IAD concurrence, the Commission must be empowered to direct further investigation by CPRA. This argument is wrong.

If a suspect commits a crime, and the district attorney fails to present key evidence that would convict the suspect, the appropriate remedy is to replace the district attorney with a competent substitute. As noted above, it would be wildly inappropriate for a trier of fact to direct the district attorney to conduct additional investigations and bring the materials forward for trial. In the Pawlik matter, the Commission noted concerns with the investigations conducted by both IAD and CPRA. The Commission has since dismissed the prior Director of CPRA and hired a competent substitute with clear direction to reform the CPRA. This is the appropriate remedy.

The current language of Section 604, subsection (g)(5) in Resolution One provides the Commission with necessary authority to review the work product of the CPRA, and determine whether the current Director is proposing discipline that is in-line with Commission expectations. If he fails to do so, the current language provides the Commission with the oversight access it needs to identify such a problem, and remedy it by providing direction to the current Director, or by seeking a suitable

replacement.

The Proposed Replacement Language is Fatally Flawed

The proposed replacement language contains a fatal flaw. Complex disciplinary matters take time to investigate. If the Commission forms a DC because it believes the investigation is taking too long, that DC will likely receive an investigatory file that is incomplete. Attempting to rely on an incomplete investigation to impose discipline invites litigation, and places the Commission and the City into a compromised position that would be likely impossible to defend. Police oversight is already complex and litigious and adopting the proposed replacement language would unnecessarily expose the Commission and City to legal liability.

Conclusion

For the foregoing reasons, we dissent from the Commission's June 01, 2020 Opinion Letter, and urge Council to preserve Section 604(g)(5) as currently drafted in Resolution One.

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