

OFFICE OF THE DIRECTOR  
OF POLICE ACCOUNTABILITY

## POLICE ACCOUNTABILITY BOARD REGULAR MEETING

**Wednesday, September 22, 2021  
7:00 P.M.**

### Board Members:

ISMAIL RAMSEY, CHAIR  
MICHAEL CHANG, VICE-CHAIR  
KITTY CALAVITA

REGINA HARRIS  
JULIE LEFTWICH  
DEBORAH LEVINE

NATHAN MIZELL  
JOHN MOORE III  
CHERYL OWENS

### **PUBLIC ADVISORY: THIS MEETING WILL BE CONDUCTED EXCLUSIVELY THROUGH VIDEOCONFERENCE AND TELECONFERENCE**

Pursuant to Section 3 of Executive Order N-29-20, issued by Governor Newsom on March 17, 2020, and to ensure the health and safety of the public by limiting human contact that could spread the COVID-19 virus, this meeting of the City of Berkeley Police Accountability Board will be conducted exclusively through teleconference and Zoom videoconference and there will not be a physical meeting location available.

To access the meeting remotely: join from a PC, Mac, iPad, iPhone, or Android device using this URL: <https://us02web.zoom.us/j/82237902987>. If you do not wish for your name to appear on the screen, use the drop-down menu and click on "rename" to rename yourself to be anonymous. To request to speak, use the "raise hand" icon on the screen. To join by phone: Dial **1 669 900 6833** and enter Meeting ID **822 3790 2987**. If you wish to comment during the public comment portion of the agenda, press \*9 and wait to be recognized.

### **AGENDA**

- 1. CALL TO ORDER & ROLL CALL (5 minutes)**
- 2. APPROVAL OF AGENDA (5 minutes)**
- 3. PUBLIC COMMENT (TBD)**

*(Speakers are generally allotted up to three minutes, but may be allotted less time if there are many speakers; they may comment on any matter within the Board's jurisdiction at this time.)*

The Police Accountability Board and Office of the Director of Police Accountability (ODPA) were created to provide independent civilian oversight of the Berkeley Police Department. They review and make recommendations on police department policies, and investigate complaints made by members of the public against police officers. For more information, contact the ODPA.

1947 Center Street, 5<sup>th</sup> Floor, Berkeley, CA 94704 TEL: 510-981-4950 TDD: 510-981-6903 FAX: 510-981-4955  
Website: [www.cityofberkeley.info/dpa/](http://www.cityofberkeley.info/dpa/) Email: [dpa@cityofberkeley.info](mailto:dpa@cityofberkeley.info)

4. **APPROVAL OF MINUTES** (2 minutes)  
Regular meeting of September 8, 2021.
5. **CHAIR'S REPORT** (5 minutes)  
Update from Board member Mizell on Reimagining Public Safety Task Force
6. **DIRECTOR OF POLICE ACCOUNTABILITY'S REPORT** (5 minutes)  
Status of complaints; NACOLE Conference; other items.
7. **CHIEF OF POLICE'S REPORT** (10 minutes)  
Crime/cases of interest, community engagement/department events, staffing, training, and other items of interest.
8. **SUBCOMMITTEE REPORTS (discussion and action)** (15 minutes)  
Report of activities and meeting scheduling for all Subcommittees, possible appointment of new members to all Subcommittees, and additional discussion and action as noted for specific Subcommittees:
  - a. Fair & Impartial Policing Implementation.
  - b. Director Search.
  - c. Regulations – Next meeting Sept. 20, 2021 at 7:30 p.m.
9. **OLD BUSINESS (discussion and action)**
  - a. i.) Hear and consider analysis from City Attorney's Office regarding lawful changes to hearing process to correct imbalances, and revise Interim Regulations and accompanying report to Council as necessary, to be submitted as a Supplemental Item for the Council's Sept. 28, 2021 meeting.  
  
ii.) Consider recommendation from Regulations Subcommittee that the Board send a letter to the City Attorney's Office, with a copy to the City Manager and Director of Human Resources requesting, in writing, the legal and/or contractual basis for meet-and-confer on the Interim Regulations proposed by the Board; and confirming that the legal opinion on the three significant provisions of the proposed Interim Regulations will be ready before the Board's Sept. 29 meeting. (30 minutes total)
  - b. Consider forming subcommittee for outreach activities. (5 minutes)
  - c. Training: Police Department organization; roles and responsibilities of Divisions and staff; chain of command. (2 hours)
  - d. Discuss and adopt permanent Standing Rules for the Board's conduct of business. (30 minutes)  
(See also pp. 35 – 42 of Sept. 8, 2021 packet)  
From: Interim Director


**10. PUBLIC COMMENT (TBD)**

*(Speakers are generally allotted up to three minutes, but may be allotted less time if there are many speakers; they may comment on items on this agenda only.)*

**11. ADJOURNMENT (1 minute)**

**Communications Disclaimer**

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 **Communication Access Information (A.R. 1.12)**

To request a disability-related accommodation(s) to participate in the meeting, including auxiliary aids or services, please contact the Disability Services specialist at 981-6418 (V) or 981-6347 (TDD) at least three business days before the meeting date.

**SB 343 Disclaimer**

Any writings or documents provided to a majority of the Board regarding any item on this agenda will be made available for public inspection at the Office of the Director of Police Accountability, located at 1947 Center Street, 5<sup>th</sup> Floor, Berkeley, CA.

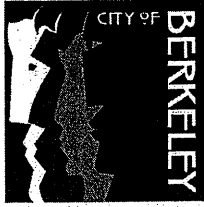
Contact the Director of Police Accountability (Board Secretary) at [dpa@cityofberkeley.info](mailto:dpa@cityofberkeley.info)



**POLICE ACCOUNTABILITY BOARD (PAB)  
REGULAR MEETING ATTACHMENTS  
SEPTEMBER 22, 2021**

<b><u>MINUTES</u></b>	
September 8, 2021 Regular Meeting Draft Minutes	Page 7
<b><u>AGENDA-RELATED</u></b>	
Item 8. – PAB Subcommittees List updated 9-9-21.	Page 11
Item 9.a.ii.) – Draft letter from Chair Ramsey to City Attorney Farimah Brown and Deputy City Attorney Sam Harvey, re Request for Written Opinion Regarding Police Accountability Board Regulations.	Page 13
Item 9.a.ii.) – Letters from Board members Calavita and Leftwich to Deputy City Attorney.	Page 15
Item 9.a.ii.) – 8-9-18 Memo from City Attorney Farimah Brown to Acting City Manager Paul Buddenhagen re Meet and Confer Requirements Related to Police Commission Ballot Measure.	Page 19
Item 9.d. Provisions from PRC Regulations regarding policy complaints.	Page 35
<b><u>COMMUNICATIONS</u></b>	
9-3-21 Article from <a href="http://www.latimes.com/california">www.latimes.com/california</a> re California lawmakers advance plan to decertify police.	Page 37
9-8-21 Article from <a href="http://www.sfchronicle.com/politics">www.sfchronicle.com/politics</a> re Policing bill to remove badges from bad officers goes to Gov. Newsom.	Page 41
9-16-21 Email from Interim Director of Police Accountability Katherine Lee to PAB Members re: [LawEnforcementOversight] Justice Department announces ban on no-knock entries, chokeholds for its own agents – POLITICO.	Page 43





OFFICE OF THE DIRECTOR  
OF POLICE ACCOUNTABILITY

DRAFT

**POLICE ACCOUNTABILITY BOARD**  
**REGULAR MEETING**  
**MINUTES**  
*(draft)*

**Wednesday, September 8, 2021**  
**7:00 P.M.**

**No physical location; meeting held exclusively through videoconference and teleconference.**

**1. CALL TO ORDER & ROLL CALL BY CHAIR RAMSEY AT 7:02 P.M.**

**Present:** Board Member Ismail Ramsey (Chair)  
Board Member Michael Chang (Vice-Chair)  
Board Member Kitty Calavita  
Board Member Regina Harris  
Board Member Juliet Leftwich  
Board Member Deborah Levine  
Board Member Nathan Mizell  
Board Member John Moore  
Board Member Cheryl Owens (left 10:28 due to internet outage)

**Absent:** None

**ODPA Staff:** Katherine J. Lee, Interim Director of Police Accountability; Byron Norris, DPA Investigator

**BPD Staff:** Chief Jen Louis, Lt. Rob Rittenhouse, Lt. Dan Montgomery, Sgt. Darren Kacalek (BPA), Ofc. Matthew Valle (BPA)

**2. APPROVAL OF AGENDA**

**Motion to approve the agenda as modified, to postpone Item #10.b. and hear Item #10.a. before Item #9.a.**

**Moved/Second (Calavita/Moore) Motion Carried by general consent**

**3. PUBLIC COMMENT**

*(Heard following Item #5.)*

There were 7 speakers.

**4. APPROVAL OF MINUTES**

**Motion to approve Special Meeting minutes of August 4, 2021.**  
Moved/Second (Leftwich/Calavita) **Motion Carried by general consent.**

**5. CHAIR'S REPORT**

Chair Ramsey reported: Mayor's Task Force on Fair & Impartial Policing recently met with the Mayor, Police Chief, and others re the recommendations by the Council. Still moving forward and will look into transitioning into the PAB subcommittee.

Board member Mizell reported on the Reimagining Public Safety Task Force: Did not meet in August. Meeting 6:00 p.m. tomorrow night – will hear presentation from Berkeley Copwatch and from NICJR on alternative response report; Task Force has been reviewing draft and will be providing input. Encourage members of public to attend.

**6. DIRECTOR OF POLICE ACCOUNTABILITY'S REPORT**

The Interim Director introduced Elisa Batista, the appointed alternate Board member, who introduced herself.

The Interim Director reported:

-- No new complaints since the last meeting. Two *Caloca* appeals still pending; one to be argued in a couple weeks.

-- Agenda packet includes the letter PAB sent to the Council regarding mandatory vaccines for Police Department employees; since then, the City issued mandate that all employees be vaccinated or tested regularly, and the matter is in meet-and-confer with all unions.

-- Hate crimes response and reporting referral from the Council – elements were referred to the PAB and will be agendized soon.

-- PAB members who would like a stipend should forward forms to our office. Will begin processing quarterly except for the Board member requesting monthly payments.

**7. CHIEF OF POLICE'S REPORT**

Interim Chief Louis reported:

-- Recent shootings: 29 so far this year; many in West Berkeley. Investigators actively working the cases, and BPD increasing connection with community -- working with Councilmembers; doing events and problem-solving with neighborhoods. Bike team and patrol increasing presence.

-- This year to date 135 calls involving a firearm. To date recovered 70 guns; achieved 3 primary ways: 1) response to call for service; 2) traffic enforcement; 3) detective work/search warrants. 17 recovered were ghost guns.

-- Cases of interest: 1) City Manager approved \$50K reward in hit-and-run death on Telegraph in June. 2) School Resource Officer contacted by Berkeley High staff re someone hacking into students' phones, obtaining compromising photos, and extorting the students. Many search warrants written and served. End of August



DA charged suspect on several counts. 3) Report of elderly man in distress at a Shattuck Ave. encampment. Unresponsive due to possible fentanyl OD, so officers administered Narcan; after 2 doses, man revived.

-- Pedestrian and bike safety a community concern. Enforcement requested re heavy trucks not following established truck routes; creates danger and damages roadway. Conducted enforcement with CHP this morning along Cedar and Milvia.

-- PAB training: goal is to provide strong foundation in the work the BPD does and how apply law and policy. As trainings go along, if want something more depth or detail, let her know. Spoke with Board member Calavita about sharing trainings BPD undergoes.

-- Staffing. Authorized for 157 sworn. Currently 153 due to retirements, resignations. Includes 3 in academy, who won't be alone on street until April 2022 at the earliest. With all initiatives going on, want to keep community safe.

Interim Chief Louis answered questions from the Board members.

## 8. SUBCOMMITTEE REPORTS (discussion and action)

a. Fair & Impartial Policing Implementation – appointment of public member/s.

George Lippman, Elliot Halpern, and Jamie Crook spoke regarding their qualifications for and interest in serving on this subcommittee. With no objections, Chair Ramsey appointed all three to this subcommittee.

b. Director Search – update. Human Resources Director LaTanya Bellow answered questions of role of subcommittee.

**Motion to allow public members on the Director Search Subcommittee Moved/Second (Calavita/Moore) Motion Carried by general consent.**

Rivka Polatnick and Marc Staton spoke regarding their qualifications for and interest in serving on this subcommittee. With no objections, Chair Ramsey appointed both to this subcommittee.

## 9. OLD BUSINESS (discussion and action)

a. i.) Reaffirm Board's August 4, 2021 action to send Interim Regulations for Handling Complaints Against Sworn Officers of the Police Department to the City Council for approval, subject to modification or withdrawal based on City Attorney's analysis.

*(Heard following Item #10.a.)*

Discussion; no action taken.

(10:06 – 10:15: Meeting interrupted due to technological problem.)

ii.) Hear and consider analysis from City Attorney's Office regarding lawful changes to hearing process to correct imbalances, and revise Interim Regulations and accompanying report to Council as necessary.

*(Postponed to the next meeting; analysis not yet ready.)*

- b. Consider forming subcommittee for outreach activities.  
(Postponed to the next meeting.)

**10. NEW BUSINESS (discussion and action)**

- a. Presentations from representatives of the Human Resources Department and City Attorney's Office regarding the meet-and-confer process with labor unions.  
(Heard following Item #8.b.)  
Human Resources Director LaTanya Bellow and Deputy City Attorney Sam Harvey spoke and answered questions from Board members.
- b. Training: Police Department organization; roles and responsibilities of Divisions and staff; chain of command.  
(Postponed to the next meeting.)
- c. Discuss and adopt permanent Standing Rules for the Board's conduct of business.  
(Postponed to the next meeting.)

**11. PUBLIC COMMENT**

There were 3 speakers.

**Closed Session**

Pursuant to the Court's order in *Berkeley Police Association v. City of Berkeley, et al.*, Alameda County Superior Court Case No. 2002 057569, the PRC will recess into closed session to discuss and take action on the following matter:

**12. CONSIDER REVISED RECOMMENDATION FOR ADMINISTRATIVE CLOSURE IN COMPLAINT #2487**

**Motion to approve Complaint for administrative closure.**

Moved/Second (Calavita/Mizell) **Motion Carried**

Ayes: Calavita, Chang, Harris, Leftwich, Levine, Mizell, Moore, and Ramsey.

Noes: None

Abstain: None

Absent: Owens

**End of Closed Session**

**13. ANNOUNCEMENT OF CLOSED SESSION ACTION**

The vote to administratively close Complaint #2487 was announced.

**14. ADJOURNMENT**

**Motion to adjourn the meeting.**

Moved/Second (Mizell/Moore) **By general consent, the meeting was adjourned at 10:35 p.m.**

**POLICE ACCOUNTABILITY BOARD  
SUBCOMMITTEES LIST**

9-9-21

<b>Subcommittee</b>	<b>Board Members</b>	<b>Chair</b>	<b>BPD Reps</b>
<b>Regulations</b> Formed 7-7-21	Calavita Chang Leftwich Owens  <u>Public:</u> Kitt Saginor	<b>Chang</b>	Lt. Dan Montgomery
<b>Director Search</b> Formed 8-4-21	Levine Mizell Moore  <u>Public:</u> Rivka Polatnick Marc Staton		
<b>Fair &amp; Impartial Policing Implementation</b> Formed 8-4-21	Calavita Moore Owens Ramsey  <u>Public:</u> George Lippman Elliot Halpern Jamie Crook		



September 22, 2021

Farimah Faiz Brown, City Attorney  
Sam Harvey, Deputy City Attorney  
City of Berkeley  
2180 Milvia St., 4<sup>th</sup> Floor  
Berkeley, CA 94704

Re: Request for Written Opinion Regarding Police Accountability Board Regulations

Dear Ms. Brown and Mr. Harvey,

We write to provide more detail on our recent request for a legal opinion on the PAB's authority to enact interim and ultimately permanent regulations related to hearings for officers accused of misconduct. We thought this would be useful as you undertake this project.

### **Background**

As you know, on November 3, 2020, the Charter of the City of Berkeley was amended to establish the Police Accountability Board (PAB) and Office of the Director of Police Accountability. Section 125(1) of Article XVIII of the Charter reads:

The purpose of the Police Accountability Board is to promote public trust through independent, objective, civilian oversight of the Berkeley Police Department, provide community participation in setting and reviewing Police Department policies, practices, and procedures, and to provide a means for prompt, impartial and fair investigation of complaints brought by members of the public against sworn employees of the Berkeley Police Department.

Section 125(3)(a)(6) also authorizes the PAB "to adopt rules and regulations necessary for the conduct of its business." Section 125(15) states that the PAB and Director of Police Accountability shall use the services of City Attorney's Office for legal advice.

The PAB is currently drafting regulations for handling complaints filed against sworn members of the Police Department. To provide an accessible and fair process, the proposed PAB regulations would allow, among others, individuals who witnessed misconduct, to file a complaint and would extend the complaint filing deadline to 180 days. In addition, in order to create more parity between the complainant and subject officer in the hearing process, the regulations would allow the complainant to be present when the officer is questioned by the PAB and to question the officer.

The PAB has been advised by Deputy City Attorney Harvey that the proposed regulations raise two issues: 1) they trigger a meet and confer obligation with the Police Officers Association,

even though they have not yet even been considered by the City Council; and 2) they may violate state law and the decision in *Berkeley Police Association v. City of Berkeley* (2008) 167 Cal. App. 4<sup>th</sup> 385. That case held that the hearing process of the Police Review Commission (PRC), the predecessor of the PAB, violated Penal Code Section 832.7 because hearings were open to the public and permitted public access to PRC investigations, reports and findings. PRC hearings were closed to the public as a result of that decision. Further, complainants were treated like any member of the public and excluded from that part of their complaint hearing that involved subject officers' questioning, apparently on the basis of a verbal opinion of the former City Attorney. Consequently, the ability of complainants to participate meaningfully in the hearing process was severely curtailed, as was transparency and the search for truth.

### **PAB Request**

The purpose of this letter is to request a written opinion from your office regarding the meet-and-confer process as it relates to these issues. The memo should include the specific legal and/or contractual basis for the contention that the proposed regulations trigger that process. We also ask that you provide information regarding the timing of the meet and confer (i.e., why it would be triggered now and, if it is in fact triggered, when the process could be expected to begin and end). Case law and statute state that before a relevant policy is "adopted," a meet and confer must occur. However, there seems some inconsistency as to what "adoption" means in this context (passage by City Council, or implementation?), as meet-and-confers have on occasion *followed* initial endorsement by Council.

The PAB also reiterates its request for a written opinion regarding the issue of whether the proposed regulations violate state law and/or case law. Mr. Harvey was present at a PAB meeting where we discussed this issue and has received letters from two PAB members, written in their individual capacities, setting forth the reasons why they believe the regulations are legally sound.

This request is urgent because the PAB is currently operating without regulations, severely threatening our ability to "promote public trust through independent, objective, civilian oversight" of the Police Department" and "provide a means for prompt, impartial and fair investigation of complaints brought by members of the public," as mandated by Measure II. **Accordingly, we ask that your written opinion be provided the Director of Police Accountability on or before the PAB meeting on September 29, specifically no later than by 12:00 p.m. that day.**

Thank you very much for your prompt attention to this important, time-sensitive matter.

Best regards,

Ismail Ramsey  
Chair, Police Accountability Board

September 2, 2021

Sam Harvey  
Deputy City Attorney  
City of Berkeley  
2180 Milvia St., 4<sup>th</sup> Floor  
Berkeley, CA 94704

Re: Police Accountability Board Interim Regulations

Dear Mr. Harvey,

I'm a member of the Berkeley Police Accountability Board ("PAB") and serve on its Regulations Subcommittee. I'm also an attorney and the former Legal Director of the Giffords Law Center to Prevent Gun Violence, where I worked for more than 20 years on the development, drafting and defense of state and local gun safety laws in California and nationwide. I'm writing to you as a PAB member, but this letter has not been submitted to nor approved by the PAB, so I do not speak officially on the Board's behalf. The letter is reflective, however, of many discussions the Subcommittee and PAB have had regarding the PAB regulations, and is consistent with comments we have received from the public on numerous occasions.

As I believe you know, the first task of the Regulations Subcommittee was to make recommendations to the PAB regarding interim regulations for the handling of complaints against sworn officers. To expedite the process, the Interim Director of Police Accountability provided the Subcommittee with draft interim regulations modeled after the regulations governing the PAB's predecessor entity, the Berkeley Police Review Commission ("PRC"). The Subcommittee felt very strongly, however, that the draft interim regulations perpetuated some of the significant inequities contained in the PRC regulations (which had also been flagged by the PRC) and the Subcommittee voted to recommend that the regulations be changed to provide a more accessible and even-handed process.

In addition to expanding the categories of individuals who may file a complaint (to include witnesses to alleged misconduct and, upon a vote of five Board members, the PAB) and extending the complaint filing deadline to 180 days, the Regulations Subcommittee recommended that the regulations regarding the hearing process create more parity between the complainant and the subject officer. Specifically, the Subcommittee voted to allow the complainant to: 1) be present when the subject officer is questioned by the PAB; and 2) question the subject officer. Under the PRC regulations and draft interim PAB regulations, the complainant was permitted to do neither. We were advised that these prohibitions were adopted in response to an opinion of the office of the former City Attorney concluding that to allow the complainant equal participation in the hearing process would violate state law and the decision in *Berkeley Police Association v. City of Berkeley* (2008) 167 Cal. App. 4<sup>th</sup> 385.

On August 4, 2021, the PAB unanimously voted to recommend that the City Council approve the changes proposed by the Regulations Subcommittee. The PAB understood, however, that the changes

regarding the hearing process could conflict with the opinion of the former City Attorney. As a result, the PAB asked that the Office of the City Attorney revisit that opinion. You have agreed to do so and to present your opinion at the PAB's September 8, 2021, meeting.

Although I have not conducted extensive legal research in this area, I have reviewed state law and the *Berkeley Police Association* case and do not see how either could serve as an obstacle to the interim regulations proposed by the PAB. The Public Safety Officers Procedural Bill of Rights Act ("POBRA") (Government Code Section 3303 et seq.) mandates that certain conditions apply to investigations and interrogations of officers by their commanding officer or other member of the employing public safety department that could lead to punitive action. Penal Code Section 832.7 provides that personnel records of police officers must, with certain exceptions, be kept confidential.

In the *Berkeley Police Association* case, the court held that PRC hearings were subject to POBRA and violated Penal Code Section 832.7 because they were open to the public and permitted public access to PRC investigations, reports, hearings and findings. The case did **not** raise the issue of whether a complainant could be present during the questioning of the subject officer or whether the complainant could question the officer. Indeed, the court noted in its description of the hearing process that existed at the time that, "All parties and witnesses are subject to cross-examination by the other side and to questioning by the PRC commissioners."

It was clearly appropriate, as a response to the *Berkeley Police Association* case, for the PRC regulations to be amended to prohibit public attendance at hearings and public access to confidential personnel records. It was not appropriate nor necessary, however, for the regulations to be amended to: 1) prohibit questioning of the officer by the complainant; and 2) require that the complainant be excused from the hearing while the PRC commissioners questioned the officer. These regulations are fundamentally unfair to the complainant and violate basic principles of due process. They have also undermined public confidence in the PRC, and will, if they are not corrected, undermine public confidence in the PAB.

I have been advised that the opinion of the former City Attorney, apparently issued in 2008, was provided verbally and not in writing. This is surprising, given the dramatic and consequential changes that were made in response to the opinion. The absence of a written opinion also makes it difficult to understand and respond to the rationale for the opinion. I can only surmise, however, that the opinion was based on a misreading of and overly cautious response to the *Berkeley Police Association* case.

I hope that in taking this opportunity to revisit the opinion, you will conclude, for the reasons stated above, that neither state law nor case law precludes the modest changes the PAB has proposed to make the hearing process more equitable. Thank you very much for your consideration.

Best regards,

Juliet A. Leftwich



Dear Deputy City Attorney Harvey:

Thank you for your willingness to attend the Police Accountability Board (PAB) meeting on 9/8/21 to discuss the legality of complainants' ability to participate fully in the PAB hearings related to their complaints of alleged police misconduct.

Although I am a member of the PAB (and was a PRC Commissioner for 3 years), I am writing to you as a concerned individual. My PhD is in sociology (specifically, sociology of law) and I am not an attorney; however, I have studied carefully the Public Safety Officers Bill of Rights (POBRA), and the California Penal Code Sections 832.5, 832.7, and 832.8, as well as the relevant court cases (especially the most recent *Berkeley Police Association v. City of Berkeley* 2008).

Three points emerge from these documents: 1) police officers have a right of privacy regarding items in their personnel records, including their identity in cases of alleged misconduct; 2) the public at large may not attend oversight hearings regarding alleged misconduct of officers; and 3) plaintiffs may not have access to, nor inquire about, the specific items in officers' personnel records listed in Penal Code 832.8 (a) (1-6).

I have found no record of previous City Attorneys interpreting these legal materials, and it is unclear to me how it came to be that in the Berkeley Police Review Commission the *complainant* in a case of alleged police misconduct was considered "the public", was thus excluded from the officers' questioning, and therefore precluded from fully participating in his/her own case. In my reading of it, the Courts had meant to close hearings that had previously been open to the Berkeley public, but nowhere in those legal cases was it implied that a participant in the case (the complainant) was to be considered "the public." Indeed, cases cited in *BPA v City of Berkeley* (e.g. *City of San Diego v. Superior Court* [1981]) assume complainants' participation when referring to plaintiffs' right to question officers in formal legal proceedings (but put limits on what they may inquire about).

Analogous cases can be found in family court and juvenile court where the proceedings are closed to the public but where all parties to the case participate fully. Procedural justice principles could hardly allow otherwise.

I understand that this is about officer privacy and closed hearings versus open ones. Hearings that are closed to the public protect officer privacy; however, I see nothing in POBRA, case law, or statute that implies that one party to the misconduct hearing must be excluded from full participation. To the contrary, statements about protecting officer identity, as well as placing limitations on what plaintiffs may ask about, point to the opposite reading: that the legal authorities meant to exclude the public but not complainants (who of course are already aware of the officer's identity).

I do not consider the law here to be ambiguous, but in cases of ambiguity a balancing test is useful. One function of complaint procedures is to enhance public trust and transparency. There is evidence that was eroded after the exclusion of complainants from the process. Anecdotal evidence suggests as much,

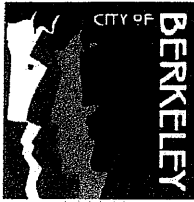
but so do the statistics regarding complaints. From 2000 to 2008, the average annual number of complaints received by the Berkeley PRC was 46. From 2009 to 2020, the annual average had plummeted to 20 with comparable drops in the number of Black complainants. In 2000, African Americans comprised 50% of complainants. Last year, there were zero African American complainants. Someone might argue that this is evidence that residents are more satisfied with Berkeley police officers than they were in the past. However, it is notable that the sharpest decline in complaint filings occurred immediately following the 2008 court decision to close hearings and exclude complainants, falling from 42 complaints in 2008 to 29 the following year.

PAB members (several of whom are practicing attorneys) voted unanimously to allow complainants to attend all phases of the misconduct hearing in which they are plaintiffs. Given this unanimous PAB support, the apparent meaning of the case law, and the need to restore confidence in and legitimacy to complaint procedures while still protecting officer privacy, it is my hope that PAB complaint hearings will allow complainants to participate in the officer questioning phase of hearings but prohibit them from inquiring about items in officers' personnel records.

Thank you again for considering these issues and for your upcoming participation in the PAB meeting on 9/8/21.

Respectfully,

Kitty Calavita



Office of the City Attorney

Date: August 9, 2018

To: Paul Buddenhagen, Acting City Manager

From: Farimah Brown, City Attorney  
By: Kristy van Herick, Assistant City Attorney *KVH*

Re: Meet and Confer Requirements Related to Police Commission  
Ballot Measure

**Background**

This office issued an opinion to City Manager Dee Williams-Ridley on March 26, 2018, providing initial legal analysis of City Council's November 14, 2017 proposals related to police oversight reforms. (Attached hereto.) The opinion included a basic discussion of the meet and confer requirements triggered by the key proposals.

On July 10, 2018, after considering multiple proposals, the City Council agreed to move forward with a proposed Police Commission Charter Amendment provided by Mayor Arreguin and Councilmember Harrison. The City Council specifically voted to direct the City Manager to move expeditiously in the meet and confer process with affected bargaining units. The deadline to submit measures to the Alameda County Registrar of Voters to be placed on the ballot for the November 2018 election is Friday, August 10, 2018.

On August 7, 2018, this office was asked to provide additional information on the meet and confer process as it relates to the Police Commission Charter Amendment. In line with Council's July 10<sup>th</sup> action, the City's Human Resources Director provided notice of the Council action to the Berkeley Police Association (BPA) on July 12, 2018. The parties worked expeditiously to schedule meet and confer. The City and BPA have already held an initial meet and confer session. BPA and City representatives have been engaged and participating in good faith in the process, and the parties have already scheduled the next meet and confer session.

However, the parties are still early in the process. As set forth below, the parties must meet and confer in good faith and either reach an agreement or exhaust impasse procedures. It is not possible to reach an agreement or exhaust impasse procedures

Memo to Acting City Manager

August 9, 2018

Page 2 Re: Meet and Confer on Charter Amendments

before the August 10<sup>th</sup> deadline to place the Police Oversight Ballot Measure on the November 2018 ballot. Following is a discussion of the various steps required in the meet and confer process before the Police Commission Charter Amendment can be placed before the voters.

### ***Contract Amendment Required***

There are certain Sections of the proposed Police Commission Charter Amendment that, if enacted, would modify the current discipline process. The Memorandum of Understanding (MOU) between the City and Berkeley Police Association, adopted by the City Council on July 31, 2018, includes Section 37.4, providing for a 120 Day Limit on Imposition of Discipline. This section is unchanged from the prior MOU. On the other hand, the proposed Police Commission Charter amendment, Section 17(5), seeks to implement a one year disciplinary process, which is inconsistent with the current MOU.

The MOU is a formal contract between the City and the Union, and is further covered by the Meyers-Miliias-Brown Act (MMBA), as discussed in this office's March 2018 opinion. Any change to the MOU requires the mutual consent of the parties and ratification by the City Council, as stated in the MOU:

"This Understanding cannot be modified except in writing upon the mutual consent of the parties and ratification by the City Council." (MOU 9.1.)

The City cannot make unilateral changes to the MOU. "The rule in California is well settled: a city's unilateral change in a matter within the scope of representation is a **per se violation of the duty to meet and confer in good faith.**" (*Vernon Fire Fighters v. City of Vernon* (1980) 107 Cal.App.3d 802, 823.)

### ***Meet and Confer Is Required***

In addition to Section 17(5) referenced above, there are a number of other sections of the June 10, 2018 Police Commission Charter Amendment which are subject to meet and confer under the requirements of the MMBA as matters either directly altering, or having impacts on, the terms or conditions of employment for members of BPA<sup>1</sup>. There are also a few provisions that may have impacts on members of other unions.

In *Seal Beach*, impacted employee associations sued the City of Seal Beach after voters passed a ballot initiative that amended the city's charter to require the immediate

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<sup>1</sup> Public agency management and employee representatives have a mutual obligation to bargain in *good faith* to reach agreement on decisions related to wages, hours and **other terms and conditions** of employment ("decision bargaining"). Separately, meet and confer can be triggered when a "*management right*" has impacts or effects on represented employees' wages, hours or other terms and conditions of employment. This memo does not seek to identify which of the clauses in the Police Commission Charter Amendment may trigger "decision" bargaining as opposed to "impacts" bargaining.

firing of any city employee who participated in a strike. (*Seal Beach, supra*, 36 Cal.3d at p. 595.) The City of Seal Beach had not engaged in meet and confer with the impacted unions before placing the charter amendments before the voters. (*Ibid.*) The California Supreme Court found that a charter city must comply with the meet-and-confer requirements of the MMBA *before* placing an initiative measure on the ballot, holding:

“[T]he city council was required to meet and confer ... before it proposed charter amendments which affect matters within the scope of representation. The MMBA requires such action and the city council cannot avoid the requirement by use of its right to propose charter amendments.” (*Id.* at p. 602.)

Two separate sections of the MMBA are triggered by the July 10<sup>th</sup> Police Commission Charter Amendment. The first involves notice, and the second involves the requirement to meet and confer. The Council’s action triggers Government Code Section 3504.5, subdivision (a), which “is primarily concerned with requiring notice to employee organizations in one particular circumstance: when a governing body proposes a measure affecting matters within the scope of representation.” (See *Building Material & Construction Teamsters’ Union v. Farrell* (1986) 41 Cal.3d 651, 657.) Second, the California Supreme Court recently reaffirmed that “the duty to meet and confer under section 3505<sup>2</sup> applies *in addition to* the requirements of section 3504.5.” (*Boling v. Public Employment Relations Board* (Cal., Aug. 2, 2018, No. S242034) 2018 WL 3654148 (*emphasis in original*)). “We have consistently located the source of the actual duty to meet and confer in section 3505, where the term “meet and confer” appears and is defined.” (*Ibid.*)

Under the terms of section 3505, a charter city is required to meet and confer with the unions “prior to arriving at a determination of policy or course of action” on matters affecting the “terms and conditions of employment.” (*Ibid.*) “The duty to meet and confer in good faith has been construed as a duty to bargain with the objective of reaching binding agreements between agencies and employee organizations .... The duty to bargain requires the public agency to refrain from making unilateral changes in

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<sup>2</sup> Government Code Section 3505. “The governing body of a public agency, or such boards, commissions, administrative officers or other representatives as may be properly designated by law or by such governing body, shall meet and confer in good faith regarding wages, hours, and other terms and conditions of employment with representatives of such recognized employee organizations, as defined in subdivision (b) of Section 3501, and shall consider fully such presentations as are made by the employee organization on behalf of its members prior to arriving at a determination of policy or course of action. “Meet and confer in good faith” means that a public agency, or such representatives as it may designate, and representatives of recognized employee organizations, shall have the mutual obligation personally to meet and confer promptly upon request by either party and continue for a reasonable period of time in order to exchange freely information, opinions, and proposals, and to endeavor to reach agreement on matters within the scope of representation prior to the adoption by the public agency of its final budget for the ensuing year. The process should include adequate time for the resolution of impasses where specific procedures for such resolution are contained in local rule, regulation, or ordinance, or when such procedures are utilized by mutual consent.”

employees' wages and working conditions until the employer and employee association **have bargained to impasse ...**" (*Boling, supra*, 2018 WL 3654148, citing *Santa Clara County Counsel Attys. Assn. v. Woodside* (1994) 7 Cal.4th 525, 537.) Good faith bargaining under section 3505 "requires a genuine desire to reach agreement." (*Boling supra*, 2018 WL 3654148, citing *Claremont Police Officers Assn. v. City of Claremont* (2006) 39 Cal.4th 623, 630; *International Assn. of Fire Fighters, Local 188, AFL-CIO v. Public Employment Relations Bd.* (2011) 51 Cal.4th 259, 271.)

As noted, the meet and confer process involves back and forth and a genuine desire to reach an agreement, even if the parties are ultimately unable to do so. Such a process takes time and effort, typically over a period of months and multiple meetings.

### ***Impasse Is Required (including Factfinding)***

The City Manager is the representative of the City of Berkeley in employer-employee relations as provided in Resolution No. 43,397-N.S., adopted by the City Council on October 14, 1969. The City Manager must oversee the Section 3505 meet and confer process through post-impasse procedures as discussed below.

Under the MMBA, when the parties are unable to reach agreement in meet and confer, the public agency must next go through impasse procedures, which can take a minimum of two to four months. The process includes optional mediation, mandated factfinding process as noted below, and a public hearing on impasse. PERB treats bargaining over ballot measures similarly to bargaining over union contracts, and therefore requires bargaining to impasse, declaration of impasse and exhaustion of applicable impasse procedures, including factfinding if requested. (*County of Santa Clara* (2010) PERB Decision Nos. 2114-M & 2120-M; *City of Palo Alto* (2014) PERB Decision No. 2388-M.)

Since 2012, the MMBA has required factfinding. If a local public employer and its employee organization are unable to reach agreement in negotiations, the employee organization (but not the employer) "may request that the parties' differences be submitted to a factfinding panel." Per the MMBA factfinding provisions:

"The employee organization may request that the parties' differences be submitted to a factfinding panel **not sooner than 30 days, but not more than 45 days**, following the appointment or selection of a mediator pursuant to the parties' agreement to mediate or a mediation process required by a public agency's local rules. If the dispute was not submitted to mediation, an employee organization may request that the parties' differences be submitted to a factfinding panel not later than 30 days following the date that either party provided the other with a written notice of a declaration of impasse. Within five days after receipt of the written request, each party shall select a person to serve as its member of the factfinding panel. The Public Employment Relations Board shall, within

five days after the selection of panel members by the parties, select a chairperson of the factfinding panel.” (Govt Code §3505.4 (a).)

Once factfinding is completed and findings are issued, the City must hold a public hearing regarding the impasse, and only then may the City take action to implement its last, best and final offer. This would involve a final version of the Police Commission Charter Amendment for approval by Council for placement on the ballot. The MMBA states:

“[a]fter any applicable mediation and factfinding procedures have been exhausted, but no earlier than 10 days after the factfinders’ written findings of fact and recommended terms of settlement have been submitted to the parties pursuant to Section 3505.5, a public agency that is not required to proceed to interest arbitration may, after holding a public hearing regarding the impasse, implement its last, best, and final offer, but shall not implement a memorandum of understanding. ....” (Govt Code Section § 3505.7.)

***November 2018 Election is Neither Immutable Deadline Nor Operational Necessity***

When there is a challenge to the adequacy of meet and confer due to timing of an election and the related pre-election deadlines, the Court (in the case of police associations) or the PERB (for other unions) may look to whether that particular election was an **immutable deadline**, in other words, the specific election was **the only one** at which the Charter Amendment could be considered. (See *City of Palo Alto* (2017) PERB Decision 2388a-M [Board found that “[n]o evidence suggests that if the City were unable to act in time for the November election ... that it could not again defer action to the next election cycle”]; See also *County of Santa Clara* (2010) PERB Decision Nos. 2114-M, \*15; PERB Decision Nos. 2120-M, \*16 [PERB held that County was not “faced with an imminent need to act prior to the statutory deadline for submitting the measure for the ballot” and thus was not privileged to place a Prevailing Wage Measure on the ballot prior to the completion of bargaining].)

Here, while there is certainly Council interest in moving this ballot measure forward in 2018, the Police Review Commission Ordinance and process have been in place for more than 40 years, and there are no facts that makes the November 2018 election an immutable deadline to excuse compliance with state law (i.e. this November is not the only election at which police reform items can be considered.)

At times, a compelling operational necessity can justify an employer acting unilaterally before completing its bargaining obligation. However, the employer must demonstrate “an actual financial emergency which leaves no real alternative to the action take and allows no time for meaningful negotiations before taking action.” (*County of Santa Clara* (2010) PERB Decision Nos. 2114-M, \*16, citing *Oakland Unified School District* (1994) PERB Decision No. 1045.)

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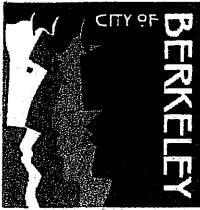
PERB has rejected efforts to use election deadlines to cut short meet and confer based on desirability as opposed to financial urgency. “[I]t does not appear that the County was faced with an imminent need to act prior to the statutory deadline for submitting the Prevailing Wage Measure for the ballot. The mere fact that the County thought inclusion of the measure on the November 2004 ballot was desirable does not constitute a compelling operational necessity sufficient to set aside its bargaining obligation.” (*County of Santa Clara* (2010) PERB Decision Nos. 2114-M, \*16.) The Police Commission Charter Amendment does not address a financial matter, much less a financial emergency that must be addressed in November of 2018.

For the reasons set forth above, it is premature to place the Police Commission Charter Amendment on the ballot for 2018.

Attachment

cc: Mark Numainville, City Clerk





Office of the City Attorney

Date: March 26, 2018

To: Dee Williams-Ridley, City Manager

From: Farimah Brown, City Attorney  
By: Kristy van Herick, Assistant City Attorney *KVH*

Re: **Legal analysis of City Council's November 14, 2017 Proposals related to the Police Review Commission**

#### **Background**

At its November 14, 2017 meeting, City Council voted to refer to the Police Review Commission (PRC) and to the City Manager a ballot measure proposal to present to Berkeley voters seeking to reform the PRC structure. The item included a referral for the PRC:

*"to review the existing enabling legislation, rules, and regulations for the PRC, and to consider all options, including charter amendments, ballot measures, and any other amendments to strengthen the authority of the PRC to consider and act on citizen complaints, and other possible structural, policy and procedural reforms."*

The Council referral also sought to have "the City Manager, through the City Attorney, provide legal analysis regarding which proposals can be completed legislatively and which require amendments to the City Charter", and provided some initial recommendations for the PRC's and City Manager's consideration, as follows:

*"Changes the City Manager and PRC should consider, but not be limited to, include the following:*

- 1. Use the "preponderance of the evidence" as the standard of proof for all PRC decisions.*
- 2. Extend the current 120-day limit on the imposition of discipline up to one year, consistent with existing California law.*
- 3. Give the PRC full discretion and access to evidence to review complaints as to alleged officer misconduct.*

*As part of the review of proposed improvements to the PRC process, the PRC should analyze police review policies and structures in other jurisdictions (e.g. San Francisco, BART, etc.), all PRC models and engage relevant stakeholders, including the Berkeley Police Association and community organizations, in developing proposals.*

*Full analysis by the PRC and City Manager must be reported to the City Council by May 2018."*

The following is a legal review of the three initial proposals provided in the City Council's November 2017 referral. The PRC has not yet issued its response to the November 2017 referral, although this office is informed the PRC has created a subcommittee to work on the referral. Should the PRC provide additional proposals, this office will provide a supplemental response.

#### Issues/Conclusions

**Issue:** As to each of the three proposed PRC reforms listed below, what legal steps are required in order to implement the reform? Which proposals can be completed legislatively and which require amendments to the City Charter?

**Proposal #1: Use the "preponderance of the evidence" as the standard of proof for all PRC decisions.**

**Conclusion:** Changing the current standard of proof would require a simple majority vote of the PRC to amend the PRC Regulations. This proposed change also has impacts on Berkeley Police Association (BPA) members, therefore, it requires meet and confer with the Berkeley Police Association. No Charter Amendment is necessary to implement this change.

**Proposal #2: Extend the current 120-day limit on the imposition of discipline up to one year, consistent with existing California law.**

**Conclusion:** This proposal would require a change to the Memorandum of Understanding between the BPA and the City. Such a change can only be made through meet and confer and a formal amendment to the Memorandum of Understanding.

**Proposal #3: Give the PRC full discretion and access to evidence to review complaints as to alleged officer misconduct.**

**Conclusion:** Depending on the type of evidence the PRC is seeking, this proposal may require a Charter Amendment. A governing-body-sponsored ballot measure as proposed by the referral would trigger meet and confer, which must be completed *before* the ballot measure goes to the voters.

### Discussion/Analysis

#### **General legal background on the PRC**

Berkeley voters adopted Ordinance 4644-N.S creating the Police Review Commission on April 17, 1973. (See Berkeley Municipal Code (B.M.C.), Chapter 3.32.) The purpose of the PRC was to, "provide for community participation in setting and reviewing Police Department policies, practices and procedures and to provide a means for prompt, impartial and fair investigation of complaints brought by individuals against the Berkeley Police Department." (B.M.C. § 3.32.010.)

A "Board of Inquiry" is the confidential hearing process used by the PRC to review specific complaints against officers. Three Commissioners are impaneled to hear and render findings on a complaint, and Commissioners are required to sign a confidentiality and nondisclosure agreement. (PRC Regulations, I.A and I.B.4 [eff. March 28, 2016].) After the hearing, a summary of the PRC's findings are provided to the City Manager and the Chief of Police. (PRC Regulations, I.B.10.)

A case decided shortly after the PRC's creation invalidated certain provisions of Ordinance 4644-N.S. that would have "(1) given the PRC the power to recommend specific disciplinary actions against individual police officers, (2) prohibited the Berkeley Police Department from conducting its own internal investigations and disciplinary proceedings, and (3) given the PRC the right to demand and receive information from the police department or other city departments." (*Berkeley Police Ass'n v. City of Berkeley* (2008) 167 Cal.App.4th 385, 390, citing *Brown v. City of Berkeley* (1976) 57 Cal.App.3d 223, 233-235 (*Brown*)).

In *Brown*, the Court found that the invalidated provisions in the Ordinance were in conflict with "the charter grant of powers to the city manager." (*Brown v. City of Berkeley, supra*, 57 Cal.App.3d at p. 233.) It is long established that, to be valid, an ordinance must harmonize with the charter. (See *South Pasadena v. Terminal Ry. Co.* (1895) 109 Cal. 315, 321.) "An ordinance can no more change or limit the effect of the charter than a statute can modify or supersede a provision of the state Constitution." (*Brown v. City of Berkeley, supra*, 57 Cal.App.3d at p. 231.) Therefore, the powers specified in the Charter take precedence over the language in City ordinances, even those passed by voter initiative.

Article VII, section 27, of the Charter reads: "The Council shall appoint an officer, who shall be known as the City Manager, who shall be the administrative head of the Municipal Government and who shall be responsible for the efficient administration of all departments." Further, Article VII, Section 28, states, in relevant part:

"...The City Manager shall have the following powers and duties:

... (b) *Except as otherwise provided in this Charter, to appoint, discipline or remove all officers and employees of the City, subject to the Civil Service provisions of this Charter. ... Except for the purpose of inquiry, the Council and its members shall deal with the administrative service solely through the City Manager, and neither the Council nor any member thereof shall give orders to any of the subordinates of the City Manager, either publicly or privately.*

(c) *To exercise control over all departments, divisions and bureaus of the City Government and over all the appointive officers and employees thereof...*

(f) *To make investigations into the affairs of the City, or any department or division thereof, or any contract, or the proper performance of any obligation running to the City.*

(g) *To prepare and submit to the Council for its consideration the proposed annual budget."*

Under the City Charter, Article VII, sections 28(b), (c) and (f), the City Manager has the authority to oversee all performance issues of City staff, to oversee the administration of the police department, and to direct the activity of the Chief of Police and his staff. Any shift in these key roles from the City Manager to an appointed or elected police commission would therefore require a Charter amendment.

***Referral No. 1: Use the "preponderance of the evidence" as the standard of proof for all PRC decisions.***

The first proposal referenced in the Council resolution involves changing the standard of proof used for all PRC Board of Inquiry decisions from "clear and convincing evidence" to "preponderance of the evidence". As discussed below, this proposed change would not require a Charter Amendment or ballot measure. However, this proposal requires two steps: (1) amending the PRC Regulations for Handling Complaints Against Members of the Police Department, which can be accomplished through a simple Commission action, and (2) completion of a meet and confer process with the BPA prior to implementation.

The PRC's enabling ordinance specifically empowers the PRC to "adopt rules and regulations and develop such procedures for its own activities and investigations as may be necessary." (B.M.C. § 3.32.090.E.) The PRC Regulations currently specify a "clear and convincing" evidence standard:

*"Standard of Proof. No complaint shall be sustained unless it is proven by clear and convincing evidence presented at the hearing or otherwise contained in the record. "Clear and convincing" is more than a preponderance of evidence, but less than beyond a reasonable doubt."*

(PRC Regulations, VIII.C.)

As background, under California law, " 'Burden of proof' means the obligation of a party to establish by evidence a requisite degree of belief concerning a fact in the mind of the trier of fact or the court. The burden of proof may require a party to raise a reasonable doubt concerning the existence or nonexistence of a fact or that he establish the existence or nonexistence of a fact by a preponderance of the evidence, by clear and convincing proof, or by proof beyond a reasonable doubt. Except as otherwise provided by law, the burden of proof requires proof by a preponderance of the evidence." (Evid. Code § 115.)

The PRC has utilized the "clear and convincing evidence" standard in its BOI hearings for more than 30 years. The PRC in 2014 proposed changing the standard of proof as part of a package of regulation amendments. After engaging in meet and confer as required under the Meyers-Milias-Brown Act (MMBA) (Govt. Code § 3500, et seq.) concluded, this proposed amendment was not implemented.

The MMBA "has two stated purposes: (1) to promote full communication between public employers and employees; and (2) to improve personnel management and employer-employee relations within the various public agencies." (*Seal Beach Police Officers Assoc. v. City of Seal Beach* (Seal Beach) (1984) 36 Cal.3d 591, 597; see Govt. Code § 3500; *DiQuisto v. Co. of Santa Clara* (2010) 181 Cal.App.4th 236, 254.) To achieve these purposes, "the MMBA requires governing bodies of local agencies to 'meet and confer [with employee representatives] in good faith regarding wages, hours, and other terms and conditions of employment' and to 'consider fully' such presentations made by the employee organizations." (*Seal Beach, supra*, 36 Cal.3d at p. 596 (quoting Govt. Code § 3505).) Section 3505 of the Government Code defines "meet and confer in good faith" as both parties having "the mutual obligation personally to meet and confer promptly upon request by either party and continue for a reasonable period of time in order to exchange freely information, opinions, and proposals, and to endeavor to reach agreement on matters within the scope of representation...."

As to the PRC's Regulations, the City is obligated, consistent with MMBA, to meet and confer with representatives of the Berkeley Police Association and endeavor to reach agreement on the practical consequences "**of any changes** in wages, hours and **other terms and conditions** of employees represented by the Association." Meet and confer continues until management and labor either reach an agreement or reach impasse. "Impasse" means that the City and the BPA have a dispute over matters within the scope of representation and have reached a point in meeting and negotiating over the dispute at which their differences in positions are **so substantial or prolonged** that future meetings would be futile.

Impasse is only reached after multiple meetings and extensive effort on both sides to reach an agreement. Before imposing a regulation, the parties typically would be required to participate in fact finding before a neutral party. After this process is completed, if the union does not agree to implement the change, the City Council can

unilaterally impose the change. However, such imposition can result in legal action, particularly if there is any question as to whether the parties were truly at impasse and whether the parties were participating in good faith.

***Referral No. 2: Extend the current 120-day limit on the imposition of discipline up to one year, consistent with existing California law.***

To be effective, this referral would involve a change to language in the current Memorandum of Understanding (“MOU” or “Understanding”) between the City and the Berkeley Police Association. The current MOU states in relevant part:

***37.4 120 Day Limit on Imposition of Discipline***

*The City agrees that no disciplinary action against an employee covered by this Understanding, which action involves a loss or reduction of pay or discharge, shall be imposed unless such action is taken within one hundred twenty (120) calendar days after the date of the incident giving rise to the disciplinary action or within one hundred twenty (120) calendar days of the date the City has knowledge of the incident giving rise to the disciplinary action.*

*If a letter of advice or written reprimand is issued by the Department, neither the document nor any testimony offered by the Department or the City in an appeal process shall reference any time restrictions set forth in this section, nor reference any other discipline that may have been considered, recommended or imposed, but for the time restrictions set forth herein.*

Any change to the MOU requires the mutual consent of the parties and ratification by the City Council.

*“This Understanding sets forth the full and entire understanding of the parties regarding the matters set forth herein [...] This Understanding cannot be modified except in writing upon the mutual consent of the parties and ratification by the City Council.”*

(BPA –COB MOU Section 9.1.)

For a modification to the MOU to be discussed in the *current* negotiation process, it would have needed to be shared with the BPA in May of 2017. Therefore, to make this change without violating state law, any change to the 120 calendar day provision must be done through a separate meet and confer process reaching mutual consent and ratification by Council.

Any attempt to implement a change to the MOU without mutual agreement is considered a “unilateral change”. A unilateral change in violation of the MMBA occurs when an employer takes any action to change the status quo on a matter within the scope of representation without having given the employee organization proper notice

and an opportunity to bargain. "The rule in California is well settled: a city's unilateral change in a matter within the scope of representation is a per se violation of the duty to meet and confer in good faith." (*Vernon Fire Fighters v. City of Vernon* (1980) 107 Cal.App.3d 802, 823.)

***Referral No. 3: Give the PRC full discretion and access to evidence to review complaints as to alleged officer misconduct.***

For the reasons set forth below, this third proposal would require a Charter Amendment. The *Brown* case, referenced above, examined and invalidated a number of provisions in the original 1973 voter initiative creating the PRC as conflicting with the City Charter. One of the invalidated provisions is substantially similar to the Council's third referred proposal.

Specifically, Section 10(c) of the original voter adopted ordinance had provided the PRC with the power:

*"to request and receive promptly such written and unwritten information, documents and materials and assistance as it may deem necessary in carrying out any of its responsibilities under this ordinance from any office or officer or department of the city government, including but not limited to the Police Department, the City Manager, the Finance Department, the Public Works Department, and the City Attorney, each and all of which are hereby directed as part of their duties to cooperate with and assist the Commission in the carrying out of its responsibilities; ..."*

This section was found to violate the charter mandate that everything pertaining to administrative services go solely through the City Manager. (*Brown, supra*, 57 Cal.App.3d at p. 233-235.) In order for the PRC to have "full discretion and access to evidence" under the current proposal, the City Charter would need to be amended to shift some of the City Manager's authority to the PRC.

Depending on the level of discretion and access envisioned, state laws protecting the confidentiality of peace officer personnel records could also be implicated. Any language to change the Charter or PRC Ordinance also needs to be consistent with Penal Code sections 832.5 and 832.7<sup>1</sup> as well as Evidence Code 1043 to 1046, which specifies that *peace officer personnel records are confidential pursuant to the California Penal Code.*

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<sup>1</sup> Penal Code section 832.7(a), provides, in part, that "[p]eace officer or custodial officer personnel records and records maintained by any state or local agency pursuant to Section 832.5, or information obtained from these records, are confidential and shall not be disclosed in any criminal or civil proceeding except by discovery pursuant to Sections 1043 and 1046 of the Evidence Code." The Evidence Code provides that in order for personnel records of a peace officer to be disclosed for possible use in a civil proceeding, the agency must pursue a discovery motion (commonly referred to as a *Pitches* motion.)

In addition to requiring amendment to the City Charter, the proposal triggers a requirement to meet and confer with the BPA and possibly with other City unions to the extent the changes impact other represented employees. Meet and confer must be conducted with all impacted unions *before* the City Council puts such an amendment before the voters.

According to the MMBA,

*"[e]xcept in cases of emergency as provided in this section, the governing body of a public agency, and boards and commissions designated by law or by the governing body of a public agency, shall give reasonable written notice to each recognized employee organization affected of any ordinance, rule, resolution, or regulation directly relating to matters within the scope of representation **proposed to be adopted** by the governing body or the designated boards and commissions and shall give the recognized employee organization the opportunity to meet with the governing body or the boards and commissions."*

(Govt Code § 3504.5 [emphasis added].)

The language "proposed to be adopted" indicates that the meet and confer needs to happen before the ordinance or other legal change can take effect.

In *Seal Beach*, impacted employee associations sued the City of Seal Beach after voters passed a ballot initiative that amended the city's charter to require the immediate firing of any city employee who participated in a strike. (*Seal Beach, supra*, 36 Cal.3d at p. 595.) The City of Seal Beach had not engaged in meet and confer with the impacted unions before placing the charter amendments before the voters. (*Ibid.*) The California Supreme Court found that a charter city must comply with the meet-and-confer requirements of the MMBA *before* placing an initiative measure on the ballot, holding: "[T]he city council was required to meet and confer ...before it proposed charter amendments which affect matters within the scope of representation. The MMBA requires such action and the city council cannot avoid the requirement by use of its right to propose charter amendments." (*Id.* at p. 602.)

It is less clear whether there the City must meet and confer on a citizen-sponsored initiative which does not *directly* involve a proposal by the governing body. Last year, a California Court of Appeal decision annulled a decision of the Public Employment Relations Board (PERB) that the 'pre-ballot' meet-and-confer requirement for a governing-body-sponsored ballot proposal also applied to a citizen-sponsored initiative. (*Boling v. Public Employment Relations Board* (2017) 10 Cal.App.5th 853, *reh'g denied* (May 1, 2017), *rev. granted*, California Supreme Court (July 26, 2017).) In *Boling*, the voters of City of San Diego approved a citizen-sponsored initiative, the Citizens Pension Reform Initiative ("CPRI"), which adopted a charter amendment mandating changes in the pension plan for certain employees of City of San Diego. However, the mayor of San Diego (a City with a strong mayoral form of government) had provided support to



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the proponents of the citizen-sponsored initiative to develop and campaign for the CPRI. (*Boling, supra*, 10 Cal.App.5th at p. 856.) The underlying PERB Decision found that the initiative could not be deemed purely a citizen action because of the public official's support.

The California appellate court ruled that: "[b]ecause a governing body lacks authority to make any changes to a duly qualified citizen's initiative (Elec. Code, § 9032), and instead must simply place it on the ballot without change, imposing a meet-and-confer obligation on the governing body before it could place a duly qualified citizen's initiative on the ballot would require an idle act by the governing body." (*Boling, supra*, 10 Cal.App.5th at p. 875.) However, as noted, the California Supreme Court has taken this case up for review, to consider among other matters, whether under the circumstances the voter initiative addressing a matter that falls within the MMBA was subject to meet and confer before the matter went to the voters.

Regardless of what the Supreme Court decides in *Boling*, pursuant to the language of the MMBA and the *Seal Beach* case, it is well established that governing-body-sponsored ballot proposals must go through the meet and confer process before going to the voters.

cc: Mark Numainville, City Clerk  
Opn. Index: I.E; II.G.3.c



**Provisions from PRC Regulations regarding policy complaints**

**II.**

**A. Filing a Complaint**

**1. Complaint Form**

Complaints and policy complaints must be filed on a form provided by the PRC and, except as provided in section 3, signed by the complainant. . . .

...

**4. Sufficiency of Complaint**

...

b. Policy complaints will be brought to the Commission for discussion or action within 30 calendar days of filing or at the next regularly scheduled meeting of the PRC if the 30 days has expired. If a majority of the Commissioners feel that a policy review is warranted, they may take appropriate action, including, but not limited to, initiating a formal investigation or establishing a subcommittee; a subcommittee, if established, will seek BPD involvement in its review of a BPD policy. Upon completion of its review, the subcommittee will present its conclusions and recommendations to the full Board.

**V.**

**A. Administrative Closure**

**1. Grounds**

...

i) A policy complaint that has been considered by the Commission.

**2. Procedure**

...

A policy complaint may be administratively closed by a majority vote of Commissioners during open session at a regularly scheduled meeting.

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**City Charter, Article XVIII, Section 125:**

**Section 17. Policy review and approval.**

(a) The Chief of Police shall submit all newly adopted Departmental policies and revisions to the Board within thirty (30) days of implementation. The Board may review policies, practices, and procedures of the Police Department in its discretion or at the request of a member of the public, due to a policy complaint, or due to a complaint from a member of the public against an officer.



<https://www.latimes.com/california/story/2021-09-03/california-lawmakers-approve-closely-watched-bill-to-decertify-police-officers>

## California lawmakers advance plan to decertify police

BY PATRICK MCGREEVY STAFF WRITER

SEP. 3, 2021 12:17 PM PT

SACRAMENTO —

California law enforcement officers could be stripped of their license to carry a badge if they engage in serious misconduct, including excessive force, racial bias and dishonesty, under legislation approved Friday by the state Assembly after an emotional debate.

The new measure was approved by the Assembly on a largely party-line vote of 46-18 and next goes back to the Senate, which had passed the bill before it was amended. It was opposed by dozens of law enforcement groups as well as Republican lawmakers who said it is overbroad and creates a system biased against police officers.

The measure is one of a series of bills that were introduced after the killing of George Floyd last year by a Minneapolis police officer that sparked demonstrations throughout the country calling for stricter accountability for law enforcement agencies.

State Sen. Steven Bradford (D-Gardena) said his legislation is needed to prevent police officers who are fired, resign or are disciplined for misconduct from moving to another law enforcement agency and continuing to carry a badge and gun.

“California is able to revoke the certification or licenses of bad doctors, lawyers and even barbers, but is unable to decertify police officers who have broken the law and violated the public trust,” Bradford said. “This is all about treating people fairly and holding those who don’t accountable.”

Currently, 46 other states have rules preventing abusive officers from switching jobs, but Bradford said California is “so far behind” on the issue. A similar bill stalled in the California Legislature last year.

The bill gives new powers to the state's 17-member Commission on Peace Officers Standards and Training, or POST, to investigate and suspend or revoke the certification of peace officers who are terminated for cause or found to have engaged in "serious misconduct."

Such misconduct would include excessive force, dishonesty, sexual assault and acts of bias on the basis of factors including race, sexual orientation and gender.

The bill would require the governor to appoint a nine-member Peace Officer Standards Accountability Advisory Board by Jan. 1, 2023, within POST.

The board, which is made up of two law enforcement officers, one civilian oversight attorney and six members of the public, would review POST's investigation of misconduct allegations and recommend whether the commission should seek decertification.

SB 2 was opposed last week by law enforcement groups including the Los Angeles Deputy Sheriffs Assn., the California Assn. of Highway Patrolmen, the California Peace Officers Assn. and the Los Angeles Police Protective League.

Like others, the Peace Officers Research Assn. of California, which represents 77,000 public safety officers, said it supports revoking licenses for officers who engage in gross misconduct.

However, the association criticized the bill for creating a nine-person panel to oversee the process that includes seven members of the public that would not be required to have law enforcement expertise or experience.

"Ultimately, this bill creates an inherently amateurish and potentially biased panel to oversee the process of revoking an officer's license to practice law enforcement, ignoring our country's tradition of due process and subjecting officers to a biased review of their actions where guilt is assumed, and the deck is stacked against them," the group said in a letter to lawmakers.

Assemblyman Kelly Seyarto (R-Murrieta) said he supports adopting a decertification mechanism but that he voted against the bill because he believes it creates a system biased against law enforcement officers. He complained that the nine-member advisory board would only include two representatives of law enforcement.

“The composition of the advisory board is grossly unfair,” Seyarto told his colleagues.

He also objected that the measure provides for including people who are the victims of police violence. Seyarto noted that is not the practice on boards that discipline doctors.

“Their boards don’t have people who have been adversely affected by a bad surgery,” he said. “This creates bias.”

The floor debate was emotional at times, with legislators speaking the names of Black men and women who had been killed by police officers in California and elsewhere.

Assemblyman Freddie Rodriguez (D-Pomona), who withheld his vote Friday, said he fears the bill would undercut law enforcement officers like his son, a Los Angeles County sheriff’s deputy who he worries might not come home after working a shift if he is hurt or killed. Assemblyman Reggie Jones Sawyer (D-Los Angeles) responded that he worries that his two Black sons won’t come home at night because of violence by police officers.

Assemblywoman Akilah Weber (D-La Mesa) said Friday that the measure protects the due process rights of law enforcement officers to a fair hearing. The majority of POST commission members are representatives of law enforcement, she noted.

“This is not an anti-police bill. This is an accountability bill,” she told her colleagues during Friday’s floor debate. “Without any accountability we lose integrity of the badge and the bond with the community is broken.”

Facing continuing opposition, Bradford this week amended the bill to require a two-thirds vote of the POST Commission to decertify an officer and only after “clear and convincing” evidence has been presented of misconduct.

Bradford also agreed to eliminate a proposal in the bill requiring two members of the panel to be people affected by police violence. Instead, the two seats will be reserved for non-law enforcement members of the public, with “strong consideration” given to whether they’ve been affected by police violence.

The removal of the requirement for board members affected by police violence and the two-thirds vote were disappointing changes to the bill, according to supporters of the measure including Sheila Bates, an organizer with Black Lives Matter California.

But she said the bill is still essential in a state where an officer can be fired for misconduct and continue as a police officer elsewhere.

“Unfortunately they are just able to move from one department to another and we see how dangerous that is for our communities, so we still absolutely back this bill,” Bates said.

Some law enforcement groups said they are reviewing the changes before determining whether to drop their opposition.

Other bills introduced in response to the Floyd killing are also moving through the Legislature.

Lawmakers on Thursday sent the governor SB 16 by state Sen. Nancy Skinner (D-Berkeley), which expands public access to files on police misconduct by adding records on officers who have engaged in biased or discriminatory behavior, conducted unlawful arrests or searches, or used force that is excessive or unreasonable.

On Wednesday, the Assembly approved AB 26, which sets guidelines requiring police officers to intercede when they witness excessive force by another member of law enforcement, and report the incident to a supervisor.

“Instituting these core values are paramount to building public trust that has eroded between law enforcement and communities across California,” said Assemblyman Chris Holden (D-Pasadena), who introduced the bill.



<https://www.sfchronicle.com/politics/article/Policing-bill-to-remove-badges-from-bad-officers-16444426.php>

POLITICS

## Policing bill to remove badges from bad officers goes to Gov. Newsom

Alexei Koseff

Sep. 8, 2021 Updated: Sep. 8, 2021 5:48 p.m.

SACRAMENTO — California took another step Wednesday toward establishing a process for stripping problem police officers of their badges when the state Legislature gave final approval to a decertification bill long sought by activists.

SB2 by state Sen. Steven Bradford, a Democrat from Gardena (Los Angeles County), would allow state regulators to revoke the licenses of officers who commit “serious misconduct,” including using excessive force, committing sexual assault, displaying bias and participating in a law enforcement gang.

California is one of only four states without a system to decertify officers who are found guilty of misbehavior, which advocates argue would help prevent them from shuttling between law enforcement agencies if they are punished.

“This bill allows them to rid the bad apples that we know exist,” Bradford said during a speech on the Senate floor. “Just because you put on a uniform and a badge doesn’t absolve you or make you immune to being a bad person.”

The measure now goes to Gov. Gavin Newsom, who has about a month to either sign or veto it. A spokesperson declined to comment on pending legislation.

Creating a decertification process has been a priority for activists since last year’s racial justice protests, but the proposal has been caught in bitter disagreements with law enforcement groups over how the process should work. Like other major policing bills this legislative session, it was ultimately scaled back to win passage through the Legislature.

Under SB2, the state Commission on Peace Officer Standards and Training would investigate allegations of “serious misconduct,” and a civilian-controlled advisory

board would review the findings and make a recommendation about whether to decertify the officer. A decision to strip an officer of his or her badge would need to be adopted by two-thirds of the commission, and the officer could potentially be suspended instead.

Even after a requirement that two members of the advisory board be victims of excessive force or people whose family members had been killed by police was softened to a recommendation, the composition of the board continued to generate controversy among some lawmakers and police organizations who believed that it would be biased against officers.

“This unaccountable board is not on the street at night when officers have to make a split-second decision. It’s easy for us all to do Monday-morning quarterbacking,” Sen. Shannon Grove, R-Bakersfield, said during the floor debate Wednesday, where she urged her colleagues to vote against the bill. She said the justice system was already equipped to handle cases of wrongdoing by officers, pointing to Derek Chauvin’s conviction earlier this year for murdering George Floyd.

The decertification measure passed 28-9, with Democrats voting for it and Republicans opposed. It advanced through the Assembly last week on a similarly partisan 49-21 vote.

**Lee, Katherine**

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**From:** Lee, Katherine  
**Sent:** Thursday, September 16, 2021 10:24 AM  
**To:** Lee, Katherine  
**Subject:** FW: [LawEnforcementOversight] Justice Department announces ban on no-knock entries, chokeholds for its own agents - POLITICO

Dear Board Members,

Please see below regarding no-knock warrants. Earlier this year, a PRC Subcommittee led by Izzy looked into the issue and the PRC recommended that the BPD ban the use of no-knock warrants. The BPD agreed to enact such a ban (see Policy 606, Warrant Service). (Use of chokeholds and the carotid restraint had long been prohibited already.)

-Kathy

**Katherine J. Lee**  
**Interim Director of Police Accountability**  
**City of Berkeley**  
**Office: 510.981.4960 (usually in office during regular business hours)**  
**Cell: 510.926.1103**

*The Police Accountability Board and the Director of Police Accountability replaced the Police Review Commission as of July 1, 2021*

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**From:** [LawEnforcementOversight@groups.io](mailto:LawEnforcementOversight@groups.io) <[LawEnforcementOversight@groups.io](mailto:LawEnforcementOversight@groups.io)> **On Behalf Of** Brian Corr via groups.io  
**Sent:** Tuesday, September 14, 2021 5:09 PM  
**To:** NACOLE Listserv <[LawEnforcementOversight@groups.io](mailto:LawEnforcementOversight@groups.io)>  
**Subject:** [LawEnforcementOversight] Justice Department announces ban on no-knock entries, chokeholds for its own agents - POLITICO

**WARNING:** This is not a City of Berkeley email. Do not click links or attachments unless you trust the sender and know the content is safe.

<https://www.politico.com/news/2021/09/14/justice-department-no-knock-chokeholds-ban-511785?nname=politico-nightly&nid=00000170-c000-da87-af78-e185fa700000&nrid=0000014f-8419-d12f-a1df-dcdf482e0000&nlid=2670445>

## **Justice Department announces ban on no-knock entries, chokeholds**

The DOJ announced new restrictions for law enforcement [under its direct control], including bans on carotid restraints and chokeholds except in the case of deadly force

By **CLAIRE RAFFORD**  
09/14/2021 02:41 PM EDT

The Justice Department on Tuesday announced a ban on "carotid restraints, chokeholds and "no-knock" entries for its law enforcement agencies unless the use of deadly force is authorized.

The new directive applies only to law enforcement overseen by the department, including the FBI, Drug Enforcement Agency and U.S. Marshals Service. The policy does not apply to immigration enforcement agencies, which are overseen by the Department of Homeland Security, nor does it apply to state and local law enforcement.

"Building trust and confidence between law enforcement and the public we serve is central to our mission at the Justice Department," said Attorney General Merrick B. Garland. "The limitations implemented today on the use of 'chokeholds,' 'carotid restraints' and 'no-knock' warrants, combined with our recent expansion of body-worn cameras to DOJ's federal agents, are among the important steps the department is taking to improve law enforcement safety and accountability."

In a press release announcing the new policy, the department said chokeholds and carotid restraints would only be allowed in situations where "the officer has a reasonable belief that the subject of such force poses an imminent danger of death or serious physical injury to the officer or to another person." No-knock warrants, where an agent does not knock and announce their identity, are prohibited except when an agent believes doing so would create a threat of physical violence to either the agent or someone else. To obtain a no-knock warrant, an agent must get approval from both their law enforcement component and a federal prosecutor.

Deputy Attorney General Lisa Monaco emphasized the importance of implementing single set of standards for the entire department, which also includes the Bureau of Alcohol, Tobacco, Firearms and Explosives as well as the Bureau of Prisons.

"As members of federal law enforcement, we have a shared obligation to lead by example in a way that engenders the trust and confidence of the communities we serve," she said in the statement.

This announcement comes over a year after the deaths of George Floyd and Breonna Taylor. Taylor was killed by police in March 2020 after officers executed a no-knock warrant on her home, though the suspect in their investigation had already been apprehended. Floyd was murdered in May 2020 after Minneapolis Police officer Derek Chauvin knelt on his neck for over nine minutes. Chauvin was later convicted on murder charges.

The DOJ opened policing probes into both the [Minneapolis Police Department](#) and the [Louisville Metro Police Department](#). Additionally, the [DOJ announced in June that all federal law enforcement officials](#) would be required to wear body cameras "during pre-planned law enforcement operations."

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