

NYC

COMMISSION TO COMBAT POLICE CORRUPTION

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of the Commission

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Commissioners

Kathy Hirata Chin, Acting Chair

Clifton Stanley Diaz

Deborah E. Landis

Freya Rigterink

James D. Zirin

Executive Director

Marnie L. Blit

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INTRODUCTION

The year 2020 was like no other due to the COVID-19 pandemic and significant developments in policing that came about after the deaths of multiple unarmed people of color during their encounters with members of law enforcement. In May 2020, after a police officer kneeled on George Floyd’s neck for more than nine minutes, causing his death, crowds of people took to the streets nationwide to protest police brutality, systemic racism, and discriminatory police practices.

In New York, large protests and the police response to those protests prompted a number of changes to policing, many directly impacting the New York City Police Department (“NYPD” or “the Department”). In June 2020, the former governor and the New York State legislature enacted a series of laws designed to bring about police reform. The development most relevant to the work of the Commission to Combat Police Corruption (“the Commission” or “CCPC”) was the repeal of New York Civil Rights Law §50-a (“§50-a”), which had been interpreted to shield police disciplinary records from public review. With the repeal of §50-a, the Department began publishing information regarding internal NYPD discipline.

In our past reports, we have discussed the formal discipline imposed on members of the service without identifying the specific officers involved. We did this to keep focus on penalties that were inadequate or unfair in light of the misconduct involved, with the goal of influencing future discipline imposed for similar misconduct. We also sought to bring more transparency to a system that was largely hidden from the public. While publication of individual disciplinary records accomplishes further transparency, the records themselves contain no objective, outside analysis, nor do they report trends over time. We will continue to review the Department’s formal disciplinary decisions to bring inappropriate penalties to the attention of the Department, elected officials, and the public.

The former governor also required all localities, including New York City, to develop and approve police reform plans by April 1, 2021. In response, both the New York City Council and the Mayor introduced their own reform plans to address racialized policing. The Mayor’s plans included adherence to a Disciplinary Matrix (“Disciplinary Matrix” or “the matrix”) that had been published by the Department in January 2021. The matrix sets forth penalty ranges for common categories of police misconduct. Prior to the initial release of the matrix for public comment, the Commission was given the opportunity to review the draft and offered comments and suggestions.¹

Although the Commission has not specifically examined or addressed racial biases or discrimination in policing, we understand that reform is necessary and desirable in this area. Adoption of the Disciplinary Matrix was an important step in the right direction because it sets forth discipline for civil rights violations that are often directed towards people of color. Furthermore, it also specifies that termination is the presumptive penalty for racial profiling and bias-based policing. In future reports, the Commission will examine the Department’s adherence to the matrix and whether the penalty ranges are adequate to deter misconduct and facilitate the separation of individual officers who have demonstrated an unfitness to serve the public. The Commission will also continue to provide recommendations to the Department and the Mayor’s Office for improvement of the matrix, and otherwise work to fulfill its mandate of examining whether the Department is effectively detecting, investigating, and disciplining incidents involving allegations of corruption and serious misconduct.

¹ The Commission submitted two detailed letters to the Department, which are attached as Appendix B and C to this Report. Many of the concerns we raised were not addressed when the Department published its final version of the matrix in January 2021. The most significant among our outstanding concerns are discussed briefly at the conclusion of this Report. *See* pp. 101-109.

OVERVIEW

The Commission, created in 1995 by Mayoral Executive Order No. 18, is mandated to monitor the efforts of the Department to gather information, investigate allegations, and implement policies designed to detect, control, and deter corruption among its members.² The Commission accomplishes this largely through examining a sample of investigations conducted by the Internal Affairs Bureau (IAB)³ and reviewing all closed disciplinary cases involving uniformed members of the service. The Commission reports its findings in its annual reports. From time to time, we issue special reports on specific topics or at the request of the Mayor's Office, and we also provide comments in writing with respect to proposed changes in Department policies of specific importance to us.⁴

This Report, *The Twentieth Annual Report of the Commission*, covers the work performed by the Commission with respect to IAB investigations reviewed during the 2019 and 2020 calendar years. With respect to closed disciplinary cases, the statistical analyses here cover cases adjudicated between October 2018 and December 2020, as the availability of information for adjudicated matters does not follow the calendar year.

This Report contains a brief summary of the case categories used by the Commission in reviewing investigations and disciplinary actions, followed by two main sections. The first main section describes the Commission's approach to monitoring IAB's efforts to detect and investigate corruption, which includes attending monthly IAB briefings to the Police

² The Executive Order specifically withheld authorization from the Commission to conduct its own investigations into allegations of corruption against members of the Department, except in specific, narrowly-defined circumstances. Executive Order No. 18, §3(b) (February 27, 1995). (The Executive Order is attached as Appendix A.)

³ IAB is the bureau within the Department responsible for investigating allegations of corruption and serious misconduct against members of the service.

⁴ One special report requested by the Mayor's Office, addressing discipline in cases of failure to take police action, is discussed *infra* at pp. 73-75 and 100.

Commissioner, Steering Committee meetings, and case reviews, as well as evaluating a sample of completed IAB investigations. We then assess IAB's performance across the investigations reviewed, discussing the issues we found regarding dispositions, interviews of available witnesses, interview quality, and timeliness in searching for video evidence.

The second main section of this Report discusses (i) the 374 disciplinary cases that were prosecuted by either the Department Advocate's Office (DAO) or the Administrative Prosecution Unit (APU) of the Civilian Complaint Review Board (CCRB) and adjudicated by the Department between October 2018 and September 2019 ("the first review period"), and (ii) the 458 disciplinary cases that were adjudicated between October 2019 and December 2020 ("the second review period").⁵ Among other breakdowns, this section identifies the number of disciplinary cases for each rank, the discipline imposed, and the average length of time the Department took to adjudicate the cases.

The majority of the second section sets forth the Commission's evaluation of the penalties imposed within various categories of cases adjudicated during the first review period.⁶ For this evaluation, we focused on those categories with which we disagreed most often with imposed penalties, as well as those encompassing misconduct that appears to present a particular corruption hazard within the Department. To explain the reasoning behind our disagreement with certain penalties, we include case examples. We note in this regard that the Department's adoption of its Disciplinary Matrix imposes presumptive penalties for various types of misconduct, and we expect the matrix to govern most future cases.⁷ Given this expectation, in

⁵ See *infra* at p. 37 for descriptions of DAO, APU, and CCRB. See also *infra* at p. 6, fn. 11.

⁶ Due to the disruption caused by the pandemic, completing a thorough analysis of the penalties imposed in the 2020 cases within a reasonable time period became problematic. Given that the Department was in the process of drafting the Disciplinary Matrix which would set forth the appropriate penalties to be used going forward, the Commission decided not to comment on the adequacy of the penalties for the cases adjudicated during the second review period, and focused instead on providing input with respect to the developing matrix.

⁷ The Disciplinary Matrix can be found at https://www1.nyc.gov/assets/nypd/downloads/pdf/public_information/disciplinary-system-penalty-guidelines-effective-01-15-2021-compet-.pdf

addition to commenting on past disciplinary outcomes, we also note areas of agreement and disagreement with the provisions of the Disciplinary Matrix as it applies to various case categories.

The Commission’s Other Monitoring Activities during the Reporting Period

In addition to the analyses discussed in the remainder of this Report, the Commission performed other monitoring work during this reporting period. We engaged in efforts to revamp the Department’s false statement policy and recommended improvements to the initial version of the Disciplinary Matrix.⁸ Regarding the false statement policy, our chief recommendation was that the presumption of termination be retained when an officer intentionally made a false official statement about a material matter. We also engaged in multiple meetings to discuss our concerns about the language of the revised false statement policy. As discussed below, some of these concerns have been addressed, but many concerns remain and extend to the false statement section in the matrix.

The Commission submitted detailed comments to the Department on the matrix in its draft form, and as the Department is therefore aware, the current version of the matrix does not always align with the Commission’s view of appropriate penalties. In addition to our comments on the matrix penalty ranges in the disciplinary section, the end of this Report discusses the Commission’s ongoing concerns about the matrix, and our proposals for future changes to that document.⁹

Among the Commission’s other responsibilities during this reporting period was reviewing the Department’s implementation of recommendations made by an independent group

⁸ The Department’s false statement policy was previously found at Patrol Guide §203-08. After the time period covered by this Report, the false statement policy was moved to Administrative Guide §304-10.

⁹ Given the Department’s representations that the matrix is a “living document” that will be subject to future amendments, the Commission will continue to discuss penalty decisions in its annual reports in an effort to change specific presumptive penalties in future versions of the matrix.

appointed in 2018 by then-Police Commissioner James O’Neill to study the Department’s disciplinary system (“the Independent Panel” or “the Panel”). On January 25, 2019, the Panel issued a report regarding four problem areas within the disciplinary system. These were: (1) lack of transparency in the disciplinary process and its outcomes; (2) the Police Commissioner’s unlimited discretion over disciplinary cases; (3) allegations of favoritism and bias leading to inconsistent penalties; and (4) delays in the resolution of cases.¹⁰

In its report, the Panel recommended that the Department move towards increased transparency of disciplinary outcomes and promote greater accountability by the Police Commissioner in cases where the Commissioner departs from the outcome recommended by the APU¹¹ or the Trial Commissioner.¹² The Panel also recommended that DAO increase its staffing size to resolve delays in cases involving more serious offenses.¹³

The Panel also identified issues involving the Department’s handling of false statement cases and domestic violence cases, and specifically adopted recommendations this Commission had previously made regarding these types of misconduct. For example, the Panel found that the Department was inconsistent in how false statements were charged, if they were charged at all. As we noted in our *Nineteenth Annual Report*, even when a subject officer had violated the false statement prohibition found in Patrol Guide §203-08, the Department often disregarded its own presumptive penalty of termination. The Panel recommended that the Department strengthen its

¹⁰ Report of the Independent Panel on the Disciplinary System of the New York City Police Department (January 25, 2019).

¹¹ CCRB is a separate City agency that has jurisdiction to conduct investigations of force, abuse of authority, discourtesy and offensive language (FADO) complaints against uniformed members of the service. NYPD investigators may conduct concurrent investigations into these allegations as well. The Commission does not review CCRB investigations except when the evidence gathered by CCRB is included in IAB investigations. APU is a division within CCRB that prosecutes disciplinary cases against uniformed members of the service in the Department’s Trial Rooms.

¹² At the time of the Panel’s report, §50-a had not yet been repealed. The repeal of §50-a occurred in June 2020.

¹³ For cases involving less serious offenses, the Panel recommended that these cases be submitted for “fast track” review. Fast track cases would “proceed to final resolution without review by the First Deputy Commissioner and the Commissioner.”

discipline in false statement cases and apply the presumption of termination when officers had intentionally made false statements regarding material matters. The Panel expressly agreed with this Commission that when the Police Commissioner elects to retain an officer, the “exceptional circumstances” justifying that decision should be set forth in writing to provide future guidance, and recommended that in those instances when an officer was not terminated, dismissal probation be included as part of the penalty.

In cases involving domestic violence, the Panel found, as the Commission had repeatedly observed previously, that the penalty imposed was often less severe than the penalty for seemingly less serious misconduct. The Panel recommended that the Department adopt the Commission’s recommendations regarding presumptive penalties in domestic violence cases, specifically, that dismissal probation be included in the penalty for a first instance of physical domestic violence. The Panel also supported the Commission’s prior recommendation that termination be the presumptive penalty in cases where the officer was found criminally liable for a physical act of domestic violence or there was clear and convincing evidence that the officer had engaged in physical acts of domestic violence previously.

Commissioner O’Neill agreed to implement all 13 of the recommendations made by the Panel, including its recommendation that the Department work with external auditors on the Department’s disciplinary system. At the Department’s request, this Commission agreed to fulfill the role of external auditor and to report on the Department’s implementation of the Panel’s recommendations.¹⁴ The Commission is currently working on a report detailing the Department’s compliance with the Panel’s recommendations.

¹⁴ A Memorandum of Understanding (MOU) was entered into between the Department and CCPC on November 15, 2019.

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CASE CATEGORIES

In analyzing IAB investigations and the disciplinary cases, the Commission utilizes the following categories of misconduct:

Bribery/Gratuities: Accepting or soliciting anything of value in exchange for favorable treatment, or accepting or soliciting any improper gifts, meals, merchandise, currency, or other item of value.

Computer Misuse: Unauthorized access to and/or dissemination of information from a Department or law enforcement database.¹⁵

Criminal Association: Associating with, and/or disclosing confidential information to, individuals known to have a criminal history or known to be engaging in criminal activities.

Domestic Incident: Misconduct involving a member of the service and a family member or someone with whom the member of the service had a present or past intimate or familial relationship.¹⁶ This category includes verbal disputes requiring the intervention of law enforcement, harassment, physical assaults, stalking, and violations of protective orders.

DWI/Unfit for Duty: Driving while intoxicated or impaired, or being intoxicated to the extent that the member of the service is unfit for duty, regardless of whether the member of the service is on or off duty.

FADO: On-duty excessive or unnecessary force or threatening use of force, abuse of authority, discourtesy to civilians, and offensive language.

Failure to Report Misconduct/Corruption: Failure to report known or suspected allegations of wrongdoing to IAB as required in the Patrol Guide.¹⁷ This category also includes the failure to notify the Department of the officer's own involvement in an off-duty unusual police incident.¹⁸

Firearms: Firearms-related misconduct, including improper display (off-duty), improper discharge (on or off-duty), failure to safeguard (on or off-duty), and possession of unauthorized firearms.¹⁹

Harassment/Improper Contact: Workplace harassment between members of the service, or harassment of, and/or improper contact with victims, witnesses, or suspects.

¹⁵ The Commission excluded from this category using Department computer equipment to send personal e-mails or to conduct non-Department related internet searches. That type of misconduct is included in the Performance of Duties category, as the subject officer is improperly engaging in personal activities while on duty.

¹⁶ This category includes incidents involving the current "significant other" of an ex-romantic partner or the ex-partner of a current boyfriend/girlfriend.

¹⁷ Patrol Guide §207-21 "Allegations of Corruption and Other Misconduct Against Members of the Service."

¹⁸ Patrol Guide §212-32 "Off Duty Incidents Involving Uniformed Members of the Service."

¹⁹ The unjustified on-duty display of a firearm is included in the FADO category.

Insubordination: Defiance of a supervisor’s authority, discourtesy toward a supervisor, and failure to obey a lawful order.

Minor Rules Violation: Misconduct related to adherence to post assignments and paperwork requirements, including failing to maintain or record adequate memo book entries.

Narcotics: Possession, use, or trafficking of illegal drugs, or the improper possession, use, or sale of prescription medication. This category includes charges related to a Department drug test failure or the refusal to take such a test.

Performance of Duties: Nonfeasance of duty. This category includes failure to investigate, failure to respond, failure to supervise, failure to appear in court or offer adequate testimony, and failure to take police action.

Perjury/False Statements: False, misleading, or inaccurate statements, regardless of the intent of the member of the service, including those made under oath or in an official Department or CCRB interview, false or inaccurate entries in Department records, and false statements to prosecutors or other investigative bodies.

Property: Missing or stolen property. Broadly includes property missing/stolen/improperly released during any interaction with members of the public, or property missing/stolen from a Department facility, vehicle, etc. This category also includes allegations related to the handling of personal or Department property or evidence including failure to safeguard, failure to voucher, failure to secure, and damage to property.

Tow/Body Shop: Unauthorized business referrals and/or improper associations with tow or body shop businesses. Also includes allegations of not adhering to the Department’s Directed Accident Towing Program (“DARP”) procedures.

Unlawful Conduct: Unlawful acts not otherwise categorized.

Miscellaneous: Misconduct that does not readily fit into any of the other categories, including sick leave violations and engaging in unauthorized off-duty employment.

MONITORING IAB INVESTIGATIONS

A. Introduction

In a time of increasing distrust in the Department's ability to police itself by conducting thorough investigations and resolving allegations appropriately, outside oversight is more essential than ever. The Commission's independent, external scrutiny of IAB's investigations provides City officials and the public with a detailed assessment of IAB's investigative competency. Equally important, the Commission's critiques of investigations can and do lead IAB to improve its practices, providing additional training to its investigators, and in particularly serious cases, reexamining its own thoroughness and taking additional investigative steps.

The Commission provides its oversight in four main ways. First, the Commission's members and staff attend IAB's monthly briefings to the Police Commissioner and the Commissioner's executive staff. At these briefings, IAB typically presents details of two ongoing investigations chosen by our Executive Director, who selects these investigations because of their overall significance, or to highlight corruption issues and trends that have been observed through our other monitoring efforts. During these briefings, we ask questions about the cases presented, make suggestions for further investigative action, and convey any concerns directly to the Police Commissioner.²⁰

Second, the Commission's staff attends IAB Steering Committee meetings. The Steering Committee is comprised of the executive staff of IAB. Three times during the year, each IAB group presents brief summaries of its most serious pending investigations.²¹ The Steering

²⁰ The Police Commissioner and other Department executives also pose questions and make investigative or disciplinary recommendations.

²¹ IAB is currently comprised of 23 investigative groups. Some of these groups cover a specific geographic area of New York City, while others investigate cases involving specific groups of service members or certain types of misconduct. Four of the groups primarily provide support services for the other investigative groups. Group 9, IAB's overnight call-out group, does not carry its own caseload and therefore does not make presentations to the Steering Committee.

Committee questions the commanding officer and the team regarding investigative steps and results, and recommends future investigative actions. Commanding officers also identify patterns of corruption or serious misconduct within their areas of responsibility and discuss proactive measures to uncover corruption, serious misconduct, or other violations of Department rules. The Commission's presence at IAB Steering Committee meetings provides us with an overview of the most serious cases being investigated by IAB and the progress of those investigations. Commission staff attended 58 Steering Committee meetings in 2019 and approximately 25 meetings in 2020.²² We found the Steering Committee's oversight to be detailed, reflecting appropriate concern with detecting—and proving—corruption and wrongdoing by members of the service.

The third method we use to monitor the work of IAB is attending case reviews, which are held at the individual IAB field offices. During these reviews, usually held once or twice per year per IAB group, each commanding officer presents their entire active caseload to the zone supervisor²³ and Commission staff, who ask questions and provide investigative recommendations.²⁴ Case reviews enable the Commission to keep abreast of almost the entire IAB caseload. Commission staff attended 26 case reviews in 2019. In 2020, due to the pandemic, the Commission only attended five case reviews.

While Steering Committee meetings and case reviews provide the Commission with an

²² Due to the COVID-19 pandemic, no Steering Committee meetings were held between late March 2020 and early August 2020.

²³ IAB's investigative groups are divided into three zones: 1) the four investigative groups that cover Manhattan and the Bronx; 2) the six investigative groups that cover Queens, Brooklyn, and Staten Island; and 3) the five investigative groups that cover detectives (2 groups divided by geography), traffic agents, school safety agents, and allegations of excessive use of force. Each zone has a zone commander and an executive officer. Together, they comprise the zone supervisors and review the majority of the investigations prior to their closure.

²⁴ The Commission staff does not attend case reviews for Groups 2, 7, 9, 52, and 55, as these groups primarily provide support services for other investigative groups. The Commission staff also does not attend case reviews for the Special Investigations Unit and Group 25, as they present their entire caseloads at each Steering Committee meeting. Finally, the Commission staff does not attend case reviews for Group 51, which investigates impersonations of members of law enforcement.

important understanding of IAB's operations and investigations, these reviews do not always reveal the details of those investigations, some of which the Commission finds significant. Therefore, as discussed in the next section, the Commission conducts more in-depth and independent reviews of IAB's investigations through its closed case monitoring.

B. The Commission's Review of Closed IAB Investigations

1. Introduction

For this Report, the Commission reviewed a randomly-selected sample of 36 IAB investigations that were closed in 2019 and 73 IAB investigations that were closed in 2020 to evaluate whether they were fair, thorough, accurate, and impartial.²⁵ The Commission concentrated on whether adequate and appropriate investigative steps were taken, whether the results of those steps were properly analyzed, and whether the ultimate investigative findings were fair and proper based on the evidence obtained. Where an investigation involved multiple allegations of wrongdoing, the Commission evaluated the disposition of each allegation.

We comment below on significant shortcomings that appear in individual cases, as well as more minor deficiencies found in multiple cases; minor, isolated errors are not highlighted. We also discuss all perceived areas for improvement with IAB.

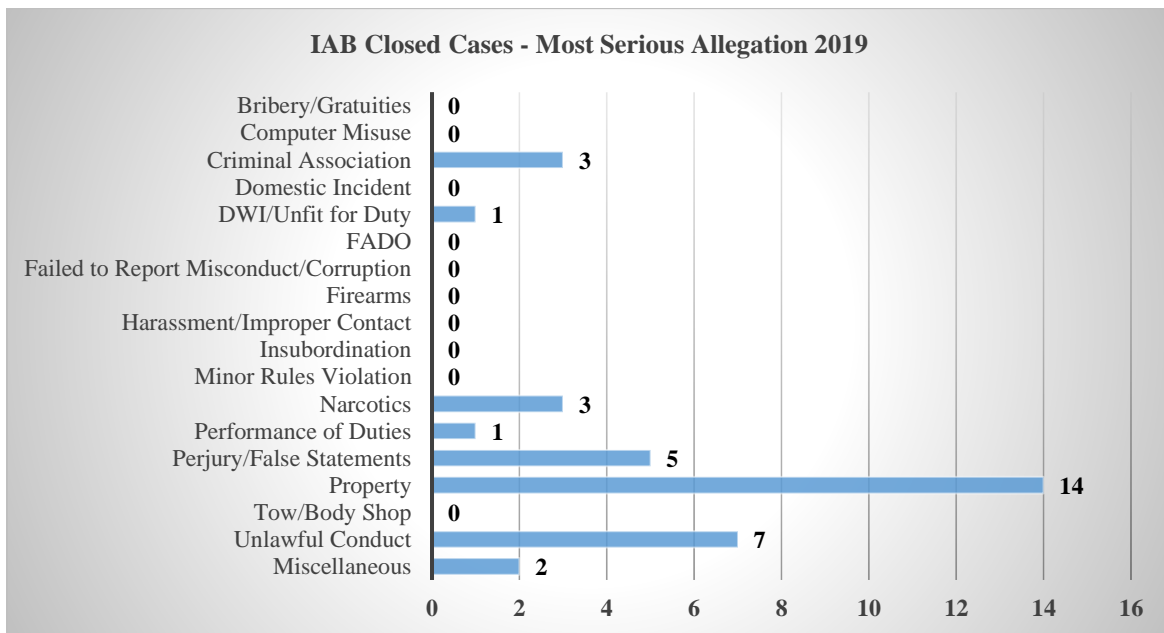
2. General Analysis of Closed Investigations

The Commission randomly chose cases from IAB closed case lists that only identified the case number and investigative group responsible for each case. The Commission reviewed investigations from multiple IAB groups to obtain an overall sense of the adequacy of IAB's operations across commanding officers, investigators, and case allegations.

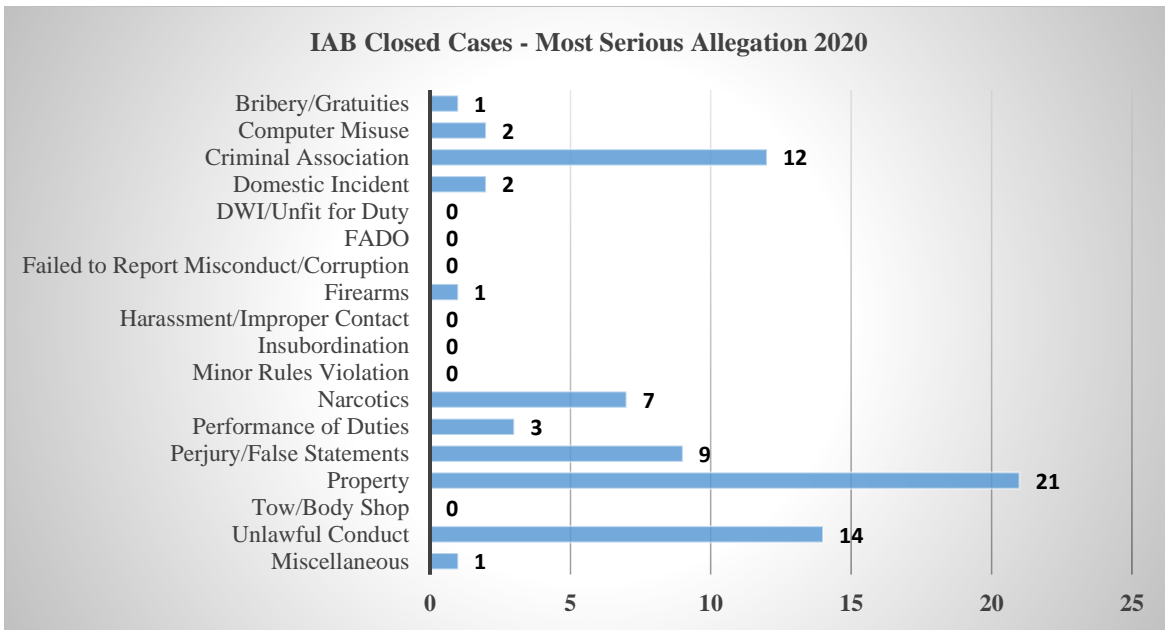
²⁵ IAB considers a case closed after the investigation is completed, including reviews by supervisory IAB personnel. If allegations are substantiated and there is a determination that administrative charges are warranted, the case is referred to DAO for prosecution of those charges, but the IAB investigation will be closed. IAB investigations will also be closed when there is a determination that no further action by IAB is necessary.

A majority of the cases we reviewed involved multiple members of the service and multiple allegations of misconduct. The 36 cases reviewed from 2019 involved 86 subjects and 245 separate allegations. The 73 cases reviewed from 2020 involved 202 subjects and 524 allegations. For each case, we identified one allegation for purposes of case categorization as the most serious allegation.

The breakdown of the most serious allegations for the cases reviewed in 2019 and 2020 appear in the following two charts.²⁶



²⁶ Because only one allegation per case was identified as the most serious allegation, an indication of “0” on a chart does not necessarily mean that IAB did not investigate any such allegations. Also, it should be noted that allegations of Domestic Incidents, DWI/Unfit for Duty, Firearms, and Insubordination are not typically investigated by IAB. The Commission included these categories in the charts to maintain consistency with the disciplinary section of this Report, which covers disciplinary cases that result from investigations from various entities within the Department, as well as the CCRB.



Consistent with the Commission’s observations in past years, Property allegations represent the most common allegation that IAB investigates. Consistent with our review from the *Nineteenth Annual Report*, the next most common allegations continued to be Unlawful Conduct and Perjury/False Statements.²⁷

a) Investigation Length

Pursuant to state statute, to impose discipline, the NYPD must administratively charge a subject officer within 18 months of the last date that the alleged misconduct took place.²⁸ If charges are not served upon a member of the service within this statute of limitations (SOL), the opportunity to impose discipline for the misconduct is generally lost.²⁹ Therefore, it is important that investigations be conducted expeditiously to ensure that substantiated misconduct can be addressed in a meaningful manner.³⁰ Swift investigations are also important for other reasons. For discipline to have the greatest effect, it should be imposed as close in time to the misconduct

²⁷ *Nineteenth Annual Report of the Commission (“Nineteenth Annual Report”)* (December 2019) at pp. 15-16.
²⁸ N.Y. Civil Service Law § 75(4). This statute of limitations does not apply in cases where the alleged misconduct would constitute a crime if proven in a criminal proceeding.
²⁹ For less formal command disciplines, the discipline must be fully adjudicated prior to the SOL’s expiration.
³⁰ If the SOL expires prior to the service of charges and specifications or the imposition of other discipline, a letter of instruction can be placed in the individual’s personnel file; however, no penalty can be imposed.

as possible. In addition, unnecessary investigative delays leave members of the service in limbo, with possible charges and discipline affecting advancement. As a general matter, prompt investigations should also result in better, more definitive dispositions for most cases, as physical evidence is more likely to be preserved and witnesses' memories are more likely to be accurate.

The Commission analyzed the length of the IAB investigations reviewed during these reporting periods from the start of each investigation (when the Department received notification of the allegations) until the conclusion (when the case was closed, each allegation was given a disposition, and the IAB supervisory review process was completed.) As part of its analysis of the investigation length, the Commission examined whether the Department had lost the opportunity to impose discipline for any misconduct due to the expiration of the SOL, and assessed whether any investigation remained open longer than necessary based upon the allegations and the investigative steps conducted. Overall, we found that in almost all instances, IAB investigators closed cases in a timely manner, and when cases exceeded 18 months, there appeared to be justification for the longer investigative periods.

The investigations reviewed in 2019 averaged 9.5 months, with the shortest lasting one month, and the longest 28 months. All but two cases (94%) were completed within 18 months. The average length of IAB investigations reviewed in 2020 was 9.75 months, with the shortest lasting one month and the longest 42 months. All but six cases (92%) were completed within 18 months.

Of the total of eight cases that remained open beyond the SOL period, the Commission believed that one investigation could have been completed more expeditiously but understood the reasons provided by IAB as to why the investigation took so long. Specifically, the case involved multiple subject officers, multiple separate complaints, and a complex set of facts and allegations, including claims of missing property and flaking, and an undercover officer who

allowed confidential informants to keep part of the narcotics they purchased during undercover operations.³¹ Official Department interviews of the subject officers were delayed so an integrity test could be conducted on one of the subjects without alerting him to the investigation, as he had been the subject of multiple similar prior allegations.³² As a result, Departmental interviews were not conducted until almost 16 months into the investigation.³³ The Commission recognized that the integrity test required time to plan and execute. Despite the long investigation, allegations against the officers were ultimately unsubstantiated.³⁴

The remaining seven cases that were open for more than 18 months involved either complex issues, multiple subject officers, numerous allegations of misconduct, or in one instance, an ongoing criminal investigation and/or related criminal prosecution.³⁵ The Commission believed that the investigation lengths were reasonable given the allegations and investigative steps conducted.

Among other factors affecting timeliness, we looked at whether there were lengthy gaps between investigative steps: we found lengthy gaps in only two cases, one from 2019 and one from 2020. The 2019 case involved allegations of missing property, and that investigation lasted approximately 13 months. Roughly three months into the investigation, there was an unnecessary

³¹ “Flaking” refers to the planting of evidence, typically narcotics or less frequently, a firearm, to support an arrest.

³² In an integrity test, investigators create an artificial scenario to replicate a situation that a member of the service could encounter. In this manner, investigators can determine if the member of the service adheres to the provisions of the Patrol Guide. Failing to do so can result in discipline.

³³ Patrol Guide §206-13 requires members of the service to answer all questions posed to them in official Department interviews and warns that failure to do so can result in suspension and/or discipline including termination.

³⁴ See *infra* at p. 21 for a definition of “unsubstantiated.” We note that in 2020, after this case was closed, an elaborate integrity test was conducted by IAB involving the subject officer who had multiple prior missing property allegations. Disciplinary charges were brought against the officer for some of his actions during the test. The same officer was also the subject in another investigation (not involving missing property), which was substantiated, and he has since resigned from the Department.

³⁵ The investigation that lasted 42 months arose from a wiretap into a criminal gambling enterprise, where there was mention of a member of the service running computer checks on behalf of targets involved in the gambling ring. Due to the sensitivity of the ongoing criminal case, IAB’s investigation was often delayed, as deference was given to the criminal investigation and ensuing prosecution.

50-day delay between investigative steps.³⁶ The 2020 case also involved allegations of missing property and lasted approximately 11 months. At approximately the midway point of the investigation, there was a three-month period during which very little investigative work was performed. The investigator cited computer glitches, scheduled vacations, increased workloads, and meetings as the reasons why so little investigative work was done during the period. While the Commission understands that investigators handle multiple cases and that other job-related responsibilities may affect their investigative priorities, investigations should not be left to languish. The longer an investigation continues without meaningful work being performed, the less likely it becomes that a definitive disposition will be reached. Additionally, the longer an investigation is open without significant progress, the more likely it is that the individual investigator's caseload will increase. This, in turn, may affect the investigator's ability to devote sufficient time to other assignments.

The average length of the investigations reviewed for this Report was slightly higher than the average length of the closed investigations we reviewed for 2018 (9.1 months), but shorter than the investigations we reviewed for the four-year period between 2014 and 2017.³⁷ We view this latter trend favorably and hope it continues in the future. We would not, however, want the quality of investigations to suffer just so IAB can conclude investigations more promptly.

One reason for the decreasing length of time to complete investigations may be that in recent years, the initial call-out investigations conducted by IAB have been more in-depth.³⁸ This is a positive development: concentrated, focused initial investigative steps have a better

³⁶ We note that the IAB supervisor assigned to oversee the investigation independently recognized the lengthy gap in the investigation and noted this in the investigative file.

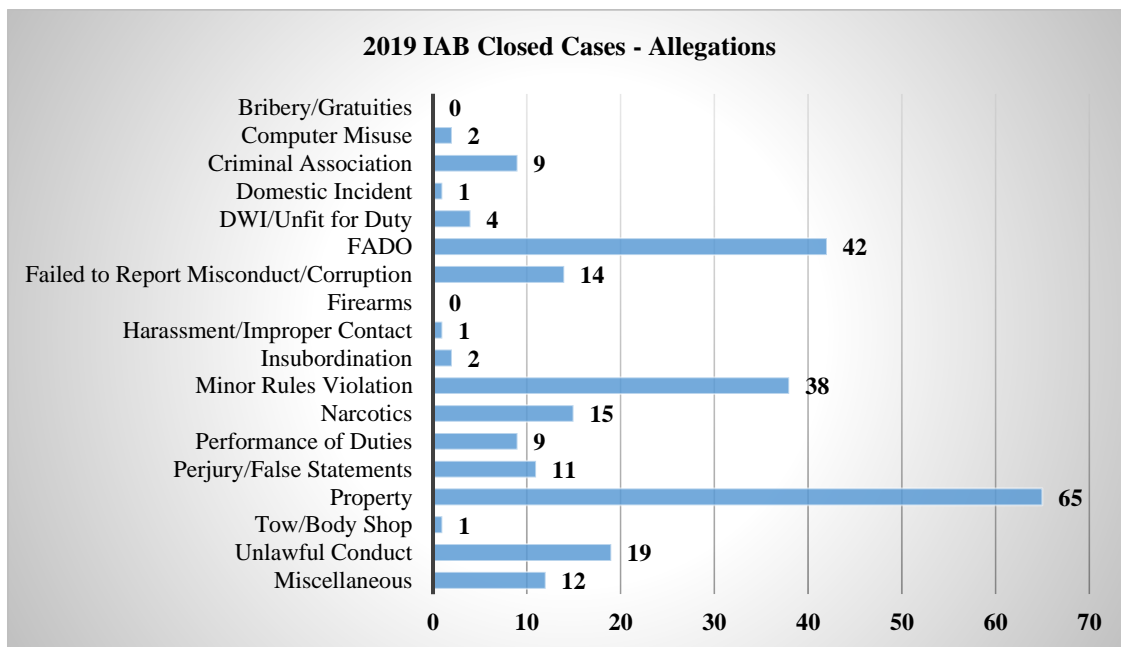
³⁷ The average length of IAB investigations that were reviewed in the years 2014 through 2017, respectively, was 13 months, 12 months, 10 months, and 11.8 months.

³⁸ A call-out investigation is the preliminary investigation that is conducted by members of IAB immediately upon receipt of most complaints. Investigators attempt to interview the complainant and witnesses, collect evidence, and search for video. A decision is made whether to open a fuller investigation based on what is uncovered in this preliminary investigation.

likelihood of collecting evidence before it is lost or altered, whether physically or through other intervening events, including memory loss or witness-tampering. Another possible reason for the shorter investigations is the increase in body-worn camera footage, which can provide incontrovertible evidence early in an investigation, eliminating the need for other investigative steps.

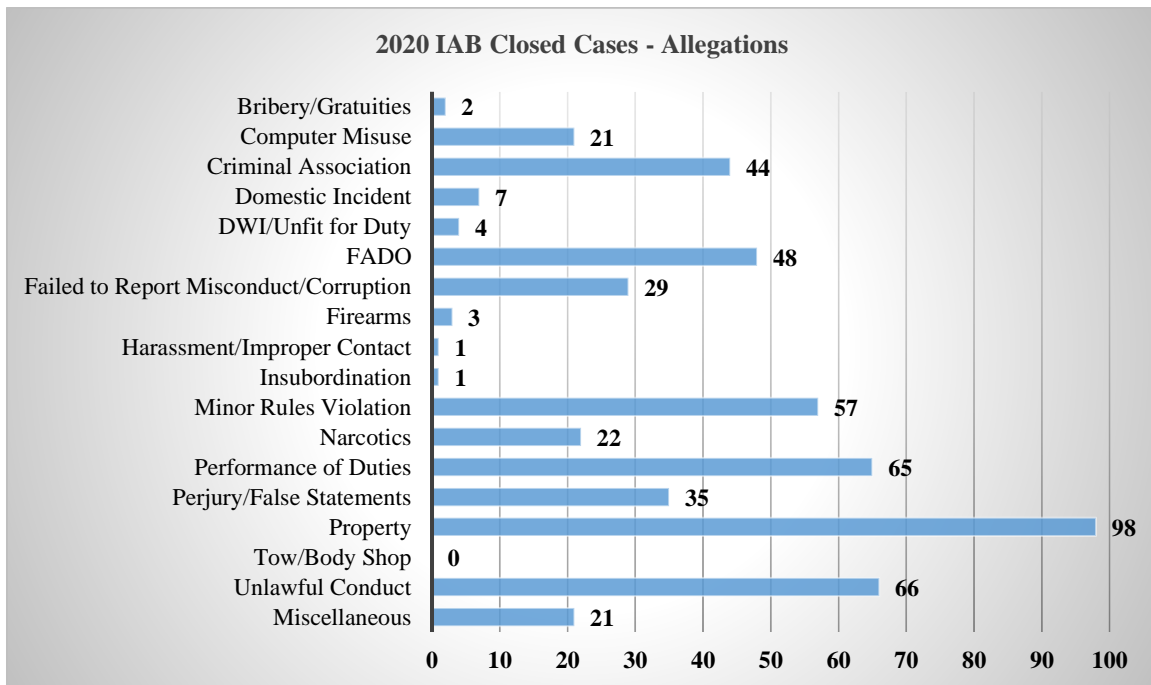
b) Types of Allegations

Of the 245 individual allegations of misconduct included among the 2019 cases the Commission reviewed, the three most prevalent allegations - as opposed to the most serious allegations - involved Property, FADO, and Minor Rules Violations.³⁹ The breakdown of all allegations investigated in those cases is set forth below.



³⁹ Beginning with the cases reviewed in 2019, the Commission categorized memo book failures as Minor Rules Violations rather than Performance of Duties, as the Commission had done in its past reports. This change was made to reflect the Department’s position that when memo book inaccuracies are the sole substantiated misconduct, they may be addressed by command discipline or a letter of referral to the subject officer’s command. This change explains the increase in Minor Rules Violation allegations and the corresponding decrease in Performance of Duties allegations when compared to prior years.

The three most prevalent allegations in the 2020 closed cases we reviewed involved Property, Unlawful Conduct, and Performance of Duties. The breakdown of all 524 allegations is set forth in the chart below.



As these charts readily reveal, the number of allegations in each case category differed significantly from 2019 to 2020. Because we reviewed a random sample of cases, these figures do not reflect the total number of each type of allegation made in a given year.

c) Dispositions

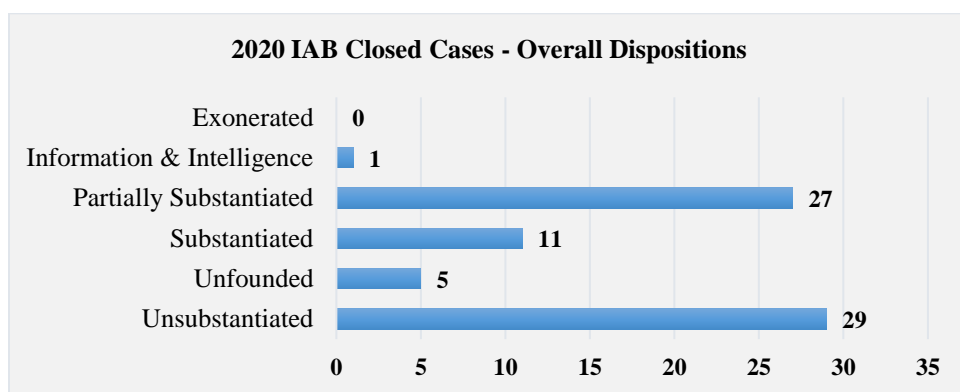
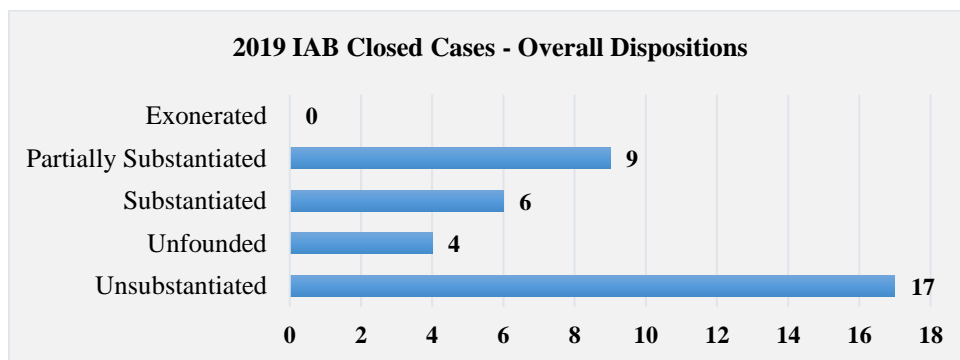
At the conclusion of an investigation into a member of the service, IAB typically assigns one of six dispositions to each allegation and another to the overall case.⁴⁰ They are:

- **Substantiated:** The investigation determined that the subject committed the act of misconduct alleged. As applied to the overall case, the accused member of the service committed all the acts of misconduct alleged.
- **Partially Substantiated:** The investigation determined that the subject committed some of the acts of misconduct alleged. A *Partially Substantiated* disposition only applies to the overall disposition of the case, not to individual allegations.

⁴⁰ These are the most common dispositions given to allegations, but there are other possible dispositions, such as substantiated-no further discipline, which are used less commonly. The Commission did not encounter any of these other dispositions in the sample of investigations reviewed for this Report.

- **Unsubstantiated:** The investigation was unable to clearly prove or disprove that the alleged misconduct occurred.
- **Exonerated:** The investigation clearly proved that the subject was involved in the incident, but his or her conduct was lawful and proper.
- **Unfounded:** The investigation found that the alleged misconduct did not occur, was not committed by the subject of the allegation, or was not committed by members of the NYPD.
- **Information & Intelligence:** The investigation found insufficient evidence to substantiate the allegation, but IAB is tracking the conduct alleged for intelligence purposes, or the allegation constituted minor misconduct and the subject’s command addressed the misconduct at IAB’s request. All allegations investigated by CCRB, which CCPC does not analyze, also receive this disposition.

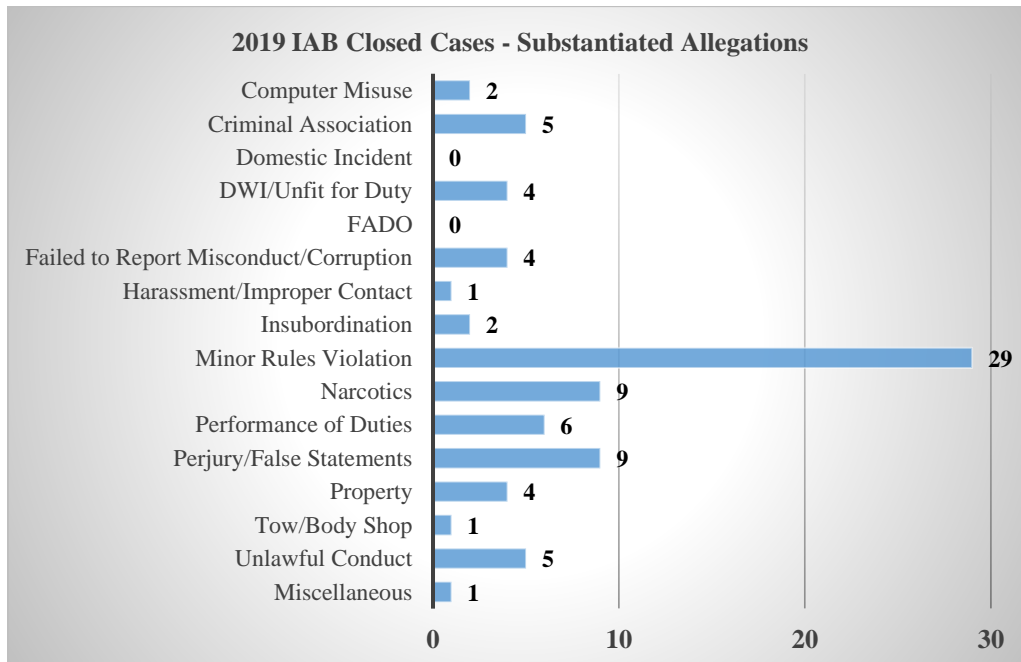
The two charts below depict the overall case dispositions for the 2019 and 2020 cases we reviewed. As there were no cases closed with the overall disposition of Information and Intelligence in 2019, that disposition is not reflected in the chart below.

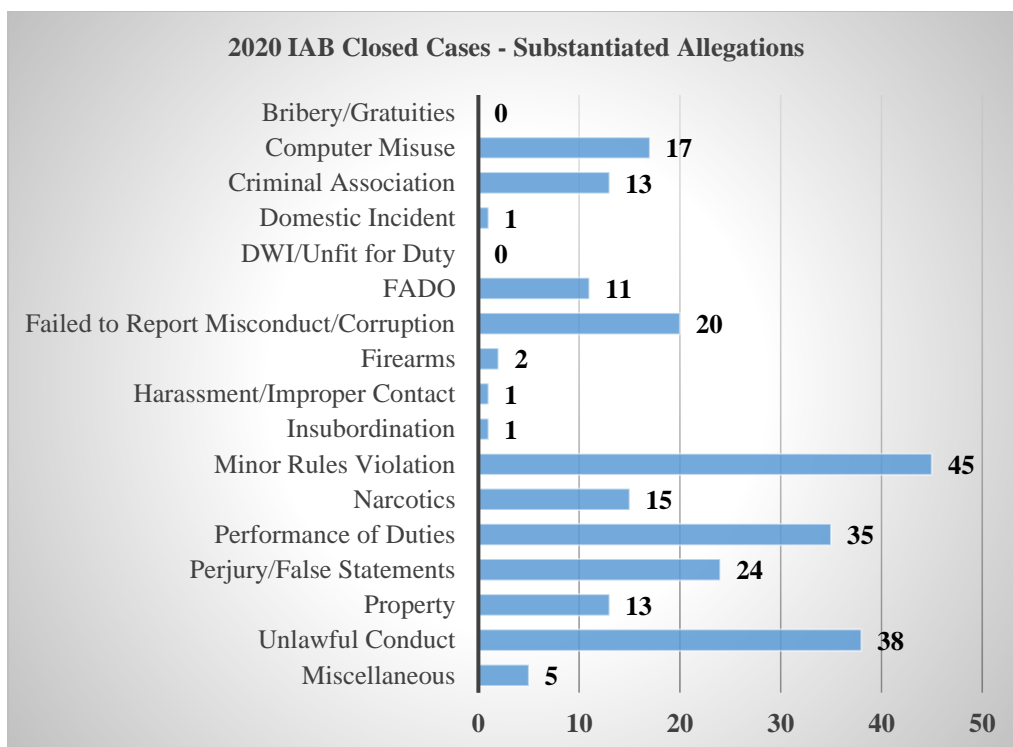


d) Substantiated Allegations

IAB closed investigations with at least one substantiated allegation in 15 of the 2019 cases reviewed (approximately 42%), and in 38 of the 2020 cases reviewed (approximately 52%). These are significant increases in IAB’s substantiation rate as compared to previous years. In 2017, 35% of the cases we reviewed were closed with at least one allegation substantiated, and in 2018, only 30% of the cases we reviewed were closed with a substantiated allegation.

The following two charts reflect the number of all substantiated allegations in the 2019 and 2020 cases reviewed.





As indicated above, the number of substantiated allegations can differ each review period; however, the same categories usually have the highest number of substantiated dispositions. For this Report, these categories include Minor Rules Violation (which usually relates to memo book issues), Perjury/False Statements, Performance of Duties, Narcotics, and Unlawful Conduct.

The most notable increase in the percentage of substantiated allegations occurred in the Perjury/False Statements category. For the 2019 review period, 82% of all Perjury/False Statement allegations in the Commission’s sample were substantiated by IAB, and for the 2020 review period, 69% of all Perjury/False Statement allegations were substantiated. These percentages contrast with those from 2017, when only 50% of the Perjury/False Statement allegations in our sample were closed as substantiated, and 2018, when only 36% of these allegations were substantiated. This significant increase tends to reflect well on IAB. However, it is important to observe here that the increase does not necessarily translate into a similar increase

in False Official Statement charges brought by DAO, which would subject an officer to a presumptive penalty of termination. Instead, as discussed later in this Report, DAO often charges officers’ false official statements under the provision of the Patrol Guide prohibiting “conduct prejudicial to the good order, efficiency, and discipline of the Department” (commonly called “Conduct Prejudicial”), a catchall provision that covers a large variety of misconduct and does not carry a presumption of termination.⁴¹

Even when some allegations are substantiated, it does not necessarily follow that the original or most serious allegation is substantiated. In fact, as can be seen from the following two charts, which set forth the disposition of the most serious allegations in each of the reviewed cases, the most serious allegation is likely to be unsubstantiated. This makes sense given that the most prevalent case type involves missing property, which is very difficult to prove as there is usually no direct evidence to corroborate a claim that a member of the service took the missing property.⁴²

2019 Disposition of Most Serious Allegations					
Case Type	Exonerated	Substantiated	Unfounded	Unsubstantiated	Total
Criminal Association	-	2	-	1	3
DWI/Unfit for Duty	-	1	-	-	1
Miscellaneous	-	-	1	1	2
Narcotics	-	3	-	-	3
Performance of Duties	-	1	-	-	1
Perjury/False Statements	-	3	1	1	5
Property	-	-	1	13	14
Unlawful Conduct	-	-	3	4	7
Total	0	10	6	20	36

⁴¹ The topic of DAO’s charging decisions in Perjury/False Statement cases is discussed in more detail *infra* at pp. 78-80.

⁴² These were the most serious allegations that were depicted in the tables *supra* at pp.14-15.

2020 Disposition of Most Serious Allegations						
Case Type	Exonerated	Substantiated	Unfounded	Unsubstantiated	Info & Intel	Total
Bribery/Gratuity	-	-	-	1		1
Computer Misuse	-	1	-	1	-	2
Criminal Association	-	5	2	4	1	12
Domestic	-	1	-	1	-	2
Firearms	-	1	-	-	-	1
Miscellaneous	-	-	-	1	-	1
Narcotics	-	3	1	3	-	7
Performance of Duties	-	-	-	3	-	3
Perjury/False Statements	-	7	1	1	-	9
Property	-	1	4	16	-	21
Unlawful Conduct	-	5	1	7	1 ⁴³	14
Total	0	24	9	38	2	73

The substantiation rate of the most serious allegation was 28% for the cases reviewed in 2019, and 33% for the cases reviewed in 2020. These substantiation rates reflect an increase from the rates in 2017 and 2018, which were 27% and 14%, respectively.

The most serious allegation was closed as unsubstantiated in 56% of the 2019 cases and 52% of the 2020 cases reviewed for this Report. The most serious allegation was closed as unsubstantiated in 57% of the 2017 cases and 73% of the 2018 cases reviewed in our *Nineteenth Annual Report*.⁴⁴

C. CCPC Analysis of Selected Trends

Over the last five years, the Commission has reported on seven specific components when evaluating IAB investigations. We have focused on these components either because of their importance (such as our agreement with the overall case disposition), or because we note

⁴³ In this case, while the most serious allegation, involving unlawful misconduct that took place prior to the subject's employment with the NYPD, was closed as information and intelligence, an allegation of computer misuse was closed as substantiated. The overall case disposition was partially substantiated.

⁴⁴ *Nineteenth Annual Report* at pp. 24-25.

problems that recur (such as the quality of investigators’ interviews of civilians and members of the service). The tables below show the percentage of outcomes and investigative steps that the Commission found satisfactory (the “satisfaction rate”) in each of these seven areas for 2019 and 2020, and a comparison of satisfaction rates over the last four years.

We note here that in a small number of cases in the tables below, an indication of our “agreement” or “satisfaction” with a disposition is more an indication that we have no solid basis on which to disagree with the result than an indication of our affirmative approval of that result. This is because, as discussed below, our review did yield some deficiencies with respect to thoroughness, completeness, and timeliness, and because we cannot always be confident that such deficiencies did not impact outcomes. If, for example, a delay in identifying a witness or obtaining a video resulted in a lost opportunity to obtain that evidence, we could only speculate as to whether the missing evidence would have provided proof to support additional disciplinary charges. Therefore, in assessing our statistical satisfaction rate, we necessarily rely on the evidence that was actually gathered during the course of an investigation and we reserve our critiques for the discussion below.

CCPC Satisfaction Rate

Description	2019 Cases	2019 Rate	2020 Cases	2020 Rate
CCPC Agrees with Disposition	36/36	100%	72/73	99%
Interview of Available Witnesses	30/36	83%	56/73	77%
Accurate Summaries of Recorded Interviews	33/36	92%	69/73	95%
Adequate Interview Quality	28/36	78%	52/73	71%
Documentation of Investigative Steps	32/36	89%	69/73	95%
Timely Search for Video Evidence	32/36	89%	71/73	97%
Presence of Team Leader Reviews	34/36	94%	66/73	90%

CCPC Satisfaction Rate – Year-over-Year Comparison

Description	2017	2018	2019	2020
CCPC Agrees with Disposition	97%	98%	100%	99%
Interview of Available Witnesses	78%	82%	83%	77%
Accurate Summaries of Recorded Interviews	88%	82%	92%	95%
Adequate Interview Quality	72%	77%	78%	71%
Documentation of Investigative Steps	84%	91%	89%	95%
Timely Search for Video Evidence	91%	93%	89%	97%
Presence of Team Leader Reviews	76%	89%	94%	90%

As can be seen from these charts, the Commission’s general satisfaction rate in each of these seven areas remained relatively stable when compared with the rates for cases reviewed for the *Nineteenth Annual Report* and in some respects increased significantly over those in past years. The largest increases in CCPC’s most recent satisfaction rate were in the accuracy of interview summaries, the documentation of investigative steps, and the timeliness of search for video. These are areas in which we have repeatedly urged IAB to show improvement, and we hope the trend will continue. We cannot say the same for IAB’s interviews of available witnesses or its interview quality, which lag far behind and even reflect a significant decline. We discuss the issues we believe are most critical to adequate investigations below.

1. Dispositions

The Commission assessed whether the information obtained by the investigator in each case we reviewed supports the overall disposition of the case, as well as the dispositions for each individual allegation when multiple allegations are involved. As indicated above, the Commission agreed with all of IAB’s allegation dispositions for the 2019 cases, and all but one allegation disposition for the 2020 cases. In the single case where the Commission disagreed

with the disposition, the complainant had alleged that currency was missing from her residence after a search warrant was executed. IAB closed the case as “unfounded,” mainly because the complainant had signed a voucher reflecting the amount of money recovered, and because the complainant was inconsistent over the course of the investigation about the amount of money missing. Despite these issues, we did not believe the investigation demonstrated that no currency had been taken, and we viewed the appropriate disposition as “unsubstantiated.”

2. Interviews of Available Witnesses

The Commission noted deficiencies related to the failure to interview witnesses in six of the 2019 cases and 17 of the 2020 cases reviewed.

- Thirteen cases involved the failure to interview available civilians during this review period (four from 2019 and nine from 2020). These cases were categorized as Property (4), Unlawful Conduct (4), Criminal Association (2), Domestic (1), Narcotics (1), and Performance of Duties (1).
- Ten cases involved the failure to interview members of the service (two from 2019 and eight from 2020). These cases were categorized as Unlawful Conduct (3), Perjury/False Statements (2), Property (2), Criminal Association (1), Performance of Duties (1), and Miscellaneous (1). The Miscellaneous case involved allegations that supervisors required subordinates to meet a quota.

The issues we noted included delays in identifying or interviewing potential subject officers and civilian witnesses. From the 2019 review, one missing property case involved delays in interviewing two civilian witnesses and the failure to add one officer as a subject of the investigation.⁴⁵ In a second missing property case, there was another delay in interviewing a civilian witness, as well as a delay in identifying a subject officer. Also, despite a directive from the team leader to add an additional subject officer to the case, the investigator did not add the officer as a subject for more than two months. In the final case, also involving an allegation of

⁴⁵ We note that the investigator assigned to the case indicated that this officer should be added as a subject. A supervisor who reviewed the case suggested that the investigator discuss this issue with the supervisor. For reasons that were not apparent, the officer was never added as a subject.

missing property, an officer who searched the complainant and vouchered other property should have been added as a subject but was not.

In the 2020 review, there were two investigations, a Narcotics case and an Unlawful Conduct case, with issues concerning either a delay in interviewing witnesses or a complete failure to do so. In another three investigations, two involving Unlawful Conduct and one involving Property, the Commission believed that officers who had been identified should have been designated subjects. In three cases, two involving Property and one involving Unlawful Conduct, members of the service were never identified during the course of the investigation, and the Commission believed that they could have been identified.

It is important that identified officers be labeled as subject officers when appropriate, even if the final disposition is not substantiated, so there is a complete record of past allegations in each officer's personnel file. When IAB receives allegations, one of its first investigative steps is to conduct a background check on the subject officer. If an officer has prior similar allegations, the investigator can look for patterns in cases, or decide to devote more resources to investigating that officer. Moreover, it is also important to identify officers as subjects as early as possible in investigations. Not only can the failure to make a timely identification affect the direction of the investigation, it also can allow an undeserving officer to be promoted or given an elite assignment at a time when executives are unaware of allegations that otherwise would have delayed or blocked such moves.

3. Interview Quality

As indicated above, the quality of interviews conducted by IAB investigators continues to be an area of concern for the Commission, as we identified interview quality issues in eight of the 2019 cases and 21 of the 2020 cases we reviewed. The two most prevalent issues, as in past reviews, were failing to cover all issues relevant to a particular witness or subject (where the

failure to do so was not the result of a deliberate investigative strategy), and failing to ask appropriate follow-up questions based upon evidence gathered either prior to or during the course of the interview.

Investigators should be clear in their questioning, vigilant in identifying evasive, incomplete and ambiguous answers, and persistent in asking all follow-up questions that are necessary to eliminate such problems. Especially in the context of official Department interviews, questioning at times appeared perfunctory, with insufficient effort made to obtain all relevant details. While the Commission has never advocated for unnecessarily prolonging interviews, in many investigations, we continued to see questioning that seemed designed merely to elicit a denial, or that failed to follow up on incomplete, vague, and/or ambiguous statements, resulting in interviews that were largely unhelpful to the investigation.

Inadequate follow-up not only fails to further the objectives of the investigation, but also makes disciplining officers for making false or evasive statements more difficult, if not impossible. Officers can and frequently do claim to have misunderstood the investigator's question, or that what appears to be a false answer can be interpreted in a way that is literally true. Careful questioning should effectively prevent such claims. Moreover, the lack of vigorous follow-up questioning aimed at challenging incredible-sounding statements can result in IAB's failure to uncover evidence that would have been revealed through more competent and persistent questioning. Seemingly *pro forma* questioning may also send a message to the subject officer and the union delegate present that IAB places no credence in the allegations, or does not view them as sufficiently serious to merit a probing inquiry.

Similar problems arise with civilian witnesses. When all appropriate follow-up questions are not asked of a civilian complainant, credibility determinations are more difficult and allegations that might otherwise be concluded with a finding of substantiated, unfounded, or

exonerated are ultimately left unsubstantiated.

One example from this review period involved allegations of missing earrings following the arrest of the complainant. The complainant stated that after he was arrested and brought to the desk inside the precinct, a “Black, plain-clothed officer, with a gold shield on his belt” came and took his backpack, which held the earrings. During the interview of the Desk Sergeant, investigators never specifically asked the Sergeant about members of the service who matched this description and who might have taken the backpack.⁴⁶

Sometimes, seemingly significant information that was not directly related to the original allegations came to light, but the investigators did not follow up with additional questioning. Such questioning might have led to discovery of other violations. One example occurred in a case involving missing property allegations that arose from a car stop. During their interviews, the subjects all stated that the driver of the vehicle refused to stop despite the officers activating their lights and sirens. The officers estimated that the vehicle traveled an additional half-mile after they turned on the lights and sirens. Despite these descriptions, the IAB investigator did not ask any questions to determine whether this event became a vehicle pursuit, which could have been a violation of the Patrol Guide and possibly subjected the officers to further discipline, depending on the circumstances surrounding the pursuit.⁴⁷

We note that the Deputy Commissioner in charge of DAO has expressed a desire to have DAO lawyers participate in interviews with certain members of the service, particularly in the

⁴⁶ The two arresting officers were specifically asked about a “Black, plain-clothed officer, with a gold shield on his belt,” but the Desk Sergeant was not. The two officers denied observing any officer matching the description take property from the complainant.

⁴⁷ The Commission does not know whether the event was actually a pursuit but believes that a follow-up inquiry by the investigators regarding this possibility should have been conducted. Specific procedures govern the use of vehicle pursuits and there were also no questions regarding whether those procedures were followed. Patrol Guide §221-15 (“Vehicle Pursuits.”)

most serious cases.⁴⁸ We applaud that effort. While we understand that DAO lawyers cannot be involved in all IAB interviews, we look forward to seeing their increased involvement.

The Commission also found that some interviews violated best practices for obtaining the most reliable information. For example, in one missing property case, the complainant alleged that during the execution of a search warrant, an officer took a manila envelope containing U.S. currency from a bedroom and put it in his back pocket. The complainant described this officer as a white male, approximately six feet tall, wearing a blue jacket. The complainant was only able to provide this general description; he could not identify any other specific characteristics of the officer, and indicated that he would not be able to identify the officer from a line-up. During the investigation, IAB secured videos from the building lobby and from inside the elevators. The complainant was never shown these videos, which might have refreshed his recollection, and led to an identification of the officer whom the complainant claimed took the envelope of cash. Similarly, when the subject officers were questioned in official Department interviews, there was confusion as to which supervisors and/or officers were present on the scene. Showing the subjects the videos would likely have helped identify who was present.

Other issues the Commission identified in interviews included the use of leading questions when open-ended questions would have yielded more information, allowing a subject's attorney to intervene excessively during questioning, failing to describe non-verbal responses or gestures for the recording, and failing to ask whether a witness whose primary language was not English would be more comfortable with an interpreter.

Fortunately, these types of deficiencies were not pervasive; we observed them in only

⁴⁸ DAO is the unit within the NYPD responsible for prosecuting the administrative disciplinary cases against members of the service. The Department Advocate who was serving while this Report was being drafted was appointed in 2020 and is implementing several changes in the prosecution of Department administrative cases. One change the Department Advocate is considering is providing training in interview techniques. Given the Commission's historical comments on many IAB interviews, we would fully support such a training.

seven of the 109 cases we reviewed. The Commission believes that the vast majority of IAB investigators made efforts to follow best practices. There were no instances in this reporting period of certain problems we have observed previously, such as interviewing witnesses together and/or using witnesses as interpreters. We also found improvement over past years in providing descriptions of nonverbal gestures for the recordings.

When there is a good reason for departing from best practices, the Commission continues to recommend that the reason be documented in the interview worksheet. We also reiterate our previous recommendation that IAB provide training in interview techniques and best practices to new investigators, as well as ongoing interview training to all IAB investigators.

4. Search for Video Evidence

The availability and use of video evidence has increased substantially over the last few years. Video captured by the Department's own systems, including body-worn cameras, along with commercial and residential closed-circuit television and video taken by cellular telephones, can help prove or disprove allegations of police misconduct. These recordings can also be used to identify subject and witness officers as well as civilian witnesses. We have frequently reiterated that a search for any possible video evidence should be conducted at the earliest possible stage of an investigation, as there is often a limited period during which video from security systems is available, and cell phone video may be deleted.

The Commission found five cases in which there was a delay in the search for video evidence, and one case where available video was never viewed.⁴⁹ The delays in these cases ranged from two weeks to seven months.

- The first case involved allegations of flaking. A canvass of the arrest location for possible surveillance video was not conducted until seven months into the investigation. No video was found of the incident.

⁴⁹ IAB supervisors noted a failure to timely search for video in only one of these cases.

- The second case involved allegations of a false statement and falsifying official Department records, in which a member of the service forged a Juror’s Proof of Service Certificate. Although there were video surveillance cameras in the courthouse lobby, a search for video was not conducted until five months after IAB opened its investigation. By that time, video from the relevant date no longer existed. Had investigators obtained the video earlier, they might have been able to determine whether the subject had entered the courthouse on the dates she claimed. Despite the lack of video, IAB was able to substantiate the allegations through other evidence.
- The third case involved allegations of criminal impersonation and false statements. In connection with a motor vehicle accident, there was an almost three-month delay in conducting a video canvass in the general area where the accident occurred. We note that IAB was not notified of the alleged misconduct until approximately seven months after the date of the accident. Thus, in all likelihood, even an immediate search for video surveillance would have yielded negative results. However, if there was a determination that a video search should be conducted, it should have been done immediately upon receipt of the allegations.
- In the fourth case, officers responded to an apartment building for a domestic incident involving the complainant and her boyfriend. Two days later, when the complainant returned to her apartment, \$80 that she had previously placed on her windowsill was allegedly missing. Video surveillance, which captured all activity in the hallways, was not requested from the location until six weeks into the investigation, by which time potentially relevant video had been erased.
- The fifth case involved allegations of unnecessary force used against the complainant. At the outset of the investigation, investigators noted the existence of surveillance cameras in the general area of interest. However, follow-up inquiry regarding surveillance video was not made until two weeks later.
- In the final case, investigators only obtained and reviewed body-worn camera footage from two of the three subject officers. Although it was unlikely that the body-worn camera footage from the third subject officer would have altered the overall case disposition, it is important to obtain and review all potentially relevant body-worn camera footage.

In our *Eighteenth* and *Nineteenth Annual Reports*, the Commission recommended that IAB team leaders and/or commanding officers verify that searches for video evidence had been completed within the first 14 days of an investigation.⁵⁰ While the Commission observed such

⁵⁰ *Eighteenth Annual Report of the Commission* (“*Eighteenth Annual Report*”) (August 2017) at p. 168; *Nineteenth Annual Report* at pp. 32 and 119.

verification in some cases, it was not present in all of the cases reviewed for this Report.

Supervisory review within 14 days of the receipt of the allegation would increase the likelihood of obtaining video that might aid in investigations and lead to more definitive dispositions.

In our next annual report, the Commission intends to examine the efficacy of body-worn cameras and document instances where such cameras helped prove and/or disprove allegations of misconduct. The Commission will also track whether IAB investigators documented searches for body-worn camera footage, and whether they fully investigated instances where officers failed to timely activate their body-worn cameras when required to do so, or prematurely discontinued those recordings.

D. Conclusion

While slightly increased from the last reporting period, the Commission has observed an overall decrease of average investigative length from the five years prior to the period covered by this Report. This might be attributable to many factors, including more comprehensive call-out investigations, the increased existence of video from body-worn cameras, and/or the decrease in IAB's overall caseload, which has allowed investigators more time to spend on each of their cases. This decrease is positive to the extent that it has been achieved without sacrificing thoroughness.

The Commission's satisfaction rates were relatively similar to those reported for 2017 and 2018. The greatest increases were in the accuracy of the summaries of recorded interviews and the inclusion of monthly team leader reviews, and the lowest area of satisfaction continued to be in the overall quality of interviews. We remain particularly concerned that investigators did not follow up with additional questions when the interviewees' answers were ambiguous, vague, or contradicted by logic or other evidence. This points to a need for additional training in this area, and we reiterate here our recommendation previously made to pair those investigators who

have less interviewing skill with more proficient interviewers. To the credit of IAB's leadership, in discussions with CCPC, they also have recognized that interviews are an area where improvement is desirable.

REVIEW OF CLOSED DISCIPLINARY CASES

A. Introduction

Two different agencies prosecute police disciplinary cases. The Department Advocate's Office (DAO), which is part of the NYPD, prosecutes administrative cases against members of the service after NYPD investigators substantiate allegations.⁵¹ The Civilian Complaint Review Board (CCRB) is an outside agency that conducts investigations into excessive or unnecessary force, abuse of authority, discourtesy, or offensive language allegations (FADO).⁵² The Administrative Prosecution Unit (APU) of the CCRB prosecutes administrative cases against members of the service based on substantiated CCRB investigations. DAO may also prosecute cases involving FADO allegations, even when those allegations have been investigated by CCRB.

Department Trial Commissioners preside over all administrative trials and recommend factual findings and administrative penalties to the Police Commissioner after considering recommendations made by DAO or APU.⁵³ The Police Commissioner makes final decisions regarding guilt and the imposition of penalties.⁵⁴

The CCPC reviews NYPD disciplinary records to evaluate whether the charges brought against officers and the penalties imposed adequately address the misconduct at issue, and

⁵¹ DAO only prosecutes cases addressed through charges and specifications and schedule C command disciplines. Command disciplines are less formal than charges and specifications and are only available for specific types of misconduct. Command disciplines are divided into schedule A, schedule B, and schedule C categories, with schedule A being the least serious and schedule C being the most serious.

Some schedule B command disciplines also originate with DAO. Many schedule A and schedule B command disciplines can be adjudicated at the command level or by other investigative divisions within the NYPD. DAO is responsible for bringing charges and specifications for any misconduct that is addressed with a command discipline when the subject officer refuses to accept that form of discipline and demands a hearing.

⁵² CCRB has jurisdiction to conduct investigations into FADO complaints against uniformed members of the service. NYPD investigators may conduct concurrent investigations into these allegations. The Commission, with its mandate to focus upon corruption, does not review CCRB investigations except when they are included as evidence within IAB investigations.

⁵³ Department Trial Commissioners also preside over negotiated settlements between APU and uniformed members of the service.

⁵⁴ N.Y.C. Administrative Code § 14-115(a).

provide sufficient specific and general deterrence. The primary factors we consider are the nature of the offense and the subject officer's disciplinary and performance history, particularly in combination with the officer's length of employment. We also consider the officer's rank and level of supervisory responsibility, and whether similarly situated officers appear to have received similar penalties.

For the first review period covered by this Report (between October 2018 and September 2019), the Commission evaluated 374 disciplinary cases that were adjudicated against 338 members of the service.⁵⁵ This is a significant decrease in the number of cases adjudicated as compared to the prior review period (between October 2017 and September 2018), when the NYPD adjudicated 498 cases against 450 members of service.⁵⁶ While the reasons for this decrease are not entirely clear, we note that during that same time period, the Department began implementing the use of schedule C command disciplines as a substitute for charges and specifications ("charges") for relatively straightforward cases that did not involve serious misconduct.⁵⁷

For the second review period covered by this Report (between October 2019 and December 2020), the Commission evaluated 458 disciplinary cases that were adjudicated against 422 members of the service.⁵⁸ This period immediately preceded the Department's

⁵⁵ Twenty-eight members of the service had multiple cases involving separate charges and specifications that were resolved with a single penalty. Where multiple cases were resolved with one penalty, the officer was counted once. Five members of service had two cases that were adjudicated separately; the Commission counted each of those officers twice, yielding 10 members of the service rather than five.

⁵⁶ *Nineteenth Annual Report* at p. 38.

⁵⁷ Schedule C command disciplines can be used to impose discipline in lieu of charges for specific types of misconduct. The maximum penalty available for misconduct addressed by a schedule C command discipline is the forfeiture of 20 vacation days. Unlike schedule A and schedule B command disciplines, schedule C command disciplines cannot be expunged from an officer's personnel records.

⁵⁸ Twenty-six members of the service had multiple cases involving separate charges that were resolved with a single penalty. Where multiple cases were resolved with one penalty, the officer was counted once. Two members of service each had two cases that were adjudicated separately; the Commission counted each of those officers twice.

implementation of the Disciplinary Matrix. Going forward, our analysis is likely to focus on whether the matrix was followed in individual disciplinary cases, and if not, whether an appropriate reason was set forth to depart from those guidelines. We will also examine whether the matrix's penalties were appropriate as applied to real fact patterns, as opposed to the hypothetical fact patterns we created in our comments to the draft of the Disciplinary Matrix.⁵⁹

B. General Analysis of Disciplinary Cases

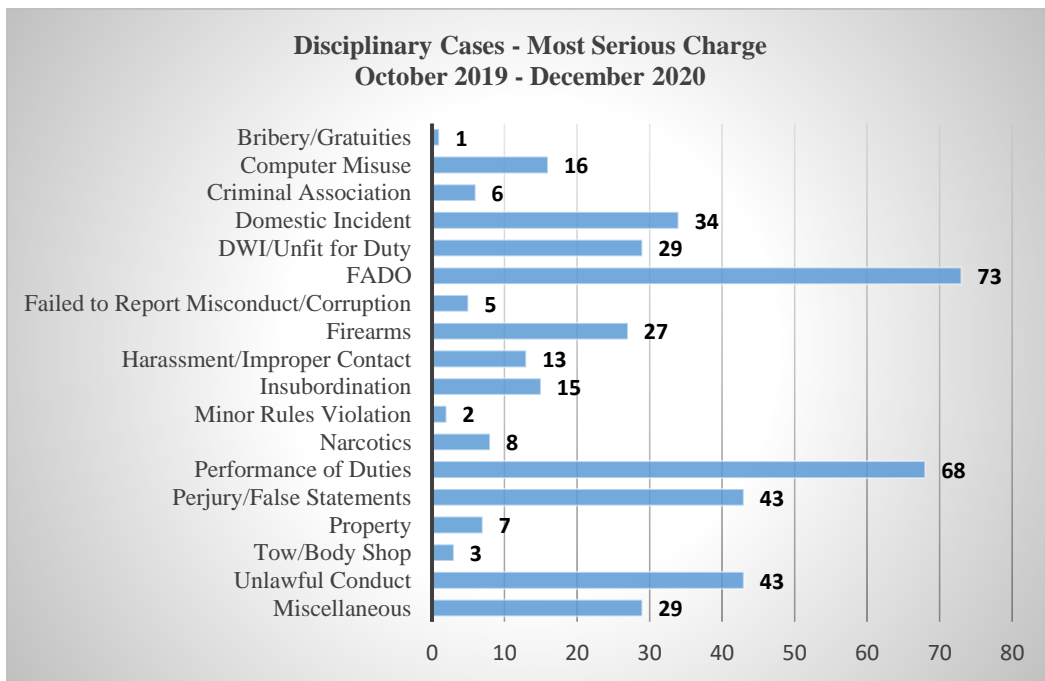
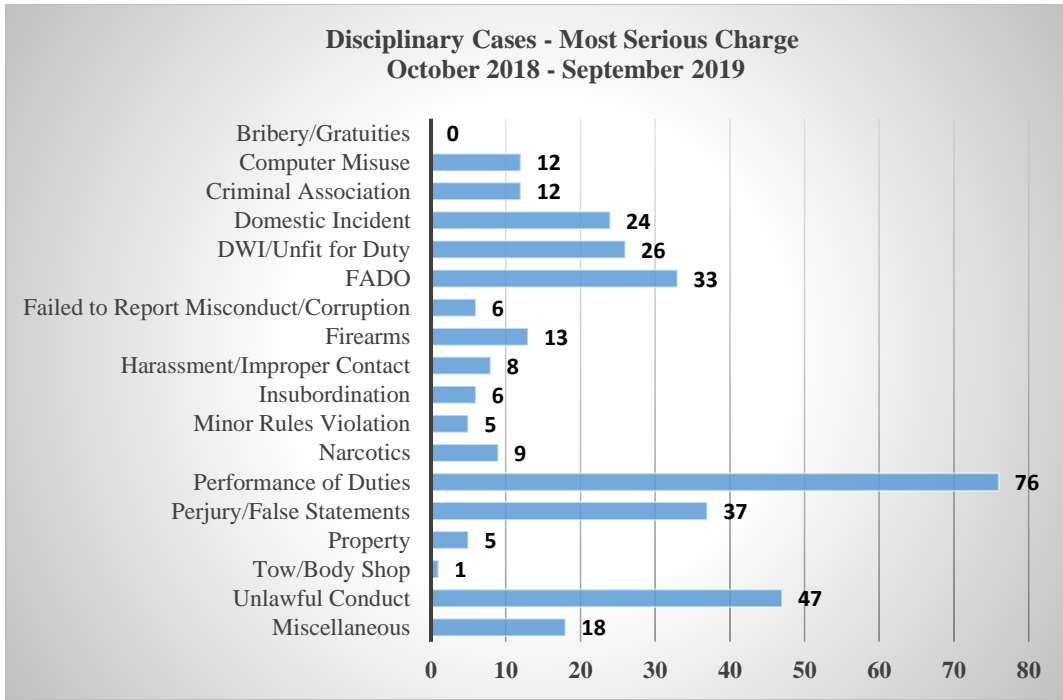
In this section, the Commission presents various statistical breakdowns of the disciplinary cases that were adjudicated during both review periods. We include this material to inform the public of the types and levels of misconduct that are subject to formal discipline. By compiling this data and comparing it to the information in our *Nineteenth Annual Report*, we can look for trends that suggest issues with particular types of misconduct and deficiencies in the way the Department addresses that misconduct. We can also follow up on possible trends going forward, and seek to determine the reasons for any significant increases or decreases.

1. Case Categories

The two charts on the next page indicate the most serious charge brought against each of the 338 members of the service who faced discipline in the first review period and the 422 officers who faced discipline in the second review period. The Commission uses the most serious charge to assign each disciplinary case to an overall case category.⁶⁰

⁵⁹ See Appendices B and C attached at the end of this Report.

⁶⁰ As described above, (*supra* at p. 14, fn. 26) the Commission used the same categories for both IAB and DAO cases and allegations. The Commission usually assigned a case category based upon the most serious specification (as determined by the Commission) of which the subject officer was found guilty. If the subject officer was found not guilty of all specifications, the Commission used what it considered the most serious specification with which the subject officer was charged. There were some cases, such as those involving DWI, in which Department guidelines dictated the appropriate penalty. When a case involved one of those offenses, the Commission placed the case in the case category most closely aligned with the imposed penalty regardless of which specification the Commission deemed to be most serious.



The Commission compared the case types from these two reporting periods to the cases it reviewed for the *Nineteenth Annual Report*⁶¹ and noted the trends discussed below.

As revealed above, the number of FADO charges went from 33 up to 73 during the two

⁶¹ *Nineteenth Annual Report* at p. 39.

periods covered in this Report, which looks like an extreme increase. However, for the preceding time period, as reflected in our *Nineteenth Annual Report*, 84 officers were charged with FADO violations. Therefore, the lower number of officers prosecuted between October 2018 and September 2019 appears to represent an anomaly.

There was an opposite trend in the Performance of Duties category. There were 76 officers (24.5%) with Performance of Duties charges adjudicated between October 2018 and September 2019. That number decreased to 68 officers (16.1%) between October 2019 and December 2020. However, as reflected in our *Nineteenth Annual Report*, between October 2017 and September 2018, the NYPD prosecuted 72 officers (16%) in this category. The recent decrease in Performance of Duties cases could be due partly to the appointment of a new Department Advocate who has prioritized the prompt adjudication of the most serious cases, as well as cases that have been pending for long periods of time.

2. Discipline by Rank

As members of the service rise in rank, they take on greater responsibilities in the Department, including the responsibility to monitor the conduct and performance of their subordinates, as well as to provide leadership to lower-ranking officers. With this increased responsibility comes an enhanced duty for supervisors to behave appropriately and to adhere to Department rules and regulations. Yet, there exists an apparent belief among the rank and file that high-ranking officers are often able to escape harsh discipline. The Commission examines the discipline imposed by rank of the members of the service in an effort to determine whether higher-ranking members are being penalized appropriately.

The two tables on the next page reflect the ranks of the members of service disciplined during the first and second review periods.

Cases Adjudicated between October 2018 – September 2019

Rank	No. of MOS	% of MOS
Police Officer	226	67%
Detective	40	12%
Sergeant	54	16%
Lieutenant	14	4%
Captain	2	<1%
Deputy Inspector	2	<1%
Inspector	0	0
Chief	0	0
Total	338	100%

Cases Adjudicated between October 2019 – December 2020

Rank	No. of MOS	% of MOS
Police Officer	283	67%
Detective	49	12%
Sergeant	55	13%
Lieutenant	28	7%
Captain	3	1%
Deputy Inspector	2	< 1%
Inspector	2	< 1%
Chief	0	0%
Total	422	100%

Notably, the number of lieutenants charged doubled from the first to the second review period. The number of lieutenants disciplined during the first review period covered by this Report was similar to the number of lieutenants disciplined during the first review period (October 2016-September 2017) covered by the *Nineteenth Annual Report*.⁶² The number of lieutenants disciplined in the second review period in this Report was similar to the number of lieutenants who were disciplined during the second review period (October 2017-September 2018) covered by our prior report, which also constituted a significant increase from the number of lieutenants disciplined during the earlier period.⁶³

In our previous report, we noted that during the second review period almost 28% of the

⁶² *Id.*

⁶³ *Nineteenth Annual Report* at pp. 42-44.

lieutenants who were disciplined had been abusing time, and not working when they should have been. We expressed concern regarding the mechanisms the Department used to supervise its lieutenants. In this Report, the Commission saw that trend continue with nine cases adjudicated against lieutenants who were not at their assignments when they were scheduled to be there, either on straight time or on overtime. Four of these lieutenants received discipline in the first review period, while the remaining five received discipline in the second review period. There were an additional four lieutenants, two in each review period, whose charges addressed their failures to perform their assignments on multiple occasions.

We also note that seven lieutenants in the second review period, up from one in the first review period, received charges for FADO violations. Five of these lieutenants, all charged with abuse of authority violations, were sergeants at the time the misconduct was allegedly committed.⁶⁴ In the three cases with guilty findings, the lieutenants forfeited between four and 10 penalty days,⁶⁵ which is consistent with the penalties imposed on lower-ranking members of the service for similar misconduct.

The very low number of supervisors against whom charges were adjudicated can be viewed as a positive indication for the Department. However, we note that this number does not capture the possibility that investigations involving misconduct by supervisors did not result in charges because decisions were made that inappropriately favored supervisors. We intend to examine that possibility in the future.

3. Timeliness

While the Department is required to administratively charge a member of the service

⁶⁴ Two were found Not Guilty after a trial. The remaining two lieutenants who faced FADO charges during this review period were respectively charged with committing discourtesy and using force without necessity.

⁶⁵ Penalty days refers to days that officers are suspended or vacation days that they forfeit as punishment for the misconduct.

within 18 months of the date the misconduct took place unless a criminal exception exists, there is no limitation on the length of time permitted to adjudicate administrative charges once the subject officer is served.⁶⁶ Just as prompt investigations can instill confidence in the disciplinary process, so does the prompt adjudication of charges and the corresponding imposition of discipline. In addition, discipline imposed long after misconduct occurred may have the appearance of being purely punitive rather than corrective—which can lead to a decrease in morale and in the deterrent effect—especially when a subject officer has refrained from engaging in further misconduct during the pendency of the investigation and disciplinary proceedings.

For this Report, the Commission analyzed a sample of 361 disciplinary cases (150 from the first review period, and 211 from the second review period) to determine: 1) the average investigative period (the period from the date of incident until the date charges were brought); 2) the average adjudication period (the period from the date charges were brought to the date the disciplinary matter was finally resolved); and 3) the average overall period from the date of incident to the date of final resolution.⁶⁷

In the first review period, the average investigative time was 7.7 months, which falls well within the 18-month statute of limitations. The average adjudication period was 13.9 months, and the average overall period was 21.6 months. In the second review period, the average investigative time for the sample was even lower, 7.3 months. The average adjudication period increased to 16.3 months, and the average overall period increased to approximately 24 months. These increases are likely related to delays caused by COVID restrictions, which began in March

⁶⁶ See *supra* at p. 15 and accompanying footnotes for a more detailed explanation of the statute of limitations and the criminal exception to that statute.

⁶⁷ The Commission limited the sample to members of service who only had a single case with one date of incident, because including multiple cases covered by one penalty could skew the results. DAO often holds back cases from the negotiation or trial process when the member of the service has other investigations pending that may also result in discipline. DAO then packages these cases together to be resolved with one penalty. Also, cases disposed of by the filing of charges (*see infra* at pp. 49-52) or by a motion to dismiss were not included in the sample. In one case, the Commission could not determine the date of charges, so excluded that case from the sample.

2020 and continued through the end of the second review period. This was less of a delay than the Commission expected, which reflects positively on both DAO and APU.

The two tables below depict the elapsed time in months, and further break these times down by the adjudication type and prosecuting entity.

Cases Adjudicated between October 2018 – September 2019

Cases	Investigative Period	Adjudication Period	Overall
All (150)	7.7	13.9	22.6
Plea (113)	6.5	13.3	19.8
Mitigation ⁶⁸ (7)	6.3	13.8	20.1
Trial (30)	12.4	16.2	28.6
DAO (126)	6.8	13.2	20.0
DAO Plea (104)	6.1	13.0	19.1
DAO Mitigation (7)	6.3	13.8	20.1
DAO Trial (15)	11.8	14.5	26.3
APU (24)	12.4	17.6	30.0
APU Plea (9)	11.4	17.3	28.7
APU Mitigation (0)	–	–	–
APU Trial (15)	13.0	17.8	30.9

Cases Adjudicated between October 2019 – December 2020

Cases	Investigative Period	Adjudication Period	Overall
All (211)	7.3	16.3	24.0
Plea (157)	5.9	15.5	21.7
Mitigation (6)	8.8	16.0	25.3
Trial (48)	11.7	19.1	31.1
DAO (162)	5.9	15.7	30.7
DAO Plea (148)	5.5	15.3	21.3
DAO Mitigation (6)	8.8	16.0	25.3
DAO Trial (8)	11.0	20.6	31.8
APU (49)	11.7	18.6	30.7
APU Plea (9)	11.1	18.2	29.6
APU Mitigation (0)	–	–	–
APU Trial (40)	11.1	18.8	30.9

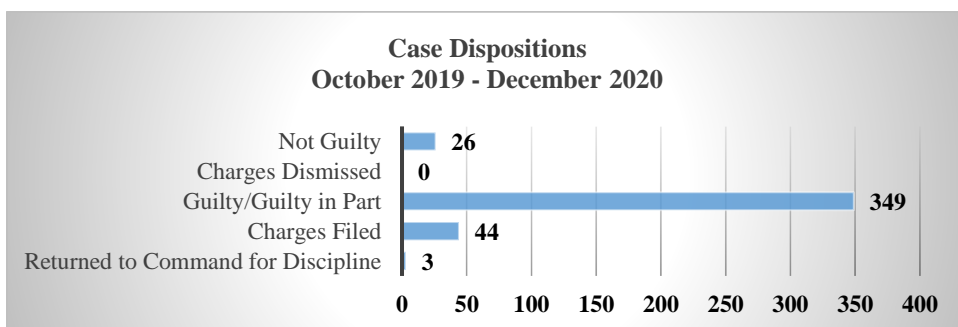
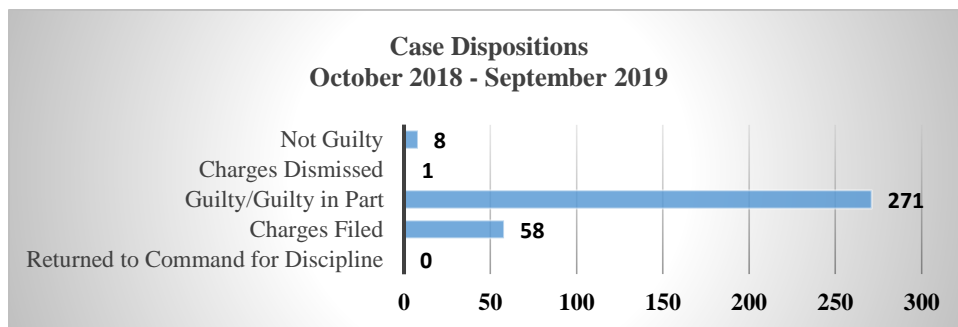
The data demonstrates that the NYPD’s investigative period decreased for those cases adjudicated during the second review period. This is a positive trend that the Commission hopes will continue.

⁶⁸ In a mitigation hearing, the member of the service pleads guilty to the charges but presents evidence before the Trial Commissioner in support of a lower penalty than that recommended by the prosecuting agency.

The data further indicates that the APU prosecuted and tried significantly more cases during the second review period than during the first review period. Between October 2018 and September 2019, APU prosecuted 25 cases, 16 of which were resolved through trials rather than negotiations,⁶⁹ whereas between October 2019 and December 2020, APU prosecuted 50 cases,⁷⁰ 40 of which were resolved through a trial. Despite the significant increase in cases brought by APU, the average overall period from the date of incident to the date of final resolution did not increase, even during the pandemic. This is commendable.

4. Case Outcomes

The two charts below and on the next page reflect the case outcomes for the first and second review periods.⁷¹



⁶⁹ One case was not included in the chart above because the officer committed the misconduct on multiple dates.

⁷⁰ One case was not included in the chart above because the charges against the officer were filed after he retired.

⁷¹ As noted above, some members of the service had multiple cases. A member of the service is found “Not Guilty” only at the conclusion of a Department trial. The Guilty/Guilty in Part category includes those officers with multiple cases and/or one case with multiple charges who were found guilty of some charges but not guilty of others, or who had some charges dismissed prior to accepting a settlement or proceeding to trial.

This data shows that significantly more members of the service were found Not Guilty in the second review period (26 out of 422 or 6.1%) than in the first review period (8 out of 338 or 2.3%). The following two charts indicate the case disposition by case category.

Disposition by Case Category October 2018 – September 2019					
Case Category	Not Guilty	Guilty/ Guilty in Part	Charges Filed	Charges Dismissed	Total
Bribery/Gratuities	–	–	–	–	0
Computer Misuse	–	10	2	–	12
Criminal Association	–	10	2	–	12
Domestic Incident	–	19	5	–	24
DWI/Unfit for Duty	1	19	6	–	26
FADO – total	7	25		1	33
APU	7	17	–	–	24
DAO	–	7		1	8
APU & DAO	–	1		–	1
Failed to Report Misconduct/Corruption	–	5	1	–	6
Firearms	–	12	1	–	13
Harassment/Improper Contact	–	8	–	–	8
Insubordination	–	5	1	–	6
Minor Rules Violation	–	4	1	–	5
Narcotics	–	2	7	–	9
Performance of Duties	–	72	4	–	76
Perjury/False Statements	–	27	10	–	37
Property	–	4	1	–	5
Tow/Body Shop	–	1	–	–	1
Unlawful Conduct	–	32	15	–	47
Miscellaneous	–	16	2	–	18
Total	8	271	58	1	338

Disposition by Case Category October 2019 – December 2020					
Case Category	Not Guilty	Guilty/ Guilty in Part	Charges Filed	Sent to Command	Total
Bribery/Gratuities	–	1	–	–	1
Computer Misuse	–	15	–	1	16
Criminal Association	–	5	1	–	6
Domestic Incident	2	27	5	–	34
DWI/Unfit for Duty	–	24	5	–	29
FADO - total	21	44	7	1	73
APU	21	28	7	–	50
DAO	–	16	–	1	17
Failed to Report Misconduct/Corruption	–	5	–	–	5
Firearms	–	27	–	–	27
Harassment/Improper Contact	–	13	–	–	13
Insubordination	–	12	3	–	15
Minor Rules Violation	–	2	–	–	2
Narcotics	–	1	7	–	8
Performance of Duties	–	64	3	1	68
Perjury/False Statements	3	37	3	–	43
Property	–	7	–	–	7
Tow/Body Shop	–	3	–	–	3
Unlawful Conduct	–	34	9	–	43
Miscellaneous	–	28	1	–	29
Total	26	349	44	3	422

As reflected above, significantly more officers were found Not Guilty in the FADO category in the second review period (21) than in the first (seven). As mentioned earlier, APU tried significantly more cases during the second review period (40) than the first (16). However, all the Not Guilty findings in FADO cases in both review periods were in cases tried by APU, rather than DAO. During the first review period, 43.8% of the individuals tried by APU (seven out of 16) were found Not Guilty, and during the second review period, 52.5% of the individuals tried by APU (21 out of 40) were found Not Guilty. This is the first report in which we have broken out the FADO dispositions by prosecuting agency, and these Not Guilty dispositions in FADO cases are disproportionately high as compared to the cases tried by DAO. We intend to make inquiries in the future to determine whether this discrepancy is reasonably explainable or a

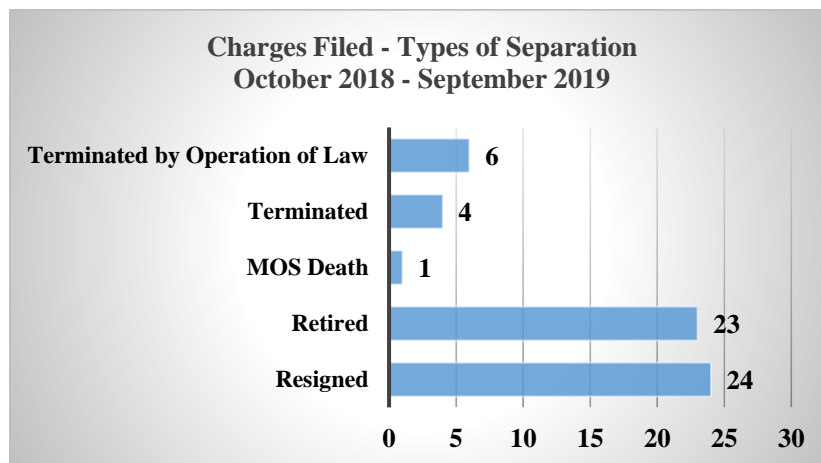
cause for concern.

While all the other case categories remained relatively stable regarding dispositions of Guilty and Not Guilty, there was an increase in the number of cases that were filed without an adjudication after the charged individuals left the Department prior to their cases being heard. This is discussed further in the next section.

a) Charges Filed

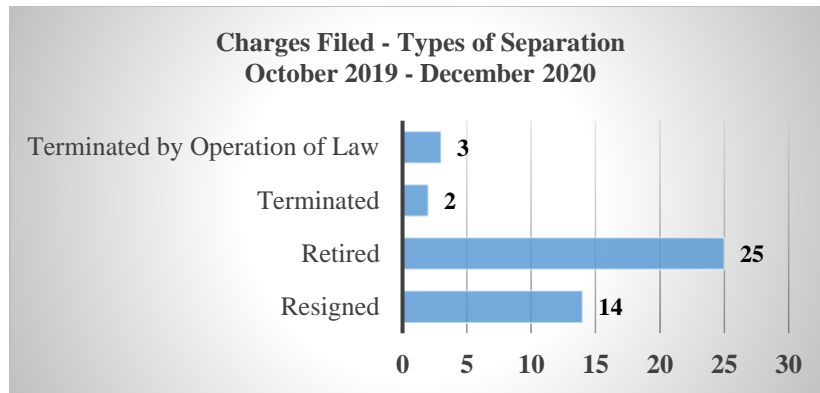
The “Charges Filed” designation is applied to officers who were separated from the Department while their investigations or disciplinary cases were pending. These separations usually occur through termination, termination by operation of law,⁷² resignation, or retirement.⁷³

During the first review period, 58 out of 338 individuals had their cases disposed of as “Charges Filed.” In the second review period, 44 out of 422 individuals had their cases disposed of as “Charges Filed.” The following two charts reflect the types of separation for these individuals.



⁷² See *infra* at pp. 50-52 for an explanation regarding termination by operation of law.

⁷³ During the first review period, one subject officer passed away during the pendency of his case.



Overall, there was a decrease in members of the service in the “Charges Filed” category from the first review period (58 out of 338 or 17%) to the second (44 out of 422 or 10.4%). However, both of these figures represented increases in the “Charges Filed” category from the two review periods in our *Nineteenth Annual Report*. In the first review period in that report, 7.4% of the disciplinary cases concluded with a “Charges Filed” disposition, while in the second review period, 7.5% of cases concluded with a “Charges Filed” disposition.

Although it is possible that some of the individuals who left the Department retired or resigned for reasons unrelated to discipline, ordinarily we would consider the increase in “Charges Filed” to be significant. An increase of this magnitude would tend to suggest that officers facing charges were more concerned that they would be terminated or severely punished if found guilty, and therefore retired or resigned to avoid discipline. However, we note that this period encompassed the year 2020, during which police departments across the nation experienced extraordinary numbers of retirements and resignations. It is therefore difficult to assess whether the increase in retirements and resignations was due to increased fear of discipline or to general dissatisfaction with police work. If this apparent trend does not continue in the future, that would indicate that 2020 resignations and retirements played an outsized role in at least some of these numbers.

In contrast, when an individual is terminated by operation of law, there is a direct

connection to the disciplinary case against that individual. Members of the service are terminated by operation of law upon conviction of a felony or a crime involving a violation of the officer's oath of office.⁷⁴ Terminations by operation of law are exercised separately from the Department's disciplinary process, and any pending disciplinary cases that cover the same misconduct are disposed of as "Charges Filed."

In the first reporting period, the following six members of the service were terminated by operation of law after being convicted of criminal charges:

Officer #1: Assault, Criminal Possession of a Weapon (two counts), Harassment, Vehicle and Traffic Law violations (four counts). (Unlawful Conduct)

Officer #2: Narcotics Trafficking, Conspiracy to Commit Narcotics Trafficking, Firearms Possession. (Narcotics)

Officer #3: Grand Larceny in the Second and Third Degree, Criminal Possession of a Controlled Substance, Official Misconduct. (Unlawful Conduct)

Officer #4: Robbery in the First and Second Degree, Assault, Menacing, Falsely Reporting an Incident, Improper Display of Plates. (Unlawful Conduct)

Officer #5: Official Misconduct. (Unlawful Conduct)

Officer #6: Attempted Enterprise Corruption (two counts). (Unlawful Conduct)

In the second review period, the following three members of the service were terminated by operation of law after being convicted of criminal charges:

⁷⁴ N.Y. Public Officer's Law § 30(1) (e). According to the Department's Disciplinary Matrix, "an Oath of Office violation includes a conviction for any felony offense under State or Federal Law, or a conviction for a misdemeanor when the crime involves knowing and intentional conduct evidencing willful deceit, a calculated disregard for honest dealings, or intentional dishonesty or corruption of purpose. This provision applies to crimes committed on or off-duty. Oath of Office offenses include, but are not necessarily limited to, Official Misconduct and Perjury among other crimes." The Department also noted that the "courts have held that the commission of the following crimes, while not exhaustive, constitutes a violation of a public officer's oath of office: Perjury, Official Misconduct, Bribery and related offenses, Aggravated Harassment, Menacing, Assault, Reckless Endangerment, Stalking, Sex Abuse 3rd Degree, Falsifying Business Records, Offering a False Instrument for Filing, and Endangering the Welfare of a Child." The New York City Police Department Disciplinary System Penalty Guidelines (January 15, 2021) at pp. 15-16.

Officer #1: Promoting Prostitution in the First and Third Degree, Enterprise Corruption, Conspiracy. (Unlawful Conduct)

Officer #2: Perjury in the First and Second Degree, Making a False Written Statement, Official Misconduct. (Perjury/False Statement)

Officer #3: Vehicular Manslaughter in the Second Degree. (DWI/ Unfit for Duty)

Other members of the service either resigned or retired while criminal cases were pending against them. While the second period saw a decrease in the number of individuals terminated by operation of law, this is likely attributable, at least in large part, to delays in the criminal proceedings during the COVID-19 pandemic.

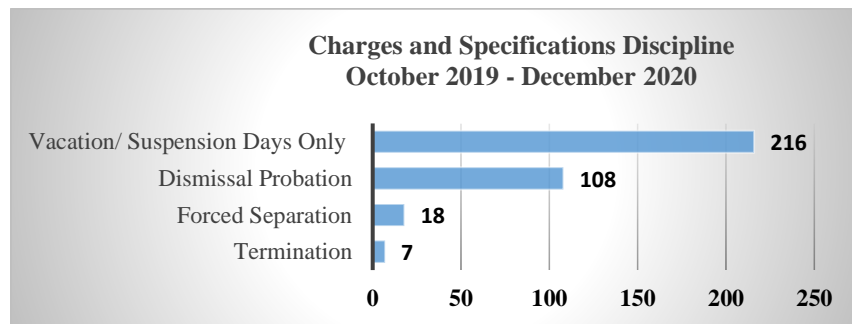
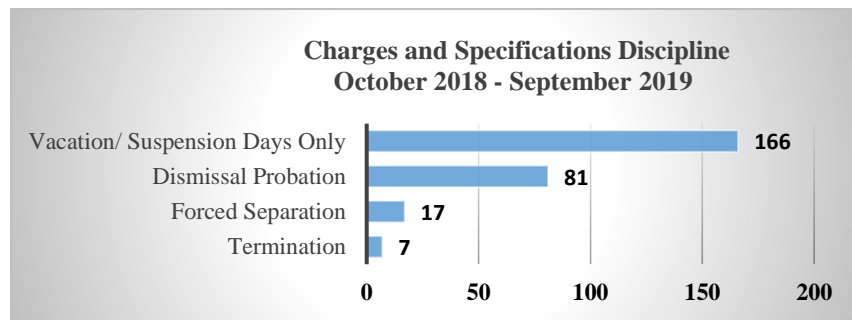
The number of individuals terminated by operation of law remained stable from the two time periods covered by the *Nineteenth Annual Report*. In our prior report, 0.9% of individuals facing discipline were terminated by operation of law, while in this Report there was a slight increase to 1.2%.

b) Penalties

A total of 271 individuals received discipline after the resolution of charges in the first review period, and 349 individuals received discipline in the second review period. The discipline imposed included the forfeiture of penalty days, dismissal probation, forced separation, and termination. The forfeiture of penalty days includes the forfeiture of vacation days or days suspended. Dismissal probation is a one-year period during which the individual is technically dismissed from the Department but that dismissal is held in abeyance.⁷⁵ During that period, the officer continues to be employed by the Department; however, should the officer engage in any further misconduct, the Department has the discretion to terminate the officer without any further hearings. Officers who successfully complete the dismissal probation period

⁷⁵ Only the time the officer is on full-duty is included in the year-long period.

are restored to their former status. Forced separation is an option that is sometimes offered as part of a negotiated disposition; this option may be preferable to termination because it may offer retirement benefits that are not available to an officer who has been terminated. An officer who is terminated is dismissed from the Department. The charts below show the breakdown of penalties during both review periods.⁷⁶



i. Separations via Discipline

Forty-nine members of the service (7.9% of the total members of the service who received discipline for both review periods) were separated from the Department as a result of the disciplinary process, either through a forced separation or through termination. This was a decrease from the 8.9% of officers who were separated from the Department as a result of the disciplinary process during the review period in our *Nineteenth Annual Report*.

When comparing the categories of misconduct that resulted in an officer’s separation in this

⁷⁶ All officers who were placed on dismissal probation also forfeited vacation days and/or suspension days. All officers who retired as the result of a negotiated agreement were also placed on dismissal probation to cover the time between the adjudication and the effective date of retirement.

reporting period with the two-year period covered in our prior report, we found there was an increase in both the number and percentage of individuals separated from the Department for Domestic Cases, from 3.2% (2 out of 62) to 16.3% (8 out of 49). This increase could be due to the Department's adoption of CCPC's recommendations for discipline in cases involving domestic disputes.⁷⁷ We continue to believe that officers who are found guilty of multiple or egregious acts of domestic violence should be forced out of the Department.

Compared to the prior period, a smaller percentage of officers were separated for Narcotics-related misconduct – only 4.1% (2 out of 49) as compared to 13% (8 out of 62) in the reporting period covered by the *Nineteenth Annual Report*. However, almost all of the officers who were not terminated outright for Narcotics-related misconduct in the current review periods resigned, retired, or were terminated by operation of law prior to adjudication of the charges. Therefore, the Department did not have to separate them using the disciplinary process.

In each of its prior reports, the Commission identified officers whom it believed should have been terminated or otherwise separated from the Department, but who were allowed to retain their employment. We have repeatedly focused on officers who have made false statements, have engaged in multiple acts of domestic violence, have had significant disciplinary histories, or have committed further misconduct despite having previously been placed on dismissal probation. Again, this year we have found cases where officers should have been terminated but were not. It is possible that application of the new Disciplinary Matrix will result in more terminations going forward. However, as discussed below, in some misconduct categories for which termination is in our view appropriate, the matrix is not adequate.⁷⁸ We hope the Department will reconsider our comments in those areas, will amend the matrix

⁷⁷ See *infra* at pp. 59-61 for a discussion of our recommendations for discipline in Domestic Incident cases.

⁷⁸ See *infra* at pp. 104-105 and 107-108 for a discussion of those areas where the Commission believed that the matrix penalties were inadequate to address the misconduct.

accordingly in its future revisions, and will terminate more officers whose misconduct demonstrates their unfitness to serve.

ii. Dismissal Probation

Over the period from October 2016 to December 2020, the Department gradually increased the imposition of dismissal probation as a penalty. Between October 2016 and September 2017, only 14% of disciplined officers were placed on dismissal probation.⁷⁹ Between October 2017 to September 2018, 25% of disciplined officers were placed on dismissal probation.⁸⁰ Between October 2018 and September 2019, 81 members of the service were placed on dismissal probation, representing 30% of the 271 officers who were found guilty of at least one charge. Between October 2019 and December 2020, 108 members of the service were placed on dismissal probation, representing 31% of the 349 officers who were found guilty of at least one charge.⁸¹

We have long advocated for the Department to use dismissal probation in more cases and we approve of these increases. In examining each case category, the Commission observed noteworthy increases in the imposition of dismissal probation in the Domestic Incidents, Perjury/False Statements, and Performance of Duties categories. The increased use of dismissal probation in the Domestic Incident cases and Perjury/False Statement cases can be attributed to the Department's adoption of the 2019 recommendations from the Independent Panel, which expressly adopted our past recommendations in these areas. Specifically, we recommended imposing dismissal probation in Domestic Incident cases involving the use of physical force for individuals with no domestic disciplinary history. We also recommended that dismissal probation be made part of the penalty in any case involving a false statement where the subject

⁷⁹ *Nineteenth Annual Report* at p. 63. (Cases adjudicated between October 2016 and September 2017.)

⁸⁰ *Id.* at p. 64. (Cases adjudicated between October 2017 and September 2018.)

⁸¹ The numbers for all review periods do not include those officers who were placed on dismissal probation in addition to a forced retirement.

officer was not separated from the Department.

As discussed throughout the remainder of this Report, we continue to believe that dismissal probation should be used more often, but we are pleased to see the increased use in the Domestic Incident cases and Perjury/False Statement cases.

C. Analysis of Disciplinary Penalties

Overall, the Commission agreed with the penalties imposed in 88% (298 out of 338) of the disciplinary cases adjudicated between October 2018 and September 2019. The chart below shows the agreement rate for each case category.

Case Type	CCPC Agreed %	CCPC Agreed Cases
Computer Misuse	92%	11/12
Criminal Association	100%	12/12
Domestic Incident	92%	22/24
DWI/Unfit for Duty	96%	25/26
FADO prosecuted by DAO ⁸²	75%	6/8
Failure to Report Misconduct/Corruption	100%	6/6
Firearms	100%	13/13
Harassment/Improper Contact	88%	7/8
Insubordination	100%	6/6
Minor Rules Violation	100%	5/5
Miscellaneous	94%	17/18
Narcotics	100%	9/9
Performance of Duties	89%	68/76
Perjury/False Statements	54%	20/37
Property	100%	5/5
Tow/Body Shop	0%	0/1
Unlawful Conduct	98%	46/47
Total	89%	278/313

⁸² In determining its agreement rate, the Commission did not include 24 FADO cases prosecuted by the CCRB's APU. Most FADO cases are prosecuted by APU, and because both the investigation and prosecution of these cases are conducted entirely by an agency outside the Department, the Commission generally defers to the penalty recommendations made by APU, and therefore does not include those cases in calculating our "agreement rate." However, the deference we generally give APU in our reporting is not absolute, and does not necessarily reflect our agreement with APU's recommendations or case outcomes. In this Report, because of the significance of our disagreement with the penalties imposed on two officers whose cases were handled by APU, as well as a third officer who was prosecuted by both DAO and APU, we depart somewhat from our usual deference. Although the chart above reflects only those cases prosecuted by DAO, we include in our comments a discussion of those APU cases.

The Commission disagreed with the penalties imposed on 38 out of 338 officers, generally due to the seriousness of the misconduct or the officer's poor disciplinary and/or performance history.⁸³ The Commission views termination (or separation through other means) as the only appropriate penalty for 21 officers. We believe that dismissal probation should have been imposed upon 12 officers and that the number of penalty days was clearly insufficient for five others.

The following sections discuss the case categories that generated a large number of disagreements, or that raised significant issues that should be addressed in the Disciplinary Matrix. Illustrative examples are included.

1. Computer Misuse

The Commission views computer misuse as significant misconduct, not only because it constitutes a clear abuse of authority, but also because of its potential for dangerous consequences. For example, disclosure of witness names or addresses could easily be life-threatening, as demonstrated in the example below.

The officer, who had four years with the Department, was contacted by a friend who owned a livery service. The friend reported that one of his employees was involved in a vehicle accident, provided the license plate information for the other vehicle, and requested the other driver's name and address, purportedly so his employee could file an accident report. Instead of directing the friend to his local precinct or offering to file a report on the employee's behalf, the officer ran the plate number and provided the requested information to his friend.

Unbeknownst to the officer, the license plate belonged to a confidential informant (CI) who was working with the New York State (NYS) Police on an on-going narcotics investigation. Also unbeknownst to the officer, his friend's employee was a drug dealer who was selling fentanyl to the CI.⁸⁴ After the officer provided the information to his friend, the friend passed it on to his employee, who

⁸³ This includes three officers whose cases were prosecuted by APU and who therefore are not listed in the chart above.

⁸⁴ The NYS Police notified IAB when they discovered that the CI's license plate had been run by an NYPD user. A computer audit revealed the identity of the officer who conducted the unauthorized inquiry.

contacted the CI, informed the CI that he knew his address, and threatened to kill the CI if the CI did not pay a \$25,000 debt. Because the CI's personal information was compromised, the NYS Police had to arrest the employee/dealer prematurely, and terminate its investigation.

The officer was charged with misuse of Department computers and the disclosure of information he had obtained. Despite the significant negative consequences of his actions, he was penalized only 10 vacation days. In support of this penalty, DAO observed that the officer had no disciplinary history, and that he obtained and disclosed the information without any malice or criminal intent. DAO cited prior disciplinary cases in which officers had forfeited 10 vacations days for accessing and disclosing information from Department databases, but none of those cases involved this type of potential or actual harm.

The Commission believes this officer also should have been placed on dismissal probation. Although the officer's intent may have been innocent, he disregarded protocols and safeguards established to protect and restrict access to such information. Moreover, he should have been aware that the license plate number alone would have been sufficient for an accident report to be prepared. Finally, the consequences of his actions, though unintended, compromised the safety of the CI and forced an ongoing criminal investigation to terminate prematurely. Under all the circumstances, this officer deserved significantly more than the usual 10-day penalty.

Presently, the Disciplinary Matrix allows for a schedule C command discipline, punishable by a forfeiture of up to 20 vacation days, to address the misuse of Department databases and the dissemination of confidential information retrieved from those databases. A schedule C command discipline generates only a minimal disciplinary record, as opposed to charges and specifications, which are accompanied either by a memorandum in support of a negotiated settlement or a trial decision that includes a more detailed description of the misconduct, the evidence that proves the misconduct, as well as the Department's and/or Trial Commissioner's reasoning regarding the appropriate penalty for the charged misconduct.

Moreover, the Police Commissioner does not review command disciplines. Given the potential seriousness of this type of misconduct, except in very limited circumstances, we do not believe a command discipline is appropriate where improperly accessed information is disclosed to others.⁸⁵ In our view, the specific facts of each case, including the type of information accessed and/or disclosed, the number of improper inquiries and/or disclosures, the person to whom the information was disclosed, the purpose of any disclosure, and the consequences or potential consequences of any disclosure must all be carefully weighed when considering appropriate discipline.⁸⁶

2. Domestic Incidents

In its 2019 report to then-Commissioner O’Neill, the Independent Panel endorsed the recommendations we had repeatedly made to the Department concerning penalties in cases involving domestic violence.⁸⁷ On April 1, 2019, the Department implemented a new domestic violence policy, which incorporated all our recommendations.

⁸⁵ There is no minimum penalty for a command discipline, and the issuance of one could lead to an officer only being warned and admonished. In response to a draft of this Report, DAO indicated that in most cases, that office sets forth a minimum penalty which the subject’s commanding officer can increase so long as it conforms with the matrix or with case precedent. There are also command disciplines for which DAO prescribes the penalty and any deviation must be approved by DAO and “established by cause.” The Department also indicated that when a schedule C command discipline is issued in lieu of charges and specifications, DAO will not direct or recommend that the subject be warned and admonished but will dictate a penalty range that is in line with the matrix and/or case precedent. DAO may also direct that an officer receive formal instructions or retraining in addition to this penalty.

⁸⁶ In response to a draft of this Report, DAO made the general comment, applicable to this and other recommendations, that while they may consider potential consequences when a subject acts in a manner indicating recklessness or negligence, or when the subject’s conduct can have a larger impact on the Department or the subject’s credibility, “DAO cannot enhance penalties based on future consequences that are difficult to predict, or that require drawing broad conclusions,” as “this would hinder the equitable disposition of cases and the important function of the” matrix, which is “intended to bring balance, transparency and consistency to disciplinary outcomes.” While we agree that the Department should not enhance penalties based on every possible potential consequence, some consequences are inherently obvious from certain misconduct and we continue to advocate that such consequences should be considered when fashioning an appropriate penalty.

⁸⁷ *Sixteenth Annual Report of the Commission (“Sixteenth Annual Report”)* (November 2014) at pp. 52–53 and *Eighteenth Annual Report* at pp. 71-73. The Report of the Independent Panel on the Disciplinary System of the New York City Police Department (January 25, 2019) at p. 55. The Department’s domestic violence policy covers incidents between domestic partners and family members that do not actually involve violence. We, therefore, use the phrases domestic violence and domestic incident here depending on the nature of the conduct involved.

Most significantly, the Department’s 2019 policy includes the imposition of dismissal probation as part of the presumptive penalty in cases involving physical acts of domestic violence, and termination as the presumptive penalty for officers found guilty of engaging in domestic violence when there is clear and convincing evidence of a physical domestic violence history. A presumptive penalty of termination also applies when there is a guilty finding of domestic violence in a criminal proceeding, regardless of whether there is any prior domestic incident history. The presumptive penalties for non-physical domestic incidents range from forfeiture of 30 penalty days to termination.

During this reporting period, five months of which occurred prior to implementation of the Department’s 2019 policy, 26 officers with a total of 35 cases received discipline for this type of misconduct. For purposes of assessing the Department’s compliance with our recommendations, the Independent Panel’s recommendations, and the 2019 policy, we divided the domestic cases into two groups: incidents involving a physical altercation and incidents not involving a physical altercation.⁸⁸ After examining the penalties imposed in these two categories and comparing them to the penalties imposed during past review periods, it appeared that the Department began following the Commission’s and the Independent Panel’s recommendations even before the formal implementation of the new policy.

In our *Nineteenth Annual Report*, we had the highest number of disagreements with the discipline imposed in the domestic incident category, disagreeing with the penalty in 41% (11 of 27) of the cases we reviewed.⁸⁹ In contrast, we disagreed with only 8% (2 of 26) of the penalties

⁸⁸ Incidents involving a physical altercation involve the use of physical force, whether or not a physical injury was sustained. According to the Department, non-physical altercations do not involve the use of physical force against a person, and include but are not limited to stalking, damage or destruction of property, verbal threats, and coercion. See The New York City Police Department Disciplinary System Penalty Guidelines (January 15, 2021) at p. 34, fn. 70.

⁸⁹ See *Nineteenth Annual Report* at pp. 66 and 70. It is worth noting that “cases” as referred to in the referenced section of the *Nineteenth Annual Report* denotes the number of subject officers.

imposed during this review period for this category, and our high agreement rate is largely due to the routine inclusion of dismissal probation in cases involving physical acts of domestic violence.

A significant portion of the Department's domestic violence policy (and the Commission's recommendations for discipline in such cases) is incorporated into the Disciplinary Matrix. Additionally, the matrix specifies individual aggravating factors in domestic incident cases, and provides specific penalty enhancements when those factors are present. While the 2019 policy represents a very important advance that we hope will be followed going forward, we continue to recommend that dismissal probation be the presumptive penalty for a first intentional violation of an order of protection. We also recommend that the Department provide a definition of a physical act of domestic violence.

In spite of our high agreement rate with the discipline imposed in the domestic incident category, our disagreement with two cases – one involving a physical altercation and one involving no physical altercation – is worthy of brief comment.

a) Cases Involving a Physical Altercation

For cases involving a physical altercation and no prior domestic violence history, the Commission typically recommends a penalty of 30 days plus dismissal probation, and cooperation with Department-recommended counseling programs.⁹⁰ Nineteen officers were disciplined for engaging in physical domestic altercations during this reporting period: 11 were disciplined prior to adoption of the Commission's recommendations and eight were disciplined afterwards. The Commission agreed with the penalties imposed in all but one case involving a

⁹⁰ See *Eighteenth Annual Report* at p. 70. The inclusion of cooperation with Department recommended counseling programs is only available in cases that are settled through negotiation. Trial Commissioners lack the authority to recommend cooperation with counseling as part of a penalty.

domestic physical altercation, which was adjudicated before the Department adopted the Commission's recommendations and is summarized below.

A detective with 18 years of employment engaged in two physical altercations with his girlfriend. One altercation involved mutual slapping. The second involved allegations that the detective slapped his girlfriend, pushed her on the bed, and dragged her by her hair, all of which the detective denied. He admitted, however, to grabbing her arm. She sustained a bruise to her arm, scratches, and a cut to her lip, none of which the detective could explain. The detective pled guilty to 1) Conduct Prejudicial for engaging in a physical altercation with the complainant,⁹¹ and 2) failure to notify the Department of this incident as required. He was penalized 25 vacation days.

The Commission believes, consistent with our prior recommendations, that in addition to forfeiting penalty days, the detective should have been placed on dismissal probation. Physical force was used against the complainant on two occasions, she suffered visible injuries, and there were no apparent mitigating circumstances. In addition, given that this detective engaged in more than one incident of violent behavior, there was reason to believe additional incidents might follow, and a period of monitoring was therefore appropriate.

The Commission observed another positive development during the first review period: in one case adjudicated after implementation of the new policy, the Department departed from its past practice of simply charging that the officer "engaged in a physical altercation," and instead described the alleged conduct specifically. We had previously recommended this change, and we hope the Department continues this practice in the future.⁹² Among other reasons to include more specificity: 1) the term "physical altercation" covers a wide range of possible conduct, and a guilty plea to a charge that contains a specific description of the conduct prevents officers from claiming later that despite having pled guilty to engaging in a physical altercation, their actual conduct was far less serious than the conduct described by the complainant; and 2) for purposes

⁹¹ This specification covered both altercations.

⁹² *Eighteenth Annual Report* at pp. 72-73.

of applying prior cases as precedent, a more detailed description of the conduct helps readily distinguish more serious cases from less serious cases.⁹³

b) Cases Not Involving a Physical Altercation

Seven officers were charged with domestic incidents that did not involve a physical altercation: three officers received discipline prior to adoption of the new domestic violence policy and four others received discipline afterwards. In all but one case, the officers forfeited at least 30 penalty days, as called for by the new policy, and in two of those cases, the officers were also placed on dismissal probation. However, in one case adjudicated after adoption of the policy, the Department imposed a less severe penalty than called for by the policy. Given the nature of the case, the Commission believes that even the presumptive penalty was inadequate.

The officer was involved in a serious romantic relationship with the complainant, a Department employee.⁹⁴ In August 2017, the complainant ended the relationship abruptly. For approximately eight months, the officer emailed, called, and tried to make in-person contact with the complainant on multiple occasions, despite her repeated requests that he leave her alone. The complainant blocked the officer's telephone number and ultimately had to change her own telephone number to avoid his attempts to contact her. The officer also admitted to knocking on the complainant's bedroom window in the middle of the night.

During his mitigation hearing, the officer sought to justify his behavior by stating that he had made no explicit threats and that there was no order of protection that prevented him from contacting the complainant. He also testified that since his official Department interview he had attended counseling and had not had any additional contact with the complainant.

⁹³ In response to a draft of this Report, DAO indicated that it had concerns with this recommendation as it is only required to provide enough detail to provide the subject officer with notice of the misconduct that is being charged. If those charges and specifications are factually vague, the Department can provide more specificity through a Bill of Particulars. The Department's concern was that providing more specific details in a charge could potentially result in a not guilty finding after a trial if the Department was unable to prove one element of the charge by a preponderance of the evidence. We note, however, that the matrix itself requires that "[s]ettlement agreements for cases involving a physical act of domestic violence shall include the specific acts for which the member of the service is admitting responsibility and accepting discipline." New York City Police Department Disciplinary System Penalty Guidelines (January 15, 2021) at p. 34. The Commission continues to advocate for specificity in the charges regarding physical acts of domestic violence so that subject officers are prevented from later claiming that while they "engaged in a physical altercation," they only did so in self-defense.

⁹⁴ The Trial Commissioner's decision did not indicate in what capacity the complainant was employed by the Department or whether she was a uniformed or civilian member of the service.

Noting that for a period of eight months the officer had engaged in “stalker-like” behavior, DAO recommended that he forfeit 20 vacation days, and the Police Commissioner imposed that penalty.

Although the allegations did not involve a physical altercation, or even a verbal threat, we believe a period of dismissal probation should have been imposed. Even under the Department’s policy, which appears in the matrix, the 20-day penalty imposed here was insufficient because, at a minimum, the presumptive penalty of 30 days for a non-physical act of domestic violence should have been enhanced by an additional 20 days for stalking.⁹⁵ Given the officer’s extended period of misconduct, dismissal probation was an appropriate safeguard to add because if he contacted the complainant again while on dismissal probation, or if he displayed any other concerning behavior, the Department could have terminated him summarily.

3. FADO

The Commission characterized 34 cases as Force, Abuse of Authority, Discourtesy, and Offensive Language (FADO) cases.⁹⁶ Of that group, 25 cases were prosecuted by APU and 9 cases were prosecuted by DAO. Although we review cases brought by APU, we generally do not discuss any disagreements in our annual reports because CCRB investigators and APU prosecutors are independent from the Department, and therefore, lack the motivation to shield their own employees from discipline. We depart briefly from this precedent to discuss one APU Discourtesy case below.

a) Force

The Commission reviewed 17 cases in which the most serious misconduct involved the unnecessary/excessive use of force or the unjustified threat of force. This misconduct included

⁹⁵ The New York City Police Department Disciplinary System Penalty Guidelines (January 15, 2021) at p. 36.

⁹⁶ The number of adjudicated FADO cases for this reporting cycle decreased significantly in comparison to previous cycles. Based on discussions with CCRB Executives, this appears to be an anomaly.

wrongfully using a chokehold; wrongfully punching, pushing, kicking or pulling a civilian; wrongfully using a Taser; and firing a service weapon at a moving car.

APU prosecuted 11 of the force cases, and DAO prosecuted the remaining six cases. The Commission disagreed with the penalties in three DAO cases. We provide one example below.

Two separate penalties were imposed on an officer who had two cases pending at the same time, one of which was a force case. The initial case was prosecuted by DAO and the second case was prosecuted by APU. Although the incidents took place close in time, because two different entities prosecuted the cases, separate penalties were imposed. The officer had a striking disciplinary history: he received his first discipline in 2014, having only been employed by the Department for one year, and he was disciplined three additional times prior to the two incidents discussed below, which occurred in late 2016.⁹⁷

The first incident, investigated by CCRB, occurred in September 2016, when the officer stopped the complainant, a 14-year-old boy who had dropped a candy wrapper on the ground. The officer claimed that the complainant began cursing when the officer told him to pick up the wrapper. The complainant alleged that the officer took candy from the complainant's bag, ate the candy, and then frisked the complainant while pushing him against a fence. The complainant reported that he yelled in the direction of his mother's nearby apartment window, whereupon the mother and other family members went to the location and spoke with the officer. According to the family members, the officer used the words "shit" and "bitch" when speaking with them, threatened to arrest the complainant's mother, and told the mother to mind her "own fucking business" and "try to keep dicks out of it." The officer, who was prosecuted by DAO, pled guilty to a total of 10 counts, including using unnecessary physical force by pushing the complainant against the fence; using offensive language; abuse of authority for improperly frisking the complainant; abuse of authority for threatening to arrest the complainant's mother; and four counts of discourtesy for his statements to the complainant's family members. For this case, the officer forfeited 15 vacation days.

Two months after the first incident, in November 2016, the officer was driving a marked police van *to a CCRB interview regarding the first case*. When driving around a car driven by the female complainant, the officer came close to making contact with her car. According to the complainant, after the near-collision, the officer looked at her, mouthed "What the fuck are you looking at?" and drove on. Then, after a few blocks, he made a U-turn and began driving back towards the complainant. The complainant, who was stopped at a traffic light, observed the officer drive past and stick his tongue out at her. In the second case, which was

⁹⁷ Two of the subject officer's previous disciplinary proceedings involved charges that were similar to his most recent cases. In those cases, he was charged with (1) Abuse of Authority for the Frisk and Search of a Person and (2) Unprofessional Demeanor. For both of these cases, he received command disciplines.

prosecuted by APU, the officer pled guilty to two counts of discourtesy to a civilian. For that case, the officer forfeited an additional five vacation days.

While the force used by this officer in the first case did not reach the level we observed in many other disciplinary cases, given the totality of the circumstances, the Commission views the penalties imposed on this officer as too lenient. The officer flagrantly abused his authority, was discourteous to multiple civilians, and made numerous offensive remarks. In neither instance was his behavior a reaction to any genuine provocation; to the contrary, he appeared in both cases to be seeking a wholly unnecessary confrontation. Even putting aside his prior disciplinary history, which was substantial, the fact that the second incident took place only two months after the first, and while the officer was literally on his way to an interview for the first case, should have called into serious question his fundamental fitness for police work. This officer should have been placed on dismissal probation so his behavior during future interactions with civilians could be closely monitored, and so he could be terminated summarily if he engaged in any further misconduct.

b) Abuse of Authority

The Commission reviewed 17 cases in which the most serious conduct involved abuse of authority. Abuse of authority encompasses a wide range of misconduct.⁹⁸ The majority of these cases were prosecuted by APU and resolved with the forfeiture of 10 vacation days or less.

Of the three cases prosecuted by DAO, the Commission disagreed with the penalty in one case, described below.

In October 2017, the subject sergeant, who had been with the Department for approximately 20 years, was on routine patrol with his partner (a police officer) in an unmarked patrol van. As the partner made a U-turn, he almost struck a pedestrian, the complainant, in the crosswalk. The complainant hit the van with his hand to alert the operator that he was in the crosswalk. When the sergeant and his partner stopped and approached the complainant, the complainant attempted to

⁹⁸ CCRB recently approved the expansion of abuse of authority to include cases of sexual misconduct and false statements made to CCRB investigators, in Department or other official documents, and during official proceedings.

flee, and was apprehended a short time later. While apprehending the complainant, the sergeant and his partner struck the complainant in the head multiple times, and when the complainant attempted to record the incident, the sergeant took his phone. Neither the sergeant nor his partner had handcuffs available, so they did not arrest the complainant. When questioned about the incident, the sergeant admitted to failing to notify his supervisor of the incident for approximately five hours, and failing to instruct his partner to include the incident in required reports.

The sergeant pled guilty to (1) failing to immediately notify his supervisor after being involved in a situation where force was used; (2) failing to prepare a stop report; (3) failing to prepare a Threat, Resistance, or Injury Incident Worksheet; (4) improperly preventing the complainant from video-recording an incident; (5) being discourteous to the complainant; (6) failing to make proper entries in his activity log; and (7) failing to have handcuffs available while interacting with the complainant.⁹⁹ He forfeited 10 vacation days.

The Commission considers this penalty insufficient, both on its face and when considered in light of the sergeant's prior disciplinary record. The sergeant's role as a supervisor, his interference with the complainant's attempt to record the incident, and the (uncharged) unnecessary force he used all required more than a 10-day penalty.¹⁰⁰ In addition, this sergeant also had two prior disciplinary cases, one in 2012 and another in 2015. In 2012, he forfeited five vacation days for failing to remain alert and failing to place himself in the Interrupted Patrol Log as required. In 2015, he forfeited 10 vacation days for (1) failing to obtain medical treatment for a prisoner; (2) using discourteous language; and (3) threatening the use of force. The Department should reasonably expect that the discipline it imposes, if sufficiently meaningful, will deter future misconduct. This officer plainly was not deterred by either the five-day penalty imposed in 2012 or the 10-day penalty imposed in 2015. He therefore should have received a more serious penalty than he received in his second case only two years prior to the incident in this case.

⁹⁹ The DAO paperwork did not indicate why the use of force was not charged.

¹⁰⁰ Under the matrix, the interference with the attempt to video the incident alone would garner a presumptive penalty of 20 vacation days. With mitigating factors that penalty could be reduced down to 10 days, however, there were no apparent mitigating factors present here but there were potential aggravating factors.

c) Future Discipline in FADO Cases

The Disciplinary Matrix substantially increased the penalties for force cases, with many resulting in termination. Aggravating factors identified in the matrix now specifically include the nature and extent of any injuries to the victim or damage to property, the victim's level of vulnerability (*i.e.*, the victim is a young child or an older adult), and a reckless disregard for a person's wellbeing. The Commission views these increased penalties favorably.

However, as discussed below, the Commission believes, and has conveyed to the Department, that the current matrix penalties for abuse of authority cases are insufficient to deter or punish the violation of constitutional or civil rights, including improper searches and seizures.¹⁰¹ (*See* Commission Letter dated August 31, 2020, App. B at pp. 12-13). In our view, these penalties, which are similar to the penalties that have historically been imposed in abuse of authority cases, will neither repair trust between the police and the community nor deter officers from continuing to violate civilians' constitutional rights. The matrix should provide for higher penalties, especially in those cases involving either intentional or reckless disregard for constitutional and civil rights.

We note, finally, our awareness that the Police Commissioner has, in the past, come under criticism for reducing penalties that were recommended by CCRB. If consistently and properly applied, the Disciplinary Matrix – which requires the Commissioner to explain in writing the reasons for any departure from the prescribed presumptive penalties – should prevent that from occurring, or more clearly reveal the frequency and circumstances in which it does occur.

¹⁰¹ *Infra* at pp. 103-104.

4. Failure to Report Misconduct or Corruption

Reports of suspected misconduct made by members of the service are an important means by which the Department learns of wrongdoing. Members of the service can observe their colleagues in situations that the general public cannot, and therefore they may be the only source of information about some forms of corruption and misconduct. Members of the service have a duty to report any information they have about the misconduct of their colleagues and supervisors, as well as allegations about their own misconduct, to IAB.¹⁰² For purposes of our review, we include within this category the failure of members of the service to notify the Department of their own involvement in off-duty incidents where police respond, even if they are merely witnesses or victims.¹⁰³ Often, these situations include officers' involvement in domestic altercations, but can include other off-duty incidents to which members of law enforcement respond. Without these notifications, the Department may never become aware of off-duty incidents, especially if they take place outside the confines of New York City.

The Commission agreed with all of the penalties imposed in cases for which failure to report was the most serious specification. However, the Disciplinary Matrix now in effect does not have any specific presumptive penalty for failing to report to IAB the alleged misconduct or corruption of other members of the service.¹⁰⁴ Given the importance of notifying IAB of

¹⁰² Patrol Guide §207-21 “Allegations of Corruption and Other Misconduct Against Members of the Service.”

¹⁰³ Patrol Guide §212-32 “Off Duty Incidents Involving Uniformed Members of the Service” requires off-duty uniformed members of the service who are present at an unusual police occurrence either as a participant or witness to remain at the scene of the incident when their personal safety is not in jeopardy and request the response of the patrol supervisor from the precinct where the incident occurred. An unusual police occurrence is not defined except to note that it can include family disputes and other incidents of domestic violence.

¹⁰⁴ The matrix addresses different failures to report as aggravating factors to be considered in the presence of other misconduct. For example, failing to report is treated as a factor enhancing the presumptive penalties set forth in domestic cases. Specifically, failure to identify oneself as a member of the service to responding law enforcement personnel merits the forfeiture of an additional 10 days for domestic misconduct. This is also the penalty enhancement for failure to notify the Department of having been served with an order of protection. Failure to notify the Department of one's involvement in a domestic incident adds five penalty days to the presumptive penalty. These penalty enhancements also serve as presumptive penalties in the off-duty misconduct category, i.e. failure to self-report involvement in an off-duty incident merits the forfeiture of five penalty days while failure to identify oneself as a member of the service to responding law enforcement officers is penalized

suspected wrongdoing to pierce the “blue wall of silence,” the Commission recommends that an additional stand-alone category for the failure to report allegations of wrongdoing to IAB be included in the matrix. We further recommend that a presumptive penalty of 15 to 20 vacation days attach to this type of misconduct, even where no other misconduct has been committed. Factors that would affect the penalty could include the nature of the misconduct that went unreported, the extent of the knowledge of the officer who failed to report it, and whether the officer who failed to report wrongdoing had reason to believe that someone else had already made a report to IAB. Including such a provision would give notice that failure to make these reports will subject members of the service to a significant penalty, and will thus incentivize them to carry out their duty.

5. Harassment/Improper Contact

This category is made up of two types of cases: those involving officers who harass or attempt to engage in inappropriate personal relationships with other members of the service, and those involving officers who discriminate, harass, or attempt to engage in improper personal relationships with civilians, including suspects, arrestees, victims/complainants, and witnesses. During this reporting period, the Commission reviewed four cases in the first category and four cases in the second category. We agreed with all of the penalties imposed for inappropriate behavior toward other members of the service, and with three penalties for inappropriate behavior toward civilians.

As we said in our *Nineteenth Annual Report*, inappropriate or harassing behavior by members of the service towards civilians can cause significant harm. Among other things, such

with the forfeiture of 10 days. Failure to report equal employment opportunity (EEO) allegations also carries a 10-day presumptive penalty. Failure to notify the Department of one’s involvement in an unusual police occurrence can be addressed with a schedule C command discipline which could result in the forfeiture of up to 20 vacation days.

behavior when aimed at complainants, witnesses, or suspects can seriously compromise criminal prosecutions.¹⁰⁵ Such behavior can also seem coercive to the civilians targeted, as they may fear retaliation if they reject officers' advances.

During this review period, in all four cases involving inappropriate behavior toward civilians, the officers attempted to initiate romantic relationships with civilians whom they met while performing their official duties. In each case, the penalty included a period of dismissal probation plus the loss of penalty days. However, in the following case, involving a detective who had been with the Department for 19 years, we believe termination was appropriate.

An anonymous tipster called the Crime Stoppers hotline in March of 2019 to report her child's father as a possible perpetrator of a home invasion. Although tipsters who call the hotline can make anonymous reports, the detective called the telephone number used by the tipster, told her she "sounded sexy over the phone, and asked her what she was wearing, and whether she slept naked." He also sent the tipster inappropriate text messages and a picture of himself wearing a suit.¹⁰⁶

During his official Department interview, the detective admitted contacting the tipster. When asked whether he had contacted any other hotline callers in this manner, he admitted having contacted two other female tipsters during the prior six months and having engaged in sexual banter with them.¹⁰⁷ He also admitted having met with one of the tipsters.

The detective pled guilty to Conduct Prejudicial for having improperly contacted or improperly attempted to have a relationship with three people who had called the hotline. He forfeited 45 vacation days and was placed on dismissal probation. The detective had a disciplinary history for similar misconduct. He had received a schedule B command discipline and forfeited 2 vacation days in 2013 for calling and texting a domestic violence victim in an attempt to have a relationship with her.

While dismissal probation and the forfeiture of 45 vacation days is undoubtedly a significant penalty, we believe that termination would be more appropriate given the detective's disciplinary history and the particular facts of this case. This detective had engaged in very similar misconduct six years earlier and had received a penalty that, in our view, was

¹⁰⁵ *Nineteenth Annual Report* at pp. 88-89.

¹⁰⁶ The paperwork contained no details concerning the content of these text messages.

¹⁰⁷ The investigation did not uncover the identities of these two women.

inappropriately lenient. That penalty apparently did nothing to deter him, as evidenced by his continued misconduct on multiple occasions. His misconduct was particularly serious because he breached the Department’s obligation to maintain the anonymity of tipsters’ identities. If the Department does not vigorously protect that anonymity, potential tipsters might fear that their identities will be publicly revealed, or revealed directly to the individuals whom they report, resulting in threats or physical harm. The effectiveness of Crime Stoppers could be undermined, significantly impacting the Department’s ability to solve crimes.

6. Performance of Duties

The Performance of Duties category includes cases in which the main misconduct is the officer’s failure to fulfill his or her duties adequately. This category consists primarily of the failure to investigate a criminal complaint adequately or take other appropriate police action (“failure to investigate”),¹⁰⁸ failure to provide back-up or support to a colleague, failure to provide supervision to subordinates,¹⁰⁹ and failure properly to classify complaints (typically, down-grading crimes). Among these types of misconduct, failure to investigate is the most common.

Seventy-six officers with 79 cases were disciplined for performance of duties misconduct during the reporting period.¹¹⁰ Half of those officers were charged with failure to investigate, failure to supervise, or both.¹¹¹ The Commission disagreed with the penalties imposed in eight cases, most of which involved failures to investigate.

¹⁰⁸ Failure to investigate cases, in turn, include failure to prepare reports, absence from an assigned post, engaging in personal business while on duty, failure to appear in court, failure to safeguard a prisoner or crime scene, and other failures to adequately perform the responsibilities of a member of the service. *Nineteenth Annual Report* at p. 95.

¹⁰⁹ This misconduct typically results in a subordinate engaging in preventable misconduct.

¹¹⁰ Two subject officers had multiple cases, all of which the Commission classified as Performance of Duties misconduct.

¹¹¹ Four cases fell under both subcategories.

a) Failure to Investigate

Most officers charged with failure to investigate forfeit penalty days, and we typically find that penalty adequate. However, we have advocated in the past that a period of dismissal probation be imposed, in addition to the forfeiture of penalty days, in circumstances where either: (1) the officer's duty failure resulted in significant negative consequences (or had the potential to do so), or (2) the officer failed adequately to perform job duties on multiple occasions. In addition, as discussed below, most recently we have urged the Department to consider terminating officers whose duty failures are truly egregious.¹¹²

One case in which we found the misconduct sufficiently serious to warrant dismissal probation involved a failure to investigate among numerous duty failures.

The subject was a 14-year veteran with a minor disciplinary history. This officer had previously been disciplined for failing to prepare a complaint report for lost property, for which he received a schedule B command discipline and forfeited four hours.

In December 2018, the subject officer, accompanied by a trainee probationary officer, responded to the complainant's home. She had found a firearm in her husband's drawer, one day after he had been arrested for assaulting her. After inspecting the firearm and finding that the serial number had been removed, the officer "made it safe" by turning on the safety lock. Rather than taking possession of the firearm and vouchering it, the officer instructed the complainant to turn it in at her local police precinct. He failed to search other areas of the home before he left, despite the complainant having provided consent for such a search. He also failed to notify a supervisor of the incident as required and failed to prepare any complaint report. He left the location and disposed of the job as "unnecessary." The complainant followed the officer's instructions, using public transportation to bring the firearm to her local precinct. When she returned home, she found her husband removing bullets for the firearm and other items from the home. After her husband left, she found a fake Department shield and zip ties.

During his official Department interview, the officer admitted the misconduct but stated that he did not conduct a search of the home because he was unsure if he could legally do so. He explained that he decided to "make the gun safe" rather than inconvenience the Emergency Services Unit.

¹¹² See *infra* at p. 100. See also the Commission's report, "*Matrix Penalties for Failure to Take Police Action*" (October 2021).

The officer pled guilty to seven charges including failing to take possession of the firearm, failing to notify a supervisor regarding the discovery of the firearm, failing to properly investigate the circumstances of a found firearm, and failing to adequately search premises that he had been given permission to search. He forfeited one vacation day and the 29 days he had served on pre-trial suspension.

The Commission found this penalty inadequate and believed this officer should have been placed on dismissal probation as well. He failed to offer any meaningful assistance to the complainant, whom he knew to be a domestic violence victim. Leaving an apparently operable firearm in the complainant's home, within reach of her abuser, and failing to conduct any further search of the home despite having been given express consent to do so, manifested a total disregard for her safety. Because the officer failed to conduct that search, he failed to discover the zip ties and fake Department identification, which tend to suggest the husband was engaged in police impersonation. There also could have been other firearms in the home. Furthermore, the officer was assigned to serve as a mentor to the probationary officer who responded with him to the scene. He not only failed in that role, but his poor judgment exposed the probationary officer to discipline, including possible summary termination. The officer's explanation for failing to search the home seems disingenuous because an officer with 14 years of service should reasonably be expected to know about consent searches. In any event, if, as he claimed, he was unsure whether he could legally search the home, he should have contacted a supervisor to inquire about the correct procedure. That he made no such contact and made no complaint report suggest that his failure to act was due to laziness. A period of dismissal probation would have helped to ensure his willingness to perform basic job responsibilities in the future, and enabled the Department to terminate him quickly if he failed to do so.

The Disciplinary Matrix does not specifically address failures to investigate; therefore, there is no presumptive penalty for this specific sub-category of misconduct. The most analogous type of misconduct addressed by the matrix is the more general "failure to take police action,"

which, until recently, carried a presumptive penalty of 20 days with the possibility of a 30-day maximum if aggravating factors were present. In response to a report we submitted to the Mayor's Office and the Department in August 2021, in which we provided examples of egregious duty failures and advocated increasing the maximum penalty to termination, the Department recently announced its intent to amend the matrix to allow for dismissal probation or termination when aggravating factors are present.¹¹³

b) Failure to Supervise

Although we did not disagree with any of the penalties imposed for failure to supervise during this review period, we take this opportunity to comment on the section of the matrix that currently covers that misconduct. The matrix recognizes that supervisors should be held to a higher standard than subordinates; that when a supervisor's failure to supervise results in a subordinate's inability or failure to perform adequately, the supervisor's failure should be penalized more heavily; and that a supervisor who engages in the same misconduct as a subordinate should receive an enhanced penalty.¹¹⁴ Accordingly, the matrix provides a presumptive penalty of 20 days if charges are brought¹¹⁵ and up to 20 days if the matter is addressed with a schedule C command discipline.¹¹⁶

While we agree with the presumptive penalty of 20 days, we do not believe it appropriate to address supervisory failures with a command discipline, as supervision is so instrumental to the proper functioning of the Department. Supervisors have the responsibility to lead by example. When supervisors set a poor example by not performing their own duties, or commit

¹¹³ The Commission's Report on *Matrix Penalties for Failure to Take Police Action* was published in October 2021.

¹¹⁴ The New York City Police Department Disciplinary System Penalty Guidelines (January 15, 2021) at p. 10. *See also Nineteenth Annual Report* at p. 122.

¹¹⁵ The presumptive penalty can be decreased to 15 days if mitigating factors exist or increased up to 30 days if there are aggravating factors.

¹¹⁶ The New York City Police Department Disciplinary System and Penalty Guidelines (January 2021) at pp. 44, 50-53.

the same misconduct as their subordinates, the cyclical effect of such behavior creates a Department that implicitly promotes misconduct and rejects accountability. To impart the seriousness of this misconduct, and to create the full factual record necessary to assess whether a supervisor is appropriate for any further advancement, failure to supervise cases should be addressed with charges and specifications.¹¹⁷

7. Perjury/False Statements

Perjury and false statements are among the most serious types of official misconduct. Such statements jeopardize the integrity of the criminal justice system, undermine the public's trust in police officers, and negatively impact the efficiency and possibly the outcome of internal investigations.

False statements have long been a focal point of the Commission, and historically, the Commission has disagreed with the charging decisions and penalties imposed in numerous cases in this category. For that reason, when assessing the Department's handling of false statements, we carefully examine not only those cases that fall within the Perjury/False Statements case category (*i.e.*, cases in which a false statement was the most serious misconduct), but also those cases that fall within other case categories but also involve a false statement. In this review period, we disagreed with the penalties imposed in 17 of the 37 cases in the Perjury/False Statement category as well as two cases that fell outside of the Perjury/False Statement category but involved false statements.

¹¹⁷ In response to a draft of this Report, DAO stated that a schedule C command discipline achieves the goal of creating a full and fair record in the same way that charges and specifications do because they “are reviewed and considered during the promotion evaluation process.” However, the Commission notes that a schedule C command discipline does not include a full description of the Department's evidence and reasoning for the discipline. Charges and specifications, when finally adjudicated, include memorandums with summaries of witness, complainant, and officers' statements, as well as other evidence in support of negotiated settlements. Cases that go to trial result in a trial decision in which the trial commissioner describes the evidence that was presented. When the Police Commissioner modifies a penalty, there is a memorandum from the Police Commissioner or First Deputy Commissioner that contains the reasoning for the modification. None of this information accompanies a schedule C command discipline.

Department policy has long called for termination in cases of intentional and material false statements unless “exceptional circumstances” existed.¹¹⁸ In practice, however, termination has rarely been imposed.¹¹⁹ Diligent application of the false statement policy, which until recently was set forth in §203-08 of the Patrol Guide, is critically important to the Department’s anti-corruption efforts.¹²⁰

We recognize that where issues of proof exist, the Department may reasonably decide not to seek termination. We also recognize that there is a wide spectrum of false statements made by members of the service, some of which are arguably not material, and some of which, given all the circumstances, are simply too minor to justify termination.¹²¹ However, based on our own observations, as well as conversations with the previous Department Advocate, in the past the Department has imposed reduced penalties, even for readily provable and clearly material false statements—specifically including false statements made to IAB and CCRB investigators—in circumstances where those statements were made to cover up misconduct the Department viewed as relatively minor. Thus, we not uncommonly see cases where “the cover-up is worse than the crime,” and yet the cover-up, which sometimes involves multiple officers, is not treated with appropriate seriousness. We disagree with that approach and urge the Department to seek termination of officers who intentionally lie, regardless of the seriousness of any underlying misconduct. As a matter of simple logic, officers willing to lie to protect themselves or others

¹¹⁸ As discussed *infra* at p. 89, in 2020, at our urging, the Department changed its standard from “exceptional circumstances” to “extraordinary circumstances.” Because the cases we reviewed for this Report preceded that change, we applied the “exceptional circumstances” test.

¹¹⁹ While the Department’s policy mandated termination for intentional and material false statements absent a finding of exceptional circumstances, we generally do not take issue with disciplinary outcomes that entail separation from the Department by other means, such as retirement.

¹²⁰ This provision is now found at Administrative Guide §304-10.

¹²¹ At the “minor” end of the spectrum we might include, for example, an intentional false memo book entry concerning the exact time an officer returned to duty following a meal break, assuming the memo book entry was not falsified to cover up misconduct by that officer or others. If, on the other hand, such an entry was made for the purpose of bolstering a false claim that the officer was not present and therefore did not witness other officers’ misconduct, we would not consider that false entry “minor.”

against discipline for minor misconduct will almost certainly lie when serious misconduct is afoot, and when the consequences of telling the truth are thus far more significant. In our view, the Department’s past practice of not seeking termination has not only minimized the seriousness of intentional lies but has, as a practical matter, incentivized officers to lie in hopes that even if their dishonesty is provable, they will still keep their jobs. This, in turn, results in an unacceptable number of cases in which officers lie when questioned.

In April 2020, based upon the recommendations of the Independent Panel, the Department released an updated false statement policy which expanded the prior policy. Among other things, the new policy explicitly addressed not only making a misleading official statement, but also making an inaccurate official statement and impeding an investigation.¹²² As discussed at the end of this Report, we have many issues with how the new policy – as well as the corresponding matrix provision – are currently drafted.¹²³ We have conveyed our concerns to the Department and we are hopeful that additional changes and clarifications will be made, but also hope that the new policy will result in more consistency with respect to charging and penalty decisions than its predecessor. However, our review of cases for this Report covered charging decisions and penalties imposed prior to adoption of the new policy.

a) Charging Decisions

As in past review periods, the Commission continued to find during this review that instead of charging officers with making false official statements pursuant to the false statement policy found at Patrol Guide §203-08, the Department frequently charged officers under Patrol Guide §203-10(5), which prohibits “conduct prejudicial to the good order, efficiency, and

¹²² The Commission met frequently with members of the Department responsible for drafting this new policy to offer suggestions and comments. While some of the Commission’s recommendations were accepted, specifically the retention of the presumption of termination, many were not. The Commission continues to engage in dialogue with the Department regarding amending the new policy and the Disciplinary Matrix.

¹²³ See *infra* at pp. 89-91 and 104-107.

discipline to the Department” (“Conduct Prejudicial”). The Conduct Prejudicial section, a general “catch-all” provision, was designed to cover misconduct not explicitly addressed in other rules and procedures. However, in the false statement context, it has frequently been used despite the availability of a more specific prohibition, presumably because it does not carry a termination presumption.¹²⁴ In cases where an officer might have made a false statement in error, or through negligence, a Conduct Prejudicial charge in lieu of a false statement charge may be entirely appropriate. However, when misconduct involves an intentional false statement, and is charged under this alternative provision—especially when the statement was made during an official interview—we view this as a deliberate circumvention of the termination policy and we continue to object.¹²⁵ When an officer intentionally makes a material false statement, it should be charged as such to maintain consistency in both the charging and penalty phases, to trigger the presumption of termination, and to properly disincentivize lying. While routine application of the termination presumption would likely result in more terminations in the short term, it would result in more truth-telling over time, particularly if the Department made its officers aware of the change in approach, and more truth-telling should be the Department’s primary goal.

The following table depicts the charges in the Perjury/False Statement cases resolved during the reporting period, and sets forth the number of cases charged under Patrol Guide §203-

¹²⁴ Violation of this provision of the Patrol Guide does not carry any presumptive penalty.

¹²⁵ The Commission has repeatedly raised this issue directly with representatives of the Department and in its annual reports. See *Ninth Annual Report of the Commission* (February 2006) at p. 35; *Tenth Annual Report of the Commission* (February 2008) at p. 33; *Eleventh Annual Report of the Commission* (February 2009) at p. 39; *Twelfth Annual Report of the Commission* (February 2010) at pp. 53-55; *Thirteenth Annual Report of the Commission* (March 2011) at p. 19; *Fourteenth Annual Report of the Commission* (February 2012) at pp. 39-45; *Fifteenth Annual Report of the Commission* (September 2013) at pp. 73-74; *Sixteenth Annual Report* at pp. 86-87; *Seventeenth Annual Report of the Commission* (“*Seventeenth Annual Report*”) (November 2015) at pp. 103-104; *Eighteenth Annual Report* (August 2017) at pp. 114; and *Nineteenth Annual Report* (December 2019) at p. 102.

08, §203-10(5), or under an alternate section. This table includes all cases that contained a false statement allegation, regardless of whether that was the most serious charge.¹²⁶

Number of Cases with Misconduct Involving False Statements	Number of Cases with Misconduct Involving False Statements Charged as P.G. §203-08	Number of Cases with Misconduct Involving False Statements Charged as P.G. §203-10(5)	Number of Cases with Misconduct Involving False Statements Charged under Alternate Section ¹²⁷
85	8	58	19

During this review period, there were multiple cases where we believed that false statement charges, as opposed to Conduct Prejudicial charges, were more appropriate. Some of those cases are discussed below.¹²⁸

b) Penalties

The Commission disagrees with the penalties imposed in 19 out of the 85 cases referenced in the above chart. Of those 19, we believe 17 should have been resolved with the officer’s separation from the Department.¹²⁹

The following chart, which addresses only the eight cases in which the officer was charged with violating Patrol Guide §203-08, categorizes the type of false statement made by the officer (with false sworn testimony considered the most serious) and indicates whether the case was resolved with the officer’s separation from the Department. In cases where the officer was found guilty of making a false official statement, separation from the Department should have been the penalty, absent a finding of “exceptional circumstances” by the Police Commissioner. The Commission also notes that during this reporting period, none of the false statement charges

¹²⁶ Based on the most serious misconduct, several of the cases included in this section were counted in other case categories, such as Performance of Duties, Unlawful Conduct, FADO, Tow/Body Shop, and Miscellaneous sections.

¹²⁷ Cases in this category either contained no charge to address the false statement or were charged pursuant to another section of the Patrol Guide that does not carry any presumption of termination, such as §203-05, which contains various administrative requirements such as making accurate and concise entries in Department records.

¹²⁸ See *infra* at pp. 84-88.

¹²⁹ One of the penalties resolved two disciplinary cases for the same officer. Due to the nature of the officer’s misconduct and the totality of the circumstances in both cases, the Commission disagreed with the outcome and counted it as one penalty for the purpose of this Report.

brought pursuant to Patrol Guide §203-08 were resolved with a finding of not guilty, or a dismissal after a motion by DAO.

Charged Under P.G. §203-08, by Type of False Statement (8 cases total involving 7 officers)	Separation from the Department	Penalty Did Not Include Separation
Sworn Testimony	1	-
Sworn Documents	1¹³⁰	-
Official Department Interviews	2	3
CCRB Interviews	-	-
Total	4	3

The next chart contains a breakdown of the penalties imposed in cases where an alternative charge was used to address what amounted to a false official statement. As demonstrated below, when an alternative charge was used, the presumption of termination was avoided, and cases were more often resolved by placing an officer on dismissal probation and/or penalizing the officer with a loss of vacation days or suspension days.

Charged Under Alternative P.G. Sections, by Type of False Statement	Separation from the Department	Penalty Did Not Include Separation	Found Not Guilty of Charge, or Case/Charge Dismissed
Sworn Testimony	2	-	-
Sworn Documents	-	-	1
Official Department Interviews and CCRB Interviews	9¹³¹	15¹³²	1
Department Records	3	18	-
Other	10¹³³	6	1
Total	24	39	3

As evidenced here, only 24 out of the 63 (38%) officers charged under an alternative section of the Patrol Guide were separated from the Department after a guilty finding. Although there were many cases that resulted in separation even when an alternative charge was used (24

¹³⁰ This officer had two cases that were both covered with his separation from the Department.

¹³¹ Four officers had multiple cases covered by the same penalty. There were 15 cases in total.

¹³² One officer had two cases covered by one penalty. There were 16 cases in total.

¹³³ Two officers had multiple cases covered by one penalty. There were 12 cases in total.

officers with a total of 32 cases), we note that in the justification for the penalty, the Department often makes no mention of the false statement. In those cases, there was no indication that the Department felt the false statement warranted separation. Five officers were separated from the Department prior to the adjudication of their charges, and three officers had engaged in other forms of egregious misconduct that would have most likely resulted in their separation from the Department even without their false statements.

i. False Statements Made in Sworn Testimony and Sworn Documents¹³⁴

The Commission reviewed five cases involving three officers who gave false testimony under oath and two cases involving one officer who made false statements in sworn documents. The Commission agreed with the penalties in these cases as all resulted in separation from the Department.

ii. False Statements Made in Official Department Interviews and Official CCRB Interviews

The majority of false statement charges we reviewed involved false statements made during an official interview conducted by members of the Department or by civilian investigators at CCRB. Patrol Guide §206-13 mandated that members of the service give formal interviews to internal Department investigators, and a refusal to answer questions can result in discipline, including termination. Patrol Guide §211-14 required that members of the service fully cooperate with CCRB and submit to formal interviews conducted by its investigators. The false statement policy as it appeared in Patrol Guide §203-08 explicitly included false statements made during

¹³⁴ The Commission used the most serious charge for which the officer pled or was found guilty when determining the applicable subcategory. The Commission ranked the categories in terms of seriousness as false sworn testimony, false statement in a sworn document, false statement in an official Department or CCRB interview, and then considered other types of official false statements based on their individual circumstances. Although we have broken the false statement cases into subcategories as demonstrated in the above charts, there is often overlap in cases as there may be multiple specifications addressing false statements in different contexts. For example, a case that involves a false statement given during sworn testimony might also include a false statement made during an official Department interview. For the purpose of categorizing types of false official statements in this Report, we used what was, in our view, the most serious false official statement made by the subject officer.

these official interviews. However, false statements made in these contexts often were not charged as violations of §203-08 and were not penalized with termination, but were instead treated as a less serious type of misconduct.

The Commission reviewed 37 cases involving 30 officers in which the most serious false statement was made during an official Department interview and/or a CCRB interview. In 17 cases involving 11 officers, the officers were separated from the Department through resignation, retirement, or termination. The Commission agreed with those outcomes.

The Commission disagrees with the charging decision and/or disposition in 13 of the remaining 20 cases. In three of those cases, the officer was charged under Patrol Guide §203-08 but was placed on dismissal probation with a loss of vacation and/or suspension days in lieu of termination, with no articulation of exceptional circumstances present to justify that result and with no such circumstances apparent in the paperwork we reviewed. In the following example, the proper charge was levelled but the proper penalty was not imposed.

In February 2017, the subject officer was in his Department vehicle when he observed the complainant engage in suspected criminal conduct. The complainant fled when the officer approached and the officer gave chase in his vehicle. The pursuit ended when the officer drove onto the sidewalk to stop the complainant from fleeing, striking the complainant with his car and causing the complainant substantial physical injuries.

In May 2018, when questioned about the incident during his official Department interview, the officer claimed that he lost control of his car on the wet roads, which caused him accidentally to drive onto the sidewalk. Video footage of the incident plainly revealed this claim to be false. In addition, although the officer made a record of the arrest in his memo book, in an apparent attempt to conceal his misconduct he omitted any mention of having struck and injured the complainant with his vehicle.

The officer, who had been with the Department for five years at the time of the incident and more than six years at the time of his interview, pled guilty to making an intentional false statement under Patrol Guide §203-08, improperly using a Department vehicle to stop a perpetrator, failing to make complete and accurate entries in his activity log, and making inaccurate entries in Department records.

Instead of applying the presumption of termination as required under §203-08, the Department placed the officer on dismissal probation and penalized him 30 vacation days, citing his high-performance evaluation ratings, Department medals, and praise from his commanding officer. In our view, these factors alone did not qualify as “exceptional circumstances” sufficient to depart from the termination presumption. The Department also justified the lesser penalty on the ground that the officer did not lie about the fact that he hit the complainant with his car, but only lied about the circumstances that precipitated the collision. That rationale is unpersuasive; the officer admitted only what was undeniable and lied about the rest to avoid responsibility and consequences. This is exactly the type of misconduct that should be met with termination.

In the other two cases, the subject officers were also placed on dismissal probation and penalized 30 days despite pleading guilty to making false/misleading statements under §203-08, with no exceptional circumstances cited. The Commission disagrees with the disposition in both of those cases.

In the remaining six cases with which we disagree, the subject officers were charged under Patrol Guide §203-10(5) (“Conduct Prejudicial”) rather than §203-08, although the conduct clearly fell within the scope of §203-08. The officers were not terminated despite the absence of any “exceptional circumstances.” One of those cases, described below, stemmed from a federal investigation into a carjacking and forged license plate enterprise involving the subject officer’s brother-in-law.

The officer had been with the Department for only about four years in late 2016, when he performed improper searches in Department databases at the request of his brother-in-law and divulged the information he had retrieved to his brother-in-law. The officer was interviewed by IAB on two occasions. When questioned about his activities, he provided misleading information about his relationship with his brother-in-law and claimed that his purpose in viewing forged license plate arrest reports in the Department database was to harvest charging language for any future arrests he might make.

DAO determined that these statements were “evasive, inaccurate, non-responsive, or wrongly made.” The officer pled guilty to making “misleading” statements during an official Department interview under Patrol Guide §203-10(5), as well as criminal association, computer misuse, and failing to carry his service firearm while on-duty. He was placed on dismissal probation and forfeited 35 vacation days.

The Commission believes that this officer was inadequately charged, as the statements charged as “misleading” were provable lies.¹³⁵ In light of all the circumstances, the officer’s explanation for accessing the information in the databases was not credible. Given the nature of his misconduct – which included not only lying but also associating with individuals engaged in a criminal enterprise – we believe he should no longer be a member of the service.

Three cases originated from an investigation into cheating on promotional examinations administered by the Department of Citywide Administrative Services (DCAS).

The three subject officers all submitted letters requesting a postponement of their exam dates. Signed by a pastor, each letter certified that it would be a violation of the officer’s religious beliefs to work on the Sabbath, when the examinations were scheduled.¹³⁶ The investigators interviewed the pastor, who stated that he had no record of issuing letters seeking religious accommodations for any of the three officers, and remarked that the letters appeared to be altered. Each officer was interviewed twice by IAB. During their first interviews, all three officers claimed that they obtained the letters from various relatives, and maintained that they were entitled to the religious accommodation that the letters sought. However, during their second interviews, after being confronted with evidence that contradicted their prior statements, the officers all admitted that they had received altered letters from another member of the service.

Each officer pled guilty to Offering a False Instrument for Filing in the Second Degree and Conduct Prejudicial for making false and/or misleading statements during two official Department interviews. All were placed on dismissal probation and forfeited 60 vacation days.

¹³⁵ Disciplinary prosecutors need only prove administrative cases by a preponderance of the evidence, which denotes that it is more likely than not that the charged misconduct occurred.

¹³⁶ None of the three officers had any disciplinary history. Two of the officers had been employed by the NYPD for approximately seven years, and one had been employed for approximately 15 years when they submitted their requests for special accommodations.

In imposing these penalties, the Department failed appropriately to address the lies these officers told when they were first interviewed. In explaining the rationale behind the penalty, the Department observed that the officers themselves had neither created nor forged the phony letters. In our view, that fact is irrelevant. They knowingly submitted altered documents to obtain a delay of a promotional exam, then lied in their official Department interviews and only admitted the truth when confronted with proof of their lies. These cases presented no apparent proof problems; the officers admitted the underlying misconduct, which was serious, as well as their lies to IAB. Under the circumstances, they should have been charged with making false statements under Patrol Guide §203-08 and terminated. Charging them under §203-10(5) instead of §203-08, and allowing them to keep their jobs despite the overwhelming proof of their misconduct, sent a clear message not only to these three officers but to the Department as a whole, that blatantly lying to IAB is not serious enough to warrant dismissal.¹³⁷

As indicated above, when dealing with officers who have lied in official interviews, the Department has in the past considered the seriousness of underlying misconduct. That approach – discounting the seriousness of lying to investigators if the underlying misconduct is not especially serious – encourages officers to lie rather than reinforcing the message that lies to investigators will not be tolerated.

For example, in the following case, the officer lied during two interviews to conceal relatively minor misconduct.

This officer had been employed by the Department for more than nine years when he made his first false statement in connection with this case. He had previously been disciplined for having a physical altercation with a civilian and failing to immediately disclose it to his supervisor.¹³⁸ In the case at issue, the underlying investigation began after the officer's driver's license was suspended because he failed to pay for his car insurance. The Department's investigation revealed other

¹³⁷ Given the seriousness of the underlying misconduct, we believe the Department should have considered terminating these officers even if they hadn't lied about the phony letters in their initial interviews.

¹³⁸ This officer forfeited 30 pretrial suspension days as a penalty for this incident, which occurred approximately two years after he started working for the Department.

instances of misconduct – including failing to notify the Department of his change of address and having unpaid parking summonses. Over the course of the investigation, the officer was officially interviewed on two occasions, during which he falsely claimed to have paid his insurance and described an elaborate set of circumstances surrounding the payment. After interviewing five witnesses, the Department disproved his version of events.

The officer ultimately pled guilty to Conduct Prejudicial for making misleading statements during an official Department interview and was placed on dismissal probation in addition to forfeiting 20 vacation days and 15 suspension days.¹³⁹

The Commission believes this subject officer should have been terminated. While the officer's underlying misconduct was primarily administrative and would not ordinarily result in termination, he lied in two separate interview sessions and his lies necessitated extensive additional investigation to disprove. Terminating this officer would send the important message that lying to investigators, even about relatively minor misconduct, will not be tolerated.¹⁴⁰

iii. False Statements Made in Department Records

Twenty-one of the cases we analyzed had false or inaccurate statements made in Department records as the most serious allegation. We did not disagree with any of the charging decisions and the penalties in these cases, as most involved time and leave issues, which the Department is uniquely positioned to address. None of the false statements made in Department records involved the circumstances of an arrest or the fabrication of evidence, actions we would urge result in termination.

iv. Other False Statement Cases

The remaining 19 false statement cases included cases where officers made false and/or misleading statements to supervisors or dispatchers, made false and/or misleading statements to

¹³⁹ In addition to pleading guilty to making misleading statements under Patrol Guide §203-10(5), this officer pled guilty to failing to maintain a current New York State driver's license, failing to provide the Department with a current address, failing to notify the Department of Motor Vehicles of his address change, and operating his personal and Department vehicles with a suspended license.

¹⁴⁰ The Commission recognizes that driving with a suspended license is a misdemeanor, but that conduct alone would not typically result in termination.

members of local law enforcement, or made false statements while off duty. Of the cases in this category, the Commission disagreed with the outcomes in four of them, including the following case, in which an officer made false statements to his supervisor about the circumstances of an accident involving a Department vehicle but was not charged with violating Patrol Guide §203-08.

A 13-year veteran police officer with no disciplinary history was operating a Department van in July 2017, transporting six civilian participants in the NYPD's Explorer Program.¹⁴¹ The officer attempted to pass a bus by driving on the center median, striking the bus in the process, and damaging the van. After the collision, the officer spoke with the bus driver but failed to make the proper notifications to the Department. He then directed the members of the Explorer program to lie if they were asked about the damage to the van.

When the van was returned to the precinct, a fellow officer noticed the damage and reported it to the sergeant. When questioned by the sergeant about the damage, the subject officer denied any knowledge of how it occurred. However, when the Captain of the Explorer program was contacted, he explained that the officer was indeed responsible for the accident and the damage to the van.

The officer pled guilty to engaging in Conduct Prejudicial for making false and misleading statements to his sergeant, and interfering with a Department investigation by directing other individuals to lie. The officer was placed on dismissal probation and penalized 45 vacation days.

While this was a significant penalty, this officer should have been charged with making a false statement under Patrol Guide §203-08 and terminated.¹⁴² His blatant false statements to his sergeant were bad enough, but they were aggravated by his instructions to young auxiliary members of the Department (and possible future members of the service) to lie to protect him. We found nothing in the disciplinary record that warranted an exception to the termination presumption.

¹⁴¹ The NYPD's Explorer Program is designed to introduce individuals aged 14-20 to a career in law enforcement and/or criminal justice. The program also serves to strengthen the relationship between diverse youth communities and the police.

¹⁴² In response to a draft of this Report, the DAO indicated that under the current wording of Administrative Guide §304-10, the subject could have been charged with "False or Misleading Statements."

c) **The Revised False Statement Policy and the Disciplinary Matrix**

The matrix to a large degree mirrors the language of the Department’s revised false statement policy. It establishes presumptive penalties for making false, misleading, and inaccurate statements, as well as for impeding an investigation. Termination is the presumptive penalty for intentionally making a material false official statement, and dismissal probation plus 30 penalty days is the presumptive penalty for intentionally making a misleading official statement or impeding an investigation. The presumptive penalty for making an inaccurate official statement is 10 penalty days.¹⁴³ The matrix also identifies specific mitigating and aggravating factors.¹⁴⁴

The Department’s revised policy and the corresponding matrix provisions have some positive aspects, including retention of the presumptive penalty of termination, and the change in the standard that must be met before the Police Commissioner may depart from the presumptive penalty from “exceptional circumstances” to “extraordinary circumstances.” The policy and the matrix also define “inaccurate” statements as misconduct and address false denials of recollection. However, the new policy and the matrix lack important clarity in other respects, including the failure to define an “official statement.” In addition, both documents contain significant internal inconsistencies, and they fail properly to address false claims of failed recollection.

Under the current provisions, if an officer denies recalling events under investigation, and that denial is demonstrably false, the false statement is defined as a “misleading” statement

¹⁴³ As defined, making an inaccurate official statement includes causing another person to make an inaccurate statement.

¹⁴⁴ The mitigated penalty for making an intentional false official statement is forced separation in lieu of termination. There is no aggravated penalty because there is no penalty more serious than termination. Depending on the presence of mitigating or aggravating factors, the penalty for making a misleading official statement can be as low as 20 penalty days or as high as termination; the penalty for making an inaccurate statement can be decreased or increased five days; and the penalty for impeding an investigation can be as low as 20 penalty days or as high as termination.

rather than a “false” statement, and thus the presumption of termination does not apply. Falsely claiming a lack of recollection during an interview is a strategy employed to avoid answering problematic questions. Of course, it may be difficult or impossible to prove that a claimed lack of recollection is false; however, when a claimed lack of recollection can be proven false in light of the other evidence and the surrounding circumstances, it is no different than any other intentional lie and it should be treated as an intentional lie. To treat it as something less serious than an intentional lie encourages officers to avoid admitting misconduct and also avoid the presumption of termination. Because we remain concerned that the Department will continue to circumvent the termination presumption by charging officers with making misleading statements instead of false ones, we will monitor the use of these charges in the future. We will continue to urge accuracy and consistency in application of the false statement policy, and continue to work with the Department to improve the policy and the corresponding matrix provisions.

The Commission also disapproves of the Department’s approach to what it calls “mere denials” of misconduct.¹⁴⁵ We note in passing here and discuss in greater detail at the end of this Report, our view that officers who falsely deny misconduct in the context of investigative interviews and Department trial testimony should be charged with making false statements. In these two contexts – as opposed to a purely procedural context such as the entry of a not guilty plea in a criminal case – the fundamental purpose of the proceeding is to determine facts, and efforts to obstruct that function should be punished. We recognize that police officers, just like civilians, should have the right to expect criminal prosecutors to meet the burden of proving their case without requiring officers to provide testimony against themselves, however, this

¹⁴⁵ *Infra* at p. 105-106.

consideration does not extend to investigative interviews or departmental trials, the purpose of which is to discern the truth.¹⁴⁶

8. Tow/Body Shop

During this review period we closely examined Tow/Body shop cases. Although the number of Tow/Body Shop cases is not large, they implicate classic forms of corruption, including bribery. These cases involve officers who respond to accidents or other motor vehicle incidents, and direct or recommend that civilians use particular tow companies, in violation of established procedures. These procedures, which are described briefly below, effectively prevent officers from collecting referral fees or other benefits from the tow companies they recommend. They serve other important purposes as well; they prevent any single tow company from monopolizing assignments with the apparent approval of the Department, eliminate claims that officers favor particular companies, and prevent tow companies from charging vehicle owners inflated fees. In addition, the Department has observed that some tow companies employ drivers who have criminal histories and/or are currently engaging in criminal conduct. When officers become friendly with these employees, there is an increased risk of criminal association, as well as an increased risk that the officers themselves will become involved in criminality, such as divulging confidential NYPD information about planned enforcement operations.

a) Procedures Involving Tow Assignments

Patrol Guide §217-09 sets forth towing procedures that apply when a vehicle has been involved in a collision or other incident, and an officer has determined that the vehicle cannot safely be driven. This section incorporates by reference provisions of the New York City Administrative Code, which requires tow companies responding to certain police calls to be part

¹⁴⁶ While officers facing criminal investigations can assert their Fifth Amendment right to remain silent and refuse to answer questions, there is no right to refuse to answer questions in official Department interviews or at administrative trials. If officers refuse to answer questions in these settings, the Department will bring charges against them based on those refusals, and will usually terminate the officers as a result.

of the Directed Accident Response Program (DARP). To participate in DARP, a tow company must comply with various New York City licensing requirements. A list of participating tow companies is maintained by the NYPD Communications Section (“Communications”).

When an officer responds to the scene of a vehicle accident and determines that a vehicle cannot be safely driven (or that the driver cannot drive the vehicle for another reason, such as injury), the officer must contact Communications to request a tow truck. Communications must use the company that is next in line for the job, and relay that information to the requesting officer. The officer must wait for the tow truck to respond and include the information about the tow truck in the official accident report. If the assigned tow truck does not arrive within 30 minutes, Communications will assign the next tow company on the list. There are various exceptions to these procedures, including tows for large vehicles weighing at least 15,000 pounds. The drivers of large vehicles can use the tow company of their choice.

Some tow truck operators seek to circumvent the procedures by using police scanners to learn about collisions and go to the scene even before officers arrive. In those cases, the Patrol Guide requires an officer to issue a summons to the tow truck operator and report the incident to the New York City Department of Consumer Affairs, the agency responsible for vetting the tow companies participating in DARP. If the tow truck operator is found not to be licensed by the Department of Consumer Affairs, the officer is supposed to seize the tow truck.¹⁴⁷

b) The NYPD’s Investigation into Tow Companies

The Tow/Body Shop disciplinary cases we reviewed grew out of an investigation originally conducted by the NYPD’s Criminal Enterprise Investigative Section (CEIS) into allegations of criminal conduct by tow companies, body shops, owners, and drivers operating in

¹⁴⁷ This procedure describes the DARP program and officers’ responsibilities under that program. Rules regarding towing of stolen and abandoned vehicles and parked vehicles that block private driveways are addressed separately in the Patrol Guide. Patrol Guide §214-14 sets forth the procedures applicable for removing parked vehicles that block private driveways.

the Bronx and Northern Manhattan. The investigation involved claims that these companies were threatening employees of competing companies and in some cases even assaulting those employees, to obtain towing jobs in their areas. At the conclusion of the investigation, 17 civilians and 10 companies were indicted on various charges, including Enterprise Corruption and Conspiracy. The Department of Investigation was also involved and made several recommendations to the Department of Consumer Affairs to strengthen the licensing system for tow truck companies and the background investigations of the owners and employees.

During the course of its investigation, CEIS found multiple links between its targets and members of the service. This discovery led in 2016 to an IAB investigation, conducted in conjunction with CEIS, which continued for more than two-and-a-half years. The IAB investigation involved multiple subjects with allegations varying in severity from providing police union courtesy cards to targets of the criminal investigation to warning targets of the criminal investigation of planned police enforcement activities and advising targets on how to avoid those activities. At the conclusion of the IAB investigation, 13 officers received formal misconduct charges. Seven of those cases were adjudicated during this reporting period.¹⁴⁸

c) The Tow/Body Shop Disciplinary Cases

Although the resulting disciplinary cases involved issues related to the tow industry, the charges levied against most of these officers either did not specifically involve car-towing or the tow-related conduct was not the most serious misconduct. For those reasons, only one case fell within the Tow/Auto Body category; four cases fell within the Performance of Duties category and the remaining two fell in the Perjury/False Statement category. We agree with the penalties imposed in three of the seven cases.

¹⁴⁸ Three other members of the service received discipline at the command level with forfeitures of vacation days.

The association between members of the service and owners and operators of tow companies is fertile ground for corruption-related activities. The failures to stop tow companies from spontaneously appearing on the scene and taking tow assignments despite not being properly licensed or next in the assignment rotation can lead to other illegalities. For example, we have observed cases involving reckless driving by tow operators that were ignored by officers, assaults as competing tow truck drivers fight with each other, and bribery to get officers to steer business in their direction. The penalties that were imposed in several of these cases were insufficient to deter members of the service from continuing these associations and from referring tow assignments to particular companies. The officers who were directly involved in this misconduct should have been severely penalized, and in many cases, terminated. Those officers who made false statements in their Department interviews – whether to cover their own misconduct, the misconduct of colleagues, or the misconduct of civilian tow operators - should have been appropriately charged and terminated, absent a finding of exceptional circumstances. The following case is illustrative:

In November 2016, a tractor-trailer overturned on a private construction site, spilling its contents onto an unoccupied vehicle. Even before police responded to the scene, a tow truck arrived and the tow truck driver asked the trailer-truck driver to sign paperwork authorizing a tow. The tractor-trailer driver refused to sign the paperwork without speaking with his supervisor, and said they would probably choose their own towing company. The tow truck driver did not leave.

The supervisor of the tractor-trailer driver arrived and told the tow truck driver that a different tow company was on the way. The tow truck driver still did not leave. The subject officer and his partner then arrived. The subject officer told the tractor-trailer driver and his supervisor that they could not choose their own tow company, and had to use the tow company called by the NYPD. This was an incorrect statement of the Department's policy because the tractor-trailer was covered by an exception to the general DARP requirements. When instructed by the officers to sign what appeared to be an invoice, the driver and his supervisor refused. Nonetheless, the tow company that was already on the scene did tow the tractor-trailer, and charged the tractor-trailer company \$49,000, which was paid by insurance.

When this incident was investigated by CEIS and IAB, the following facts were revealed: Just after the accident occurred, the owner of the tow truck, “A,” called another individual, “C,” and asked if “C” knew any police officers assigned to the precinct covering the accident location who could help. “C” mentioned the subject officer and provided “A” with the subject officer’s telephone number. “C” then contacted the subject officer.

The subject officer was on duty, but he had been assigned to work overtime in connection with the murder of a police sergeant earlier that day. Rather than respond to that assignment, he went instead to the accident location where the tow truck belonging to “A” was waiting. He spent two-and-one half hours at the scene and made no entry in his memo book concerning the truck accident.

The investigation involved wiretaps, which revealed that later the same day, “A” had called “C” to thank him. “C” responded that “A” needed to “give something to the police to keep them happy.” “A” replied that he had something for the police and for “C.” When interviewed by investigators the following year, “A” stated that he had given a person \$1000 to give to the subject officer but he could not say whether the officer received the money.

The officer was interviewed by IAB twice. His first interview took place almost 16 months after the incident. He remembered responding to the location after receiving a phone call from “C,” who complained that he was having an issue with a tow truck driver. He claimed that when he arrived at the scene, “C” was not present but a tow truck driver was there, whom he assumed was from “C’s” company. The officer spoke with the owner and driver of the overturned tractor-trailer. He admitted that they did not want to move the tractor-trailer and that he said the vehicle had to be moved.¹⁴⁹ When confronted with the DARP provision that allows owners of large vehicles to choose their own tow companies, the subject officer denied being aware of that DARP rule. However, he admitted to being aware of the DARP procedures and the requirement that he investigate any tow truck that arrived on a scene to determine how the truck arrived there and whether the truck was properly licensed. He denied pressuring anyone to use the tow truck that was present, despite being confronted with statements by the tractor-trailer driver and his supervisor identifying him. He also denied receiving any financial benefit for pressuring the tractor-trailer driver and his supervisor.

His second interview was conducted six weeks later. During that interview, he confirmed that he was supposed to perform another assignment and that before doing so, he spent two-and-a-half hours at the location of the tractor-trailer incident. He also admitted that he went to the scene only because “C” asked him to do so.

The officer was charged with and pled guilty to four specifications of misconduct: two for failure to follow DARP procedures, one for failure to maintain his memo

¹⁴⁹ According to all the witnesses, the tractor-trailer was located on a private construction site and was not blocking traffic.

book, and one for responding to the scene of the accident instead of his assignment. Despite denying to IAB that he had pressured the tractor-trailer driver and supervisor to use the tow truck at the scene, he was not charged with making a false statement.

The officer had 21 years with the Department at the time of the incident and had one prior disciplinary matter.¹⁵⁰ For the misconduct in this case, he forfeited 30 vacation days and was transferred to a different command.

We disagree with this penalty. First, the officer admitted having ignored an overtime assignment – an assignment that obviously should have been of utmost importance – and having responded instead to a tow owner’s request that he deal with a towing matter. That fact alone strongly suggests a belief on his part that he would receive something of value for his time. Second, although there was ultimately no proof that he actually received the \$1000 intended for him, the surrounding circumstances indicate knowledge that he was engaged in wrongdoing. He knew the tow truck on the scene had not been sent by Communications, but instead was connected to a friend of his who, in turn, knew that in these circumstances, the police would need “something ... to keep them happy.” He insisted that the tractor-trailer be towed even though it overturned on private property and was not blocking traffic, and he failed to follow even the DARP procedures of which he admitted being aware. In light of the proof that the officer pressured the tractor-trailer driver and supervisor to use “A’s” tow truck, the subject officer appears to have lied when he denied pressuring or forcing them to use the tow truck at the scene. Under all the circumstances, we believe this officer should have been charged with lying to IAB and should have been terminated. At the very least, the Department should have kept him under observation by imposing dismissal probation.

The officer in the example, as well as many of the other officers interviewed in connection with the IAB-CEIS investigation, claimed ignorance when asked about provisions in

¹⁵⁰ He forfeited 10 vacation days for insurance rate jumping that occurred in 2002 when he used an address in another county to register his vehicle.

the Patrol Guide involving tow procedures. Given the level of detail in the relevant Patrol Guide sections, the Commission recommends that there be regular and repeated training sessions on officers' responsibilities in the various situations in which a tow truck is needed.

The matrix addresses Tow/Body Shop misconduct by imposing a presumptive penalty of 10 days for members of the service who fail to follow DARP procedures.¹⁵¹ We question whether this is sufficient to deter the type of misconduct – specifically including bribery – that the DARP rules are intended to prevent.

D. Overall Conclusion on the Disciplinary System

The Commission believes that consistent, fair, and adequate discipline is a necessary component of the Department's efforts to deter corruption and other wrongdoing. Discipline must also be imposed in a timely manner to have the greatest effect and to reassure the general public, as well as the civilians who are victims of officer misconduct, that the Department seriously addresses the wrongdoing of its members. Consistent discipline also reassures members of the service that they are being treated equitably and that the Department's system of discipline is not arbitrary or influenced by an individual officer's connections.

For this reporting period, the Commission found that the length of time the Department took to adjudicate cases remained relatively stable. This was especially commendable given that almost one year of this period occurred during the COVID-19 pandemic. When examining the discipline imposed in each case category, the Commission was encouraged to see that the Department was more frequently attaching dismissal probation to the penalty in domestic cases involving physical altercations. However, the Commission still believed that the Department should charge more officers with making false statements. While we found that officers who

¹⁵¹ This penalty could be decreased to five penalty days with the presence of mitigating factors and increased to 20 penalty days if aggravating circumstances exist.

made false statements in sworn testimony and sworn documents were more likely to be terminated, this was not the case with officers who made false statements in the context of investigative interviews. The Commission is hopeful that with the adoption of the Disciplinary Matrix, the false statements made in interview settings will be addressed more routinely with termination.

RECENT DEVELOPMENTS AND RECOMMENDATIONS FOR THE FUTURE

This *Twentieth Annual Report of the Commission* covers the Commission's work for the 2019 and 2020 calendar years. The Department made numerous changes to its disciplinary system during that two-year period, and has made further changes since. Many of those changes were implemented in response to specific recommendations made by the Independent Panel in 2019, which included adopting a Disciplinary Matrix.

In 2019, at the request of the Department, we entered into a Memorandum of Understanding with the Department under which we would conduct an extensive audit of the Department's disciplinary system. The audit would commence after the Department had implemented all the recommendations made by the Independent Panel, and the Commission would evaluate implementation of those recommendations. Towards this end, in late 2019, the Commissioners and Executive Director began meeting monthly with members of the First Deputy Commissioner's office to discuss progress on the Independent Panel's recommendations and provide input. Our meetings with the Department took place until February 2020, then ceased for much of the pandemic, and resumed in July 2021. With the implementation of the Disciplinary Matrix, the Department reported that it had finished implementing the Independent Panel's recommendations, and we will be releasing our report on the Department's adoption of these recommendations in the near future.

Implementation of the matrix was an important step but from our perspective, many issues surrounding the matrix remain. We were given a preview of the initial version in August 2020, prior to commencement of the public comment period. In response, we made two written submissions to the First Deputy Commissioner's office, each containing a variety of objections and recommendations. Copies of those submissions are attached as Appendix B and Appendix C

to this Report. While we commented on many different provisions, by far the largest number of issues we raised related to the matrix provisions concerning false statements, and the corresponding provisions in the Patrol Guide, which have since been moved to the Administrative Guide.

Some of our suggestions were adopted before the matrix was finalized, but the majority of our most significant recommendations were not adopted. A meeting with Department Executives to discuss our most pressing concerns resulted in very few additional changes. However, those Executives assured us that the matrix is “a living document” that would be amended over time, and that our recommendations would be considered further in the future.

In 2021, the matrix began its first annual review. It now appears that one of our recommendations will be adopted. Specifically, based on a report we prepared at the behest of the Mayor’s Office discussing the inadequacy of the 30-day aggravated penalty for failure to take police action, the Department has increased the aggravated penalty to termination.

In connection with our discussion of the disciplinary cases above, we briefly mentioned some of our ongoing concerns with respect to the matrix. We further explain some of those concerns below and identify additional significant concerns, all of which were communicated to the Department more than 18 months ago. We will closely monitor how the Department handles these issues in the future. We will also monitor whether the Department adheres to the presumptive penalties set forth in the matrix, and whether departures from the matrix are accompanied by a written explanation provided by the Police Commissioner, as required.

Mitigating and Aggravating Circumstances

- The current version of the matrix provides that potential mitigating factors that can be used to decrease the presumptive penalty include “[p]ositive employment history including any notable accomplishments, Departmental recognition and positive public recognition.”¹⁵² The Commission believes that in cases of very serious misconduct – for example, perjury or intentionally making a false statement, engaging in criminal conduct (whether or not prosecuted), receiving bribes or gratuities, and other misconduct for which the presumptive penalty is forced separation or termination – an officer’s exemplary performance history should not constitute a mitigating factor. While there may be other legitimate mitigating factors in very serious cases, past performance should not be a justification used to avoid termination. (*See* Commission Letter dated August 31, 2020, App. B at p. 4).
- The current list of aggravating factors includes the nature or extent of any “actual” injury or endangerment to another person.¹⁵³ We believe that the obvious potential for such injury or endangerment should also be an aggravating factor. While the potential for injury might ultimately be given less weight than an actual injury, an officer should not escape enhanced discipline simply because a readily discernible risk of serious harm was not fully realized. (*See* Commission Letter dated August 31, 2020, App. B at p. 4).
- With respect to the impact of an individual’s prior disciplinary history, the original draft of the matrix provided that a prior penalty of 20 days or more generally would not constitute an aggravating factor if the penalty was imposed more than 10 years earlier, and that a prior penalty of less than 20 days (or dismissal probation) generally would not be an aggravating factor if it was imposed more than 5 years earlier. We objected to these presumptive limitation periods on numerous grounds. We noted, that the draft matrix called for all disciplinary matters to be “evaluated on a case-by-case basis, considering all relevant factors,” and that the list of aggravating factors in the matrix referred to “[a]ny negative employment history.” We cited a number of scenarios in which the draft proposal would not adequately penalize a second or third incident of misconduct, and we urged the Department not to impose any presumptive time bar for consideration of prior discipline, stating:

In our view, a prior disciplinary history, however old, is presumptively relevant; it should be the highly unusual case, rather than the majority of cases, in which prior disciplinary action (particularly for misconduct serious enough to warrant 20 or more penalty days or dismissal

¹⁵² New York City Police Department Disciplinary System Penalty Guidelines (January 15, 2021) at p. 9. This cite refers to the January 15, 2021 version of the matrix, which was the matrix in effect during the drafting of this report.

¹⁵³ *Id.* at p. 10.

probation) could reasonably be deemed “irrelevant.”

The only way for the Department to ensure that its new disciplinary regime is administered effectively and consistently, and to achieve the other important objectives of this significant undertaking, is to examine a [member of the service’s] entire prior disciplinary record when determining an appropriate penalty for misconduct. (*See* Commission letter dated August 31, 2020, App. B at pp. 5-6 and Commission letter dated September 30, 2020, App. C at pp. 5-8).

The matrix provisions concerning prior discipline were ultimately changed before the matrix was published. However, the matrix still includes a presumption that allows the Department to disregard most prior discipline after a certain period of time, and it presumptively caps the penalties that will be imposed for many subsequent instances of misconduct. While we are gratified to see that individuals who have engaged in certain forms of very serious misconduct are excluded from these limitations, we continue to view presumptive time limitations as inappropriate, and we question whether presumptive penalty caps are appropriate for individuals who have previously engaged in misconduct. We continue to believe that all prior discipline should presumptively be considered when imposing a penalty, and that prior discipline should only be disregarded if, on all the facts of a given case, the prior instances of misconduct and the penalties previously imposed can reasonably be viewed as “irrelevant.” There is simply no reason for the Department to tie its own hands when fashioning discipline for an officer whose prior discipline failed to deter additional misconduct.

Termination Thresholds and Dismissal Probation

- When individuals are placed on dismissal probation, their employment is technically terminated. However, that termination is suspended—typically for a period of one year—providing them with an opportunity to demonstrate that they can adhere to all Department rules and regulations.¹⁵⁴ If there is any further misconduct during that probationary period, an individual on dismissal probation can be terminated summarily, without any further hearings. The matrix states with respect to individuals on dismissal probation that the Department *may* summarily dismiss them without a formal hearing if they engage in further misconduct. We stop short of advocating mandatory termination in those circumstances, but we believe the matrix should impose a strong presumption of termination. An individual who has already committed misconduct serious enough to justify termination, and who then demonstrates an inability to conform their behavior to the Department’s requirements for even a relatively short period is, in all likelihood, unfit

¹⁵⁴ Dismissal probation can often last longer than a year as the member of the service must complete the probationary period while on full duty. Any time periods when the member of the service is on modified duty, restricted duty, or on sick or annual leave, are excluded from the dismissal probation period.

for police work; that person poses a serious risk to the Department as well as the public. While some forms of misconduct may be so minor that they should not result in the termination of someone already on dismissal probation, a heavy burden should be placed on that individual to demonstrate that summary termination is not appropriate. (See Commission Letter dated August 31, 2020, App. B at p. 8).

- If additional misconduct while on dismissal probation does not result in summary termination, the Commission believes that the period of dismissal probation should be extended. (See Commission Letter dated August 31, 2020, App. B at p. 8).

Abuse of Authority Presumptive Penalties

- When the Commission responded to the Department’s draft of the matrix, violations of constitutional rights—including detaining or searching members of the public without legal justification—carried presumptive penalties that were based on the degree of intent involved in the violation. The penalties ranged from 10 to 30 days, with 30 days being the maximum for “bad faith” intentional violations. In our responsive comments, we indicated that these penalties did not appropriately reflect the seriousness of the misconduct or the potential trauma caused to the people whose rights are violated. When the matrix was finalized, the Department removed the intent of the officer as the determinant of the penalty range and decreased the range to a minimum of training and a maximum of 15 days, with three days being the presumptive penalty. Thus, as currently in effect, even a bad faith, intentional violation of a citizen’s constitutional rights carries a maximum penalty of 15 days, which is wholly inadequate to address this type of misconduct. In our view the presumptive penalty for these types of violations should be dismissal probation regardless of whether any aggravating factors are present, and the number of forfeited penalty days should be substantially increased. (See Commission Letter dated August 31, 2020, App. B at pp. 12-13).
- Currently, the unlawful search of or entry into premises is not assessed based on the offending officer’s state of mind but rather on the extent of the entry—whether it is *de minimus* or extensive/prolonged. For example, officers who only put a foot over the threshold of a doorway are subject to a penalty of up to five days, while officers who have a prolonged entry into the premises are subject to a penalty of up to 30 days.¹⁵⁵ Officers who gain entry to premises in bad faith, even if they only place a foot over the threshold, have committed a constitutional violation that the matrix should seek to deter. As we pointed out to the Department, “[s]uch ‘de minimis’ intrusions can permit officers to observe drugs, firearms, or other contraband ‘in plain view.’” A penalty of up to five days is

¹⁵⁵ New York City Police Department Disciplinary System Penalty Guidelines (January 15, 2021) at pp. 26-27.

inadequate. (*See* Commission Letter dated August 31, 2020, App. B at p. 13).

False/Misleading/Inaccurate Statements

- The current version of the matrix and the corresponding sections of Administrative Guide §304-10 provide penalties for false official statements.¹⁵⁶ While many terms used in these two sections are specifically defined, there is no definition of an “official” false statement. It is unclear whether these penalties and prohibitions apply broadly to all statements made by members of the service in the course of carrying out their police duties, or more narrowly to only those statements made in formal settings, such as those made under oath or in official Department or CCRB interviews. If the term “official” is understood to apply narrowly, as some within the Department have previously suggested to us, it would not include statements made to criminal prosecutors, statements made to Department supervisors, or false entries made on property vouchers or other Department paperwork. We therefore believe that a broad interpretation is necessary, and should be added to the matrix and the Administrative Guide. (*See* Commission Letter dated August 31, 2020, App. B at pp. 15-16).
- As discussed above, the matrix addresses false denials of recollection with a presumptive penalty of dismissal probation and 30 days. In those cases where a denial of recollection is provably false, the matrix does not go far enough. The matrix defines denials of recollection as “misleading” rather than “false,” and thus avoids the presumption of termination applicable to other intentional lies. We have seen cases in which, during an official Department or CCRB interview, a member of the service implausibly claims not to recall the details of an incident, or not to recall the incident at all, in a readily apparent effort to avoid admitting their own misconduct or the misconduct of their colleagues. This approach plainly obstructs and impedes investigations. Moreover, by defining provably false denials of recollection as “misleading” rather than “false,” the Department creates an incentive to deny recollection because the officer does not have to fear that the presumption of termination will apply. Ordinarily, the most the subject officer will risk by falsely denying recollection of an incident is the loss of more penalty days and placement on dismissal probation. Finally, it is illogical to define a false claim of failed recollection as “misleading” rather than “false.” We understand that proving the falsity of a claim of failed recollection can be challenging because it requires an analysis of the officer’s state of mind, which typically must be proven circumstantially. However, that difficulty provides no justification for

¹⁵⁶ *Id.* at pp. 29-32.

down-grading the misconduct from a false statement to a misleading statement. In both cases, the same claim of failed recollection must be disproven. If a person does recall a fact or event and claims not to recall it, that person is lying. If the person *does not* recall the fact or event and claims not to recall it, that person is telling the truth, and there is no misconduct to penalize. If it is impossible to tell whether the person’s denial is true or false, then it is impossible to prove misconduct, and neither charge can be sustained. (*See* Commission Letter dated August 31, 2020, App. B at pp. 16-17).

- For the presumption of termination to apply, the false official statement must concern a material fact. While the matrix initially defines a material fact broadly to include any fact that is relevant to the subject matter, it goes on to limit that scope by further defining a material fact as one that is “*essential to the determination of the issue*: where the suppression, omission, or alteration of such fact *would reasonably result in a different decision or outcome*.” The latter definition is inappropriately narrow. Requiring a material fact to be “essential to the outcome” of a matter would, for example, effectively prevent the Department from prosecuting a false statement charge if a member of the service lied about misconduct but the Department nonetheless had sufficient evidence to prove that misconduct. It might prevent the Department from pursuing a false statement charge against an individual who added false details to an application for a search warrant if there were nonetheless sufficient facts to provide the requisite probable cause. In each of these examples, the false statement is clearly relevant and falls squarely within the plain meaning of the term “material,” but it would not satisfy the limiting language. That language should therefore be removed. (*See* Commission Letter dated August 31, 2020, App. B at pp. 17-18).
- As mentioned above, the Department exempts from the coverage of its false statement policy a statement that amounts to a “mere denial” of the alleged misconduct. Although the Department attempts to explain the scope of this exception, the explanation is far from clear, leaving open the possibility that during an official Department interview or even a Departmental trial, a member of the service could falsely deny specific provable facts without being subject to a false statement charge.

In our view, this “mere denial” concept should be limited to purely procedural steps, such as a plea of not guilty in a criminal proceeding (without which a trial cannot move forward), or a general denial made when an officer is presented with disciplinary charges. Official Department interviews, CCRB interviews, and Departmental trials are not purely procedural steps, but are instead substantive fact-finding functions; therefore, a denial of misconduct in those settings should not be excluded from the scope of the false statement policy,

regardless of the specific wording of the denial. The false statement policy should be amended to provide that the “mere denial” principle applies only to the procedural stages of a prosecution, civil suit, or administrative action, and that falsely denying facts or allegations during an official Department interview, a CCRB interview, or a Departmental trial will subject an officer to a false statement charge. (*See* Commission Letter dated August 31, 2020, App. B at pp. 18-19).

- While there may be instances during questioning when it is appropriate to refresh the recollection of a member of the service with video, audio, or documentary evidence, the matrix appears to require investigators to disclose contradictory evidence during these interviews by stating that a member of the service who denies specific facts “after being afforded the opportunity to recollect” has made a false statement. There should be no such requirement. Whether to reveal some or all of the evidence that the investigator has is a question that should be decided on a case-by-case basis, in light of factors such as whether the investigation is complete; whether witnesses might be threatened, harmed, or otherwise tampered with; whether evidence might be destroyed; and whether revealing the evidence will assist the subject in fabricating a defense. When a member of the service makes a false statement to investigators and there is no genuine issue as to whether that statement was an intentional lie or resulted from a failure of recollection, the investigator’s decision to withhold disclosure of contradictory evidence should not determine whether a false statement charge will be brought. (*See* Commission Letter dated August 31, 2020, App. B at p. 19).
- The matrix and §304-10 of the Administrative Guide contain serious internal inconsistencies concerning “retractions.” As discussed below, §304-10 should be amended to conform to the relevant section of the matrix.

The “Additional Data” section of §304-10 indicates, initially, that if a member of the service lies about a fact, and then tells the truth after being confronted with evidence of the lie, that individual will *not* be charged with making a false statement. We object to such an approach because it does nothing to encourage truthfulness in the first instance; to the contrary, it essentially encourages an officer to lie at the outset and wait to see whether investigators have any evidence proving the lie. If presented with evidence of the lie, an officer need only conform the story to that evidence, secure in the knowledge that no false statement charge and no presumption of termination will follow. A member of the service who intentionally lies and only tells the truth when confronted with proof should not be rewarded.

Moreover, such an approach is inconsistent with later language in §304-10, which provides that if a member of the service intentionally makes a false statement but retracts the statement and substitutes a truthful statement during the same interview, deposition or other session, a charge of making a false statement “*may not be appropriate.*” In other words, in those circumstances the Department *may or may not* decide to bring a false statement charge.

The confusion generated by these two paragraphs is amplified further by the matrix, which takes the opposite approach to retractions. The matrix clearly and unambiguously states that if a member of the service intentionally makes a false statement but then retracts the statement and substitutes a truthful statement, a false statement charge *can only be avoided if all the following requirements are met*: 1) The retraction occurs within the same interview or proceeding as the false statement (or within 24 hours of the interview giving the individual the opportunity to consult with family members and his attorney); *and* 2) The member retracts the false statement before the fact-finder has been deceived or misled to the harm and prejudice of the investigation or proceeding; *and* 3) The retraction and substituted truthful statement are made before the member knows or has reason to know the fact-finder is or will be aware of the false statement. “The substituted truthful statement must occur at a time when no reasonable likelihood exists that the member has learned that his or her falsehood has become known to the fact-finder.” Thus, the “Retraction” section of the matrix is utterly inconsistent with the two paragraphs of §304-10 quoted above. Contrary to §304-10, it establishes an “extremely narrow” set of circumstances under which a member of the service who has lied will *not* be charged with making a false statement.

The approach taken in the “Retraction” section of the matrix is the correct approach. It specifically focuses on the Department’s need to foster truthfulness, and the need for members of the service to provide the truth promptly. Unlike §304-10, it benefits only those individuals who recant their lies on their own initiative, before being confronted with proof that they have lied. Importantly, this framework serves to distinguish those individuals who are fundamentally honest from those who only admit the truth when they realize the truth is already known. (*See* Commission Letter dated September 30, 2020, App. C at pp. 3-5).

Firearm-Related Misconduct

- The presumptive penalty for failure immediately to report an improper firearm discharge is only 10 penalty days, which can be increased to 20 penalty days with aggravating circumstances.¹⁵⁷ That

¹⁵⁷ *Id.* at p. 39.

penalty is insufficient and should be changed to termination (regardless of whether there are any aggravating circumstances) unless extraordinary mitigating circumstances exist.¹⁵⁸ We have repeatedly advocated for termination in failure to report discharge cases. As we noted in our *Seventeenth Annual Report*, “Prompt reporting of a discharge is necessary for a thorough and adequate investigation into the propriety of the discharge. Delaying or failing to report the discharge can result in the loss of physical evidence and witness statements. This may then lead to unreliable conclusions about how the discharge occurred and whether anyone was injured. ... [T]he failure to report a discharge might also affect or taint the investigation of subsequent discharges.”¹⁵⁹ (*See* Commission Letter dated August 31, 2020, App. B at pp. 21-22).

- Lost firearms pose a very serious threat to public safety. Given the harm that can flow from a lost firearm, the Commission believes that the failure to report a lost firearm promptly should carry a higher presumptive penalty than 10 penalty days. In addition, to encourage members of the service to report lost firearms immediately, it might be useful to have escalating penalties based on how long it takes for the loss to be reported, or whether the loss went unreported by the member of the service and was only discovered through other means. If those are the aggravating factors the Department intends to consider when determining whether to increase the penalty, they should be specifically set forth so members of the service are on notice. (*See* Commission Letter dated August 31, 2020, App. B at p. 22).
- The matrix contains no presumptive penalty for the unjustified off-duty display of a firearm unless that display occurs during the course of a domestic incident, or while under the influence of an intoxicant, when the presumptive penalty is termination. The off-duty display of a firearm in all other situations is addressed under the category of off-duty display of a weapon, which carries a presumptive penalty of 15 days.¹⁶⁰ However, the term “weapon” is broad and includes knives, razors, brass knuckles, and any other instrument capable of causing injury. The display of a firearm may serve to escalate an already tense situation and has the possibility of leading to firearm discharges with tragic results. Due to the specific dangerousness of displaying a firearm, we believe an off-duty firearm display should be addressed separately and carry a more severe penalty. We would urge the Department to include the off-duty display of a firearm in its Firearm-Related Incidents category and assign this misconduct a presumptive penalty that includes dismissal probation and an aggravated penalty

¹⁵⁸ Currently, the matrix does not provide for a mitigated penalty.

¹⁵⁹ *Seventeenth Annual Report* at p. 144.

¹⁶⁰ This penalty can be mitigated down to 10 penalty days or increased to 20 penalty days with the existence of aggravating factors.

of forced separation or termination. (*See* Commission Letter dated August 31, 2020, App. B at p. 22).

Violations of Department Rules and Regulations

- The matrix provides a presumptive penalty of 20 days for the purposeful failure to record a prescribed event with a body-worn camera.¹⁶¹ That is not sufficient. There is no legitimate reason why a member of the service would intentionally fail to record an event that should be recorded. The only apparent motivation for such a deliberate act would be to prevent the initial recording or the subsequent discovery of misconduct, including misconduct of the most serious kind. Body-worn camera recordings serve an important purpose; when an allegation of misconduct is made, it is not unusual for a complainant and a member of the service to provide vastly different accounts of what occurred and for the presence or absence of an audio or video recording to determine whether the allegation can be substantiated. We therefore assume, as should the Department, that when police officers deliberately fail to record their activities, serious misconduct is afoot. The starting point for this penalty should be 30 penalty days plus dismissal probation. If a given case presents significant mitigating factors, an appropriate downward adjustment can be made. (*See* Commission Letter dated August 31, 2020, App. B at p. 22).

Command Disciplines

- Wrongdoing such as computer misuse, disseminating confidential information, failing to supervise, and misclassifying or failing to prepare complaint reports can currently be addressed by command discipline.¹⁶² Command discipline is not appropriate except in very limited circumstances, because corruption and other significant harm can result from these behaviors. The Department should ensure that this type of misconduct is closely examined. (*See* Commission Letter dated August 31, 2020, App. B at p. 23).

Going forward, the Commission will continue closely to monitor how the Department implements the guidelines and presumptive penalties set forth in the matrix. Among other issues, we intend to report on instances where the Department has departed from the principles set forth in the matrix, whether by not imposing discipline at all, by bringing less serious charges than can

¹⁶¹ New York City Police Department Disciplinary System Penalty Guidelines (January 15, 2021) at p. 44.

¹⁶² *Id.* at p. 53.

be readily proven to avoid applying a presumption of termination, by departing from the matrix without clear justification set forth by the Police Commissioner, or by using command disciplines in lieu of charges and specifications.

CONCLUSION

We are pleased to see improvements in many aspects of the NYPD's disciplinary system, but important work remains to be done. The recent appointment of a new Police Commissioner provides an excellent opportunity for the Department to continue to improve police accountability and transparency in discipline, and we look forward to a fruitful relationship with the new administration.

BIOGRAPHIES

Kathy Hirata Chin, Acting Chair

Kathy Hirata Chin is a Partner at Crowell & Moring LLP, where she is a member of the healthcare and litigation practice groups. Ms. Chin graduated from Princeton University and Columbia Law School, where she was Editor-in-Chief of the Journal of Transnational Law. She served as Commissioner on the NYC Planning Commission from 1995 to 2001 and has served on the Commission to Combat Police Corruption since 2003. She has been Acting Chair since 2019. She has served on the Federal Magistrate Judge Merit Selection Panel for the Eastern District of NY, former Governor Mario Cuomo’s Judicial Screening Committee for the First Department, the Gender Bias Committee of the Second Circuit Task Force, former Chief Judge Judith Kaye’s Commission to Promote Public Confidence in Judicial Elections, the Second Circuit Judicial Conference Planning and Program Committee, the Board of Directors of the NY County Lawyers Association, and the Board of Directors of NY Lawyers for the Public Interest, a non-profit that advocates for marginalized New Yorkers.

She currently serves on the Attorney Emeritus Advisory Council and the Commercial Division Advisory Council, appointed to both by former Chief Judge Jonathan Lippman of the New York State Court of Appeals, and as Co-Chair of the Board of Directors of the Medicare Rights Center, a national nonprofit organization dedicated to helping older adults and people with disabilities get affordable health care. In 2012, 2014, and in 2021 she was nominated for appointment to the New York State Court of Appeals by the New York State Commission on Judicial Nomination. Since 2016, she has been a member of the Second Circuit Judicial Council Committee on Civic Education & Public Engagement and of former Governor Andrew Cuomo’s Judicial Screening Committee for the First Department. In February 2018, Columbia APALSA honored Ms. Chin with its inaugural Hong Yen Chen award and the Asian American Bar Association of New York honored her with its Women’s Leadership Award. In 2021 she became a member of the Board of the New York City Bar Association and of EmblemHealth, one of the nation’s largest not-for-profit health insurers.

Clifton Stanley Diaz, Commissioner

Clifton Stanley Diaz presently works with the NYPD as a Community Partner and currently serves as the Chairman of the Rochdale Village Board as well as the Chairman of their Public Safety Committee. He is a member of the Queens Community Board 12, and Chairman of their Public Safety Committee; a board member of the Queen District Attorney’s Advisory Council; a board member of the Queens Defenders; and he also serves as a Queens Judicial Delegate. He recently participated with Mayor De Blasio in implementing the new NYPD Customer Service Program which has a civilian greet a person when they enter any police station to file a complaint or seek information. He previously served as a Law Enforcement Officer with the United States Air Force Security Police where he worked in the area of crime prevention and community relations. He also had the additional duty of serving as a United States Federal Court Liaison. Upon his discharge from the military, Mr. Diaz worked as an Internal Affairs investigator with the New York City Department of Transportation, which now falls under the jurisdiction of the New York City Police Department. He later served as an Assistant Director of

Public Safety at Queens College (CUNY), and as a Police Detective with the United States Department of Veterans Affairs. In 1988, Mr. Diaz was responsible for successfully reintroducing a failed Community Board 12 motion to have the street in front of the 103rd Precinct named after Police Officer Edward R. Byrne – who was protecting the home of a witness in a narcotics case and was shot and killed while sitting in a marked patrol car. Mr. Diaz was later appointed to work with the Mayor’s Southeast Queens Anti-Drug Task Force Coalition. Mr. Diaz is a graduate with honors from the New York City College of Technology (CUNY), attended the City College of New York (CUNY) and graduated from the National Crime Prevention Institute. Mr. Diaz has received a joint City Council Proclamation from all three southeast Queens area City Council Members: Donovan Richards – now Queens Borough President, I. Deneek Miller, and Adrienne E. Adams – now Speaker of the City Council for his outstanding work in Public Safety and he was recently inducted into the New York State Senates “Hall of Fame.”

Deborah E. Landis, Commissioner

Deborah E. Landis is a consultant who provides investigative assistance and litigation support to other attorneys. She focuses primarily on white-collar criminal and regulatory matters. Ms. Landis served as an Assistant United States Attorney for the Southern District of New York for more than twenty years, investigating and prosecuting cases involving police corruption, perjury, narcotics trafficking, racketeering, money-laundering, tax fraud, and other fraud on the government. As Chief of the General Crimes Unit and as Senior Litigation Counsel, she also had responsibility for supervising and teaching other prosecutors. During 2000, Ms. Landis served the Department of Justice (DOJ) in Washington, D.C., acting as an Associate Deputy Attorney General and as DOJ's Special Counsel for Health Care Fraud. Ms. Landis received many awards for her work as a prosecutor, including the Henry L. Stimson Medal for Outstanding Contributions to the Office of the United States Attorney, which was awarded by the Association of the Bar of the City of New York (1999), and the Attorney General's John Marshall Award for Trial of Litigation (2000). Ms. Landis also taught Trial Advocacy at the Harvard Law School for many years. Ms. Landis earned her JD from the University of Wisconsin Law School.

Freya Rigterink, Commissioner

Freya Rigterink is the Chief Operating Officer and Director of Public Safety Partnerships at the Policing Project at NYU School of Law. She has a background in municipal government and oversight. Previously, Ms. Rigterink served as Chief of Staff to the First Deputy Mayor for New York City, where she focused on public safety and the City’s pandemic response, among other areas. Prior to that, she served the Senior Advisor for Criminal Justice to the First Deputy Mayor, overseeing the City's plan to close the jails on Rikers Island and other initiatives to build a smaller, safer, and fairer justice system. Before joining the New York City Mayor's Office, Ms. Rigterink worked as an Assistant Inspector General for the City of Chicago Office of the Inspector General, where she focused on investigations, agency performance, and police accountability. Earlier in her career, she co-founded a start-up that works to expand educational and engagement opportunities for incarcerated people. Prior to that, she held a variety of policy and legislative roles at the New York City Council and she is also a member of the New York City Board of Correction. Ms. Rigterink holds a BA from Wesleyan University and a JD from Northwestern University.

James D. Zirin, Commissioner

James D. Zirin has been a trial lawyer for over 40 years, handling a wide variety of white-collar criminal and complex commercial litigation. Mr. Zirin is a former Assistant United States Attorney for the Southern District of New York. He is also a fellow of the American College of Trial Lawyers, a past trustee of New York Law School, a past member of the advisory board of the Woodrow Wilson School of Public and International Affairs at Princeton University, a former director and member of the executive committee of the Legal Aid Society, a member of the Council on Foreign Relations, and a past vice president and trustee of the Federal Bar Council. Mr. Zirin is the host of the critically acclaimed cable TV talk show “Conversations with Jim Zirin” and author of three best-selling books: “The Mother Court—Tales of Cases That Mattered in America’s Greatest Trial Court,” “Supremely Partisan—How Raw Politics Tips the Scales in the United States Supreme Court,” and his current book “Plaintiff in Chief—A Portrait of Donald Trump in 3500 Lawsuits.”

Marnie L. Blit, Executive Director

Marnie L. Blit is the Executive Director of the City of New York Commission to Combat Police Corruption. In this role, she oversees a staff of six attorneys and an office manager who oversee the New York City Police Department’s investigations and policies to deter, detect, and discipline corruption and serious misconduct. Ms. Blit started her employment with the Commission as an Examining Attorney in 2001 and was promoted to Deputy Executive Director in 2004. She was named Executive Director in 2007. During Ms. Blit’s employment with the Commission to Combat Police Corruption, it has published 14 Annual Reports and 10 independent studies. Prior to joining the Commission, Ms. Blit was employed for five years by the Juvenile Rights Division of the Legal Aid Society. In this position, Ms. Blit represented children in child protective, Persons in Need of Supervision, and juvenile delinquency proceedings. Ms. Blit also volunteered as a small claims court arbitrator for five years. Prior to that pro bono work, Ms. Blit volunteered at the New York County Lawyers Association’s Legal Counseling Project for one year. Ms. Blit earned her J.D. from Columbia Law School.

COMMISSION STAFF

Murad Agi, Examining Attorney
Christina Arno, Examining Attorney
Katherine Barrett, Examining Attorney
Tamela Gaither, Examining Attorney
Agnes Kusmierska, Examining Attorney
Uyen Tang, Examining Attorney
Cristina Stuto, Office Manager

APPENDIX A

EXECUTIVE ORDER



THE CITY OF NEW YORK
OFFICE OF THE MAYOR
NEW YORK, N.Y. 10007

EXECUTIVE ORDER NO. 18

February 27, 1995

ESTABLISHMENT OF COMMISSION
TO COMBAT POLICE CORRUPTION

WHEREAS, an honest and effective police force is essential to the public health, safety and welfare; and

WHEREAS, the Commission to Investigate Allegations of Police Corruption and the Anti-Corruption Procedures of the Police Department, chaired by Milton Mollen, (the "Mollen Commission") has recently concluded an investigation of the nature, extent and causes of police corruption today; and

WHEREAS, the Mollen Commission's Report finds that the vast majority of New York City police officers are honest and hard-working, and serve the City with skill and dedication every day, and that the current leadership of the Police Department has a firm commitment to fighting police corruption among those few officers who betray the public trust and tarnish the Police Department in the eyes of the public; and

WHEREAS, the Mollen Commission determined that the primary responsibility for combatting corruption in the Police Department rests with the Police

Department, and that the Police Department must be the first line of defense against police corruption;

WHEREAS, the Mollen Commission has recommended the establishment of an independent monitor, in the form of a Police Commission, to monitor and evaluate Police Department anti-corruption measures and to ensure that the Police Department remains vigilant in combatting corruption; and

WHEREAS, such a Police Commission provides the public with assurance that the Police Department is implementing and maintaining an effective anti-corruption program; and

WHEREAS, the Mayor and the Police Commissioner are accountable for combatting police corruption; and

WHEREAS, the establishment of a Police Commission can assist the Mayor and Police Commissioner in assessing the effectiveness of the Police Department's implementation and maintenance of anti-corruption efforts; and

WHEREAS, the District Attorneys, the United States Attorneys, and other government departments and agencies have committed resources and personnel to the investigation and prosecution of police corruption, and it is desirable that a Police Commission not supplant such investigative efforts;

NOW, THEREFORE, by the power vested in me as Mayor of the City of New York, it hereby is ordered:

Section 1. Establishment Of Commission.

a. There hereby is established a Police Commission (the "Commission") which shall consist of five members appointed by the Mayor, who shall be residents of the City of New York or shall maintain a place of business in the City of New York. Each of the members shall serve without compensation. The Commission shall include among its members persons having law enforcement experience. The Mayor shall appoint the Chairperson from among the members. -

b. Of the members first appointed, the Chairperson shall be appointed for a term ending December 31, 1998; two of the members shall be appointed for terms ending December 31, 1997; and two of the members shall be appointed for terms ending December 31, 1996. Upon the expiration of such initial terms, all members shall be appointed for a term of four years. Vacancies occurring otherwise than by expiration of a term shall be filled for the unexpired term.

c. Each member shall continue to serve until the appointment of his successor.

d. Any member shall be removable for cause by the Mayor, upon charges and after a hearing.

Section 2. Duties.

a. Monitoring the Performance of Anti-Corruption Systems. The Commission shall perform audits, studies and analyses to assess the quality of the Police Department's systems for combatting corruption, including but not limited to audits, studies

and analyses regarding the following:

(i) the Police Department's development and implementation of anti-corruption policies and procedures;

(ii) the effectiveness of the Police Department's systems and methods for gathering intelligence on corrupt activities and investigating allegations of corruption;

(iii) the effectiveness of the Police Department's implementation of a system of command accountability, supervision and training for corruption matters;

(iv) the effectiveness of the procedures used by the Police Department to involve all members of the Department in combatting corruption; and

(v) such other policies and procedures, without limitation, of the Police Department relating to corruption controls as the Commission deems appropriate.

b. Monitoring Agency Conditions. The Commission shall perform audits, studies and analyses of conditions and attitudes within the Police Department that may tolerate, nurture or perpetuate corruption, and shall evaluate the effectiveness of Police Department policies and procedures to combat such conditions and attitudes. In the performance of this function, the Commission shall maintain liaison with community groups and precinct councils and shall consult with law enforcement agencies of federal, state and local government and others, as appropriate, to provide the Police Department with input about their perception of police corruption and the Department's efforts to combat police corruption.

c. **Corruption Complaints from the Public.** The Commission shall be authorized to accept complaints or other information from any source regarding specific allegations of police corruption and, subject to the provisions of Section 4, shall refer such complaints or other information to the Police Department and such other agency as the Commission determines is appropriate, for investigation and/or prosecution. The Commission may monitor the investigation of any such complaints referred to the Police Department to the extent the Commission deems appropriate in order to perform its duties as set forth herein.

Section 3. Investigations.

a. The Police Commissioner shall ensure and mandate the full cooperation of all members of the Police Department with the Commission in the performance of audits, studies or analyses undertaken pursuant to this Order, and shall provide that interference with or obstruction of the Commission's functions shall constitute cause for removal from office or other employment, or for other appropriate penalty. The Police Department also shall provide to the Commission upon request any and all documents, records, reports, files or other information relating to any matter within the jurisdiction of the Commission, except such documents as cannot be so disclosed according to law.

b. The Police Department remains responsible for conducting investigations of specific allegations of corruption made against Police Department personnel, and the Commission shall not investigate such matters except where the

Commission and the Commissioner of the City Department of Investigation (the "DOI"), with the approval of the Mayor, determine that exceptional circumstances exist in which the assessment of the Police Department's anti-corruption systems requires the investigation of an underlying allegation of corruption made against Police Department personnel.

c. The Commission, in cooperation with the DOI, shall take all reasonable measures to ensure that any hearings or investigations held pursuant to this Executive Order do not inappropriately interfere with ongoing law enforcement matters being undertaken by other law enforcement agencies.

d. Any hearings or investigations undertaken by the Commission may include the issuance of subpoenas by the DOI in accordance with the DOI's powers under Chapter 34 of the New York City Charter, to the extent that the Commission and the DOI Commissioner jointly determine is appropriate.

Section 4. Reporting to the Police Department.

a. The Commission shall promptly notify the Police Commissioner of all allegations of corrupt police activity or other police misconduct and of any investigations undertaken pursuant to this Order. The Commission also shall make regular reports to the Police Commissioner regarding its activities, including the progress of audits, studies and analyses prepared pursuant to this Order.

b. The Commission may exclude a matter from the notifications and reports required by this Section and Section 2(c) only where the Commission and the DOI Commissioner, with the approval of the Mayor, determine either that the matter concerns

the activities of the Police Commissioner or would create an appearance of impropriety, and that reporting on the matter would impair the Commission's ability to perform its duties under this Order.

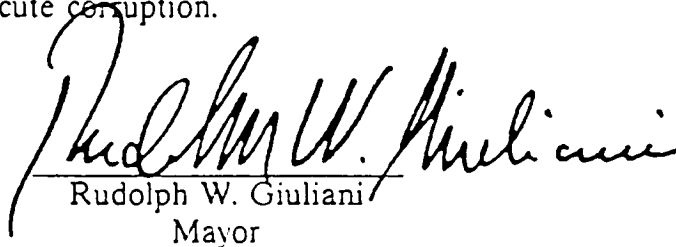
Section 5. Reporting to the Mayor.

a. The Commission shall report to the Mayor as to all its activities, without limitation, at such times as the Mayor may request, and as otherwise may be required by this Order.

b. The Commission shall provide the Mayor no later than each anniversary of the Commission's establishment an annual report which shall contain a thorough evaluation of the effectiveness of the Police Department's systems for preventing, detecting and investigating corruption, and the effectiveness of the Police Department's efforts to change any Department conditions and attitudes which may tolerate, nurture or perpetuate corruption, including any recommendations for modifications in the Police Department's systems for combatting corruption. The annual report further shall contain any recommendations for modifications to the duties or the jurisdiction of the Commission as set forth in this Executive Order to enable the Commission to most effectively fulfill its mandate to ensure that the Police Department implements and maintains effective anti-corruption programs.

Section 6. Staff. The Commission shall employ an Executive Director and other appropriate staff sufficient to organize and direct the audits, studies and analyses set forth in Section 2 of this Order from appropriations made available therefor. The Commission from time to time may supplement its staff with personnel of the DOI, including investigatory personnel as may be necessary, to the extent that the Commission and the DOI Commissioner determine is appropriate.

Section 7. Construction With Other Laws. Nothing in this Order shall be construed to limit or interfere with the existing powers and duties of the Police Department, the DOI, the District Attorneys, the United States Attorneys for the Southern and Eastern Districts of New York, or of any other department or agency of federal, state or city government to investigate and prosecute corruption.


Rudolph W. Giuliani
Mayor

APPENDIX B

AUGUST 31, 2020 LETTER TO THE DEPARTMENT



THE CITY OF NEW YORK
COMMISSION TO COMBAT POLICE CORRUPTION
17 Battery Place • New York, NY 10004
(212) 806-5370 • Fax (212) 487-7361

Commissioners
Kathy Hirata Chin, Acting Chair
Deborah E. Landis
James D. Zirin

Marnie L. Blit
Executive Director

August 31, 2020

Chief Matthew Pontillo
New York City Police Department
One Police Plaza
New York, NY 10038

Dear Chief Pontillo:

We congratulate the NYPD on the creation of the Disciplinary System Penalty Guidelines (“Guidelines”), and thank you for the opportunity to review this draft and provide some initial comments prior to publication for public comment. Having studied the disciplinary system for many years, we are very much aware of its complexity and the difficulties associated with creating a coherent and useful summary. We appreciate the effort that went into creating this draft, and hope that our comments will be helpful.

As you will see, this letter provides suggestions keyed to different sections of the Guidelines, generally in the order in which those sections appear in the Guidelines. Part A of our letter is a slight exception, as we have included here some general observations that touch on points from different parts of the Guidelines and that suggest some re-ordering of the draft document.

As noted above, we consider these our initial comments, and hope to provide further input in the weeks ahead. If it would be of assistance to discuss our comments, we would be pleased to meet in person or by telephone.

A. Introduction and General Principles

1. The Introduction section would be stronger if additional explanation were provided for creation of the disciplinary matrix. This would include a statement that the matrix has been in development since, and based on, recommendations of the Independent Panel, and that the matrix will

not only increase transparency, and thereby increase the accountability of members of the service to the Department, but will also increase the Department's accountability to the public.

2. When discussing increased transparency, it would be helpful to state at the outset, instead of (or in addition to) the statement on page 6, that any deviation from the presumptive penalties by the Police Commissioner will be accompanied by a written explanation for that deviation, as recommended by the Independent Panel. Given that the Introduction discusses the Police Commissioner as the final arbiter of discipline, it is important to stress that decisions to deviate from the matrix are expected to be limited and justified. Failing to memorialize the Commissioner's reasoning could negate the entire purpose of the matrix, as deviations could ultimately be made in many, if not most, disciplinary cases.

3. We believe that the very important principle set forth in footnote 17 – that where prior precedent conflicts with the penalties set forth in the matrix, that precedent will not be controlling – should appear in the text of the Introduction.

4. To be effective, discipline must be prompt. This should be recognized in the Introduction. The discussion captioned "Goals of the Disciplinary System" should also mention the important goal of resolving disciplinary matters promptly and efficiently. Discipline meted out years after an incident is neither effective nor appropriate.

5. Most if not all of the terms defined on pages 12 and 13 of the Guidelines are used repeatedly in the pages that precede the definition section. To make the first 11 pages clearer from the outset, we therefore recommend that the definition section be moved forward. It could, for example, conveniently be placed after "Goals of the Discipline System" and before "The Investigative Process."

6. The draft at times refers to "members of the service" or "members," and at other times refers to "respondents." For the sake of clarity, we recommend consistency. "Members of the service" can conveniently be abbreviated "MOS" with an appropriate explanatory footnote. "Respondents" presumably refers to individuals against whom disciplinary charges have been filed, but using that term requires distinguishing between those who have been charged and those who have not. In our comments below we use "MOS" to refer to a single member of the service, and "MOSs" to refer to multiple members.

B. Investigation Process and Charging Process

1. The discussion captioned "The Investigative Process" on pages 2-4 currently covers not only that process, but the charging process as well. We believe the charging process – which is critical to furthering the goals of the disciplinary system – should be broken out under a separate heading captioned "The Charging Process," and should be expanded. This section should specify that DAO will file formal charges whenever there is sufficient evidence to prove the misconduct at issue. Such a statement is necessary to ensure that the presumptive penalties set forth in the matrix are not and cannot be circumvented by the filing of charges that purposely fail to capture the most serious applicable penalties. In addition, consistent with other sections of the Guidelines (including the discussion of penalty calculation on page 9, which deals with situations where a single instance of

misconduct results in the filing of multiple specifications), this section should state that where specific acts constitute multiple violations of the Patrol Guide or other applicable provisions, all such violations will be charged.

2. On page 3, along with footnote 5, there is a discussion about pre-trial suspensions and the fact that a MOS can be suspended without pay for a period of up to 30 days. It would be helpful to the public's understanding to add that in cases of criminal allegations or other serious allegations of misconduct, a MOS can also be suspended with pay during the pendency of the investigation and disciplinary process.

3. The last four lines of the section captioned "The Investigative Process" actually address the resolution of charges through negotiated settlements. Accordingly, that section should be moved under the heading "Resolution of Disciplinary Charges," and should replace the second sentence of that section, which currently says essentially the same thing.

4. In connection with negotiated settlements, we recommend the addition of language along the following lines: "Settlement agreements properly take into account such matters as the availability of witnesses and other evidence, the strength of the available proof, and the viability of available defenses. However, in negotiating settlements, the Department will not bargain away readily provable misconduct simply to dispose of a matter promptly, to allow for a more lenient penalty than would be called for under these Guidelines, or to achieve any other result that serves to undermine the goals and purposes of these Guidelines."

C. General Penalty Guidelines

1. We note that in various sections of the matrix, the presumptive penalties specifically take into account such factors as whether misconduct caused physical injury. Therefore, with respect to the potential mitigating and aggravating factors identified on page 7, it would be useful to include in the introductory paragraph a statement that these mitigating and aggravating factors will be considered where they are not otherwise specifically accounted for by the matrix.

2. We have several comments and recommendations with respect to the list of "Potential Mitigating Factors" and "Potential Aggravating Factors" on page 7.

a. Some of the factors identified as potential mitigating and aggravating factors are included on both lists in precisely the same language. To focus more clearly on why a given factor either mitigates or aggravates misconduct, and to explain what removes a given fact pattern from the typical case, it would be useful to provide more specific language. For example, you could change "The knowledge, training and experience [of the respondent]" to "Lack of relevant knowledge, training and experience" on the list of potential mitigating factors, and change the same language to "Presence of specialized knowledge, training and experience [of the respondent]" on the list of potential mitigating factors. Similarly, with respect to a subject's veracity and cooperation with an investigation, it would be useful to differentiate between the mitigating and the aggravating factors, for example by changing the aggravating factor to "The respondent's lack of veracity and/or lack of cooperation with the

investigation.” The impact of the violation on the Department’s mission could be changed to “Minor impact or no impact upon the Department and its mission” on the mitigating factors list, and to “Significant impact on the Department and its mission” on the aggravating factors list.

b. Some of the mitigating or aggravating factors would seem to belong on both lists, yet appear only on one or the other. For example, the role of the respondent in the particular event would seem to be relevant to both lists rather than just the aggravating factor list; one individual might have a particularly significant (aggravating) role, while another might play a very minor (mitigating) role.

c. With respect to “Potential Mitigating Factors,” the Commission believes that while an accomplished employment history may be a mitigating factor with respect to a variety of non-egregious violations, an officer’s favorable performance history should not be taken into account in considering certain types of serious misconduct, including (as just a few examples) receiving or soliciting a bribe, flaking, committing perjury, and making a deliberate false statement in an official Department interview. The same is true of a MOS’s lack of prior disciplinary history, as some misconduct is so egregious that prior history simply cannot mitigate the wrongdoing. As a general matter, any misconduct so serious that the matrix calls for termination or separation should not be subject to a lesser penalty based on a favorable performance history and/or lack of disciplinary history. To allow deviations from the matrix on either or both grounds would significantly undermine the objectives of this framework. This principle should specifically be set forth.

d. The Commission believes that in addition to accounting for the nature and extent of any actual injury or endangerment to a MOS or civilian caused by misconduct, the list should account for the *potential* for such injury or endangerment inherent in the misconduct. In our view, where deliberate conduct could easily have resulted in serious injury, this should be viewed as an aggravating circumstance even if the MOS “got lucky” and the actual injury was not as bad as it could have been. For example, if an officer discloses confidential information about an informant that leads to that informant’s being harmed, that would clearly be an aggravating factor. If a second officer discloses confidential information that would foreseeably lead to an informant’s harm, but due to intervening events or circumstances beyond that officer’s control the harm is averted, that officer should not end up in a substantially better position than the first officer. While we do not suggest that there should be no difference in the penalties imposed in this example, we view creating the *risk* of injury as an additional aggravating factor.

e. Interference by a MOS in a law enforcement investigation into another individual should be an aggravating factor.

f. If a MOS recruits others to participate in misconduct, or to aid in hindering the discovery or investigation of misconduct, that should be an aggravating factor.

g. It is not clear why or how “the result of a criminal action or proceeding relating to the underlying conduct” would aggravate the penalty in a particular case. It would therefore be helpful to clarify the circumstances under which such a result might enhance an otherwise applicable penalty.

3. The Prior Disciplinary History section (page 8) provides that the imposition of a prior penalty of 20 days or more generally will not be an aggravating factor if that penalty was adjudicated more than 10 years earlier, and the imposition of a prior penalty of less than 20 days (or dismissal probation) generally will not be an aggravating factor if adjudicated more than 5 years earlier.¹ We object to this presumption for a number of reasons.

As an initial matter, we question whether **any** prior disciplinary action should presumptively be disregarded in the consideration of a penalty for subsequent misconduct. We note that at page 6, the draft Guidelines state that “[a]ll disciplinary matters must be evaluated on a case-by-case basis, *considering all relevant factors.*” In addition, the list of aggravating factors set forth on page 7 refers to “[a]ny *negative employment history.*” In our view, a prior disciplinary history, *however old*, is presumptively relevant; it should be the highly unusual case, rather than the majority of cases, in which prior disciplinary action (particularly for misconduct serious enough to warrant 20 or more penalty days or dismissal probation) could reasonably be deemed “irrelevant.” The relevance of prior misconduct is particularly obvious where an individual engages in the same or similar misconduct (say, for example, using excessive force) a second or even a third time, even if such incidents were separated by many years. Yet the presumption set forth here takes no account of that scenario.²

Where a prior disciplinary penalty falls outside the time period indicated in this section, the proposed presumption also takes no account of:

- Whether the prior disciplinary penalty was imposed for a single brief incident of misconduct, or for a long-standing pattern of misbehavior (such as, for example, improperly accessing confidential information over a period of years);
- Whether the prior discipline results from multiple separate or overlapping incidents of misconduct that, for the sake of expediency or for other reasons, were resolved jointly under a single penalty;
- Whether, because of proof issues such as an unavailable or uncooperative witness or victim (not uncommon in our experience), or because of Departmental resource issues, the prior penalty was the result of a settlement that was highly favorable to the MOS. In such situations, this presumption reinforces that unearned benefit rather than compensating for it;

¹ The text of this section appears to contain a typo. It refers to “the imposition of 20 or more penalty days *and or* dismissal probation ...” It is unclear whether this should say “and/or” or simply “or.” In addition, we note that dismissal probation is occasionally (but not typically) capitalized (*see, e.g.*, the top of page 11).

² The presumptive relevance of any prior disciplinary history is evidenced by the Police Commissioner’s IAB briefings, in which each presentation begins with a recitation of the subject’s entire disciplinary history, and sometimes even includes misconduct committed before the subject joined the Department. It would be strange, indeed, if such presentations were limited to discipline imposed during the prior 5 years, or even the prior 10 years, as such truncated presentations would beg the obvious question: “Has she ever done anything like this before?”

- Whether an individual’s prior disciplinary history (however old), taken together with the new instance of misconduct, would suggest that dismissal probation is appropriate;
- Whether a new instance of misconduct represents a continuation of prior misconduct or even an *escalation* in the seriousness of misconduct (in other words, where it is clear that the prior discipline did not serve its intended deterrent purpose);
- Changes over time in the Department’s view of the seriousness of given conduct, or an increased need to deter particular types of conduct. Because this presumption incorporates the impact of penalties imposed 5 years, 10 years, or even 15 years before the current misconduct, it essentially carries forward any such outdated views, and may result in a penalty that is significantly less severe than warranted for the current misconduct.
- Other prior inadequacies or inefficiencies in the disciplinary system that may previously have resulted in unwarranted leniency in a given case or type of case. In such instances, this presumption also carries forward those inadequacies and inefficiencies.

This is not to say, of course, that all prior misconduct, regardless of how minor or distant in time, should always result in an enhanced penalty for subsequent misconduct. The Department might reasonably decide – based on the specific facts presented in a given case – that a particular individual’s prior misconduct should not result in any enhancement of the otherwise applicable penalty. But such a consideration should *only* be made on a case-by-case basis, and not on the presumptive basis proposed here.

We recognize that this is a presumption rather than a hard-and-fast rule. Nevertheless, it would create powerful expectations among members of the service and their attorneys, as well as an implicit burden on the Department. By employing such a presumption, the Department would needlessly take upon itself some obligation (at least internally) to justify a departure from the presumption in any given case, however egregious the misconduct. In our view, responsibility properly falls on the MOS to persuade the Department that his or her prior discipline should be disregarded in determining the penalty in a second, third or even fourth disciplinary matter.

Rather than engage in the proposed presumption, it makes far more sense for the Department to modify the list of aggravating factors to refer to “any *relevant* negative employment history.” This would permit the Department, in unusual cases, to disregard prior misconduct which, under all the circumstances, seems too minor, too distant in time, or otherwise too lacking in relevance to warrant any enhancement of the current penalty.

Even if some proposed presumption were appropriate – and for the reasons above it is not – we would view the proposed 20-penalty-day threshold as too high, and the 5- and 10-year periods to be too short. Based on the disciplinary cases we have reviewed over many years, a 20-day threshold could readily result in highly relevant and serious misconduct being discounted entirely. In addition, as noted above, this section covers prior disciplinary “matters” (plural), and thus would seem to apply even if an individual has had multiple prior cases resulting in serious discipline. We intend to examine this issue carefully in light of past cases, and will provide additional comments, including examples, shortly.

4. We have several comments regarding the “Calculation of Penalties” discussion on page 9:

a. This section implies, but does not state, that where a respondent has committed multiple violations and where multiple specifications *are not* based upon the same underlying act, penalties will be aggregated, or calculated consecutively. This should specifically be stated.

b. This section is confusing with respect to the circumstances in which the same conduct constitutes two different violations. The text refers initially to each “act of misconduct,” but later refers to a “course of conduct.” The confusion arises because a “course of conduct” could be extensive, and could include within it numerous different “acts of misconduct.” In the DWI example provided, as the Guidelines expressly recognize, the very same act “necessarily” violates two different prohibitions. In that case, it makes sense to run the penalties for both violations “concurrently” because to do otherwise would necessarily amount to double-counting. We do not believe the same analysis would apply, however, if in addition to DWI, the officer refused to take a Breathalyzer test; that refusal might be part of the same “course of conduct,” but is not the same “act of misconduct” as the DWI. Nor would any additional penalty for the Breathalyzer refusal amount to double-counting. To clear up this confusion, and to ensure that each incremental violation is properly penalized, we recommend that you retain this example, delete the reference to “course of conduct,” and clarify that where the same act of misconduct “necessarily” constitutes a violation of two prohibitions, the penalty will not be enhanced on the basis of the second violation if such an enhancement would result in double-counting for precisely the same conduct.

c. The draft Guidelines provide that in calculating the penalties for multiple violations, if the total number of penalty days is greater than 90 days, the presumed penalty shall be termination or forced separation. Based on our review of the matrix, we believe the presumption should be triggered before the total exceeds 90 days.

A plausible domestic violence example makes the point:

An off-duty officer appears at the apartment of his estranged wife. He is angry (but not drunk), having heard that she has a new boyfriend. She tells him to leave but he refuses. He shoves the front door open and when she tries to leave, he pulls her inside and restrains her, telling her she isn’t going anywhere. She tries to call 911 but he grabs her phone to prevent her from calling. He threatens that if he catches her with another man, he’ll kill them both. He pulls out a hunting knife and tells her that this is how she will die. Fortunately, a neighbor who has heard the commotion appears and reports that the police have been called. This prompts the officer to leave, but not before telling her that he will return when she least expects it, and that she should remember his warning.

According to the matrix, this officer appears to have committed a physical act of domestic violence by using physical force against his wife.³ Accordingly, the matrix (on page 27) calls for an initial

³ We assume this use of force would constitute “a physical act of domestic violence,” but as mentioned below in the discussion of the Domestic Violence provisions, we are not aware of any definition of that phrase. We believe

presumptive penalty of 30 days.⁴ The specific enhancements listed on pages 27-28 do not apply, but the following aggravating factors listed on pages 29-30 do apply: The officer entered and remained in the wife's home without permission (+10 days), prevented her from leaving (+10 days), prevented her from calling 911 (+15 days), threatened her (+10 days), used a weapon other than a firearm (+10 days), and left the scene (+5 days). The total number of points *equals but does not exceed 90*. Thus, this hypothetical officer, whose behavior in our view surely warrants his termination, would appear not to qualify for that presumption. This example suggests that the "exceeds 90 points" threshold is too high. It may also suggest that the enhancements for domestic violence are too low, and that both provisions should be adjusted.

5. The discussion of dismissal probation at the top of page 10 states that if there is further misconduct during the probation period, the Department "may" summarily dismiss the member of the service without a formal hearing[.]" We believe the word "may" suggests too much leeway, and that there should be a strong presumption of termination where a MOS on dismissal probation commits additional misconduct. As explained in the text of this Guidelines section, a MOS placed on dismissal probation *has already been terminated for serious misconduct*, and termination has been held in abeyance, presumably to give the officer an opportunity to demonstrate that he or she is capable of complying with the law, and with the Department's rules and regulations. Individuals who simply cannot conform their behavior to these requirements for even a single year are, in all likelihood, unfit for police work; they pose a serious risk to the Department as well as the public. While we recognize that some forms of misconduct committed by a MOS on dismissal probation may be so minor that they should not result in termination, a heavy burden should be placed on the MOS to overcome the presumption that termination is appropriate.

To give dismissal probation the deterrent impact it deserves and requires, we urge you to modify the last sentence of this paragraph as follows: "If there is further misconduct during the probationary period, regardless of the penalty that would be imposed on a MOS who is not on dismissal probation, the presumptive penalty is dismissal. The Department may summarily dismiss the member of the service without a formal hearing. If the presumption of termination is overcome, a MOS may be required to submit to an additional period of dismissal probation as a condition of remaining with the Department." This language provides the Department with appropriate leeway where new violations are genuinely viewed as minor, but sends the clear message that dismissal probation requires the strictest compliance with all legal and Departmental requirements.

6. Given our view that misconduct committed by an individual already on dismissal probation should presumptively result in termination, we do not believe it appropriate to use the same presumptive termination chart for both entry-level probationary officers and officers on dismissal probation. While the two groups do have one important factor in common – the Department's right to

such a definition is necessary. We note, however, that even if the officer in this example were not viewed as having used "a physical act of domestic violence," the matrix would still initially call for 30 days.

⁴ This would be in addition to dismissal probation.

terminate them summarily without any formal proceedings – they differ in important ways. New probationary officers presumably have little or no history of misconduct, while officers on dismissal probation not only have a prior record of misconduct, they have a record of misconduct serious enough to warrant their termination, and they have actually been terminated. To hold the two groups to the same standards does not make sense.

This is not to say that it should be more difficult for the Department to terminate new probationary officers than the chart on pages 10-11 provides. To the contrary, we encourage the Department to identify and terminate the bad apples as soon as possible. But individuals on dismissal probation should not be given as much leeway as this chart appears to provide them. Most of the misconduct identified on that chart can be characterized as serious if not criminal, and there should be no presumption that only serious new misconduct or criminal conduct will result in their termination.

In addition, the chart states (at the top of p. 11) that the presumption of termination applies to “any misconduct for which *separation or a minimum of 30 penalty days plus Dismissal Probation* is the presumed penalty for a tenured member of the service.” In effect, as applied to individuals currently on dismissal probation, this provision says that the presumption of termination will apply if that individual engages in conduct so serious that if they were not already on dismissal probation, they would either be terminated or placed on dismissal probation. That threshold is plainly far too high.

The inappropriateness of this threshold for individuals already on dismissal probation is readily revealed by a review of the matrix, because offenses serious enough to invoke “separation or a minimum of 30 penalty days plus Dismissal Probation” are quite serious indeed. These include, among others, improper use of deadly force; use of non-deadly force causing serious injury or death; chokehold violations; sexual touching or proposition/unwanted sexual advances; overt sexual touching of a colleague; predatory sexual behavior; deleting information from a recording device; impeding an investigation; committing a physical act of domestic violence; committing a non-physical act of domestic violence if aggravating circumstances are present; domestic violence that includes the threatened use of a firearm or other aggravating factors; DWI; firearm discharge causing injury; drug offenses; and fraudulently applying for public benefits (*i.e.*, fraud).

Offenses that do **not** invoke the requisite penalty include, among many others, improperly arresting a person; stopping and searching a vehicle in bad faith; and conducting an unauthorized strip search. If dismissal probation is to have the force and effect it requires, and is to be treated with the seriousness it deserves, then individuals on dismissal probation who commit violations such as these, as well as individuals who commit a wide variety of violations *far less serious than these*, should presumptively be terminated.

For all the reasons set forth above, we propose that the chart on pages 10-11 apply to entry-level probationary officers (with amendments suggested below), but not to officers on dismissal probation.

7. We have several concerns about the chart on pages 10-11 as applied to entry-level probationary officers:

a. For the reasons discussed above in relation to MOSs on dismissal probation, the provision referring to misconduct “for which separation or a minimum of 30 penalty days plus Dismissal Probation is the presumed penalty for a tenured member of the service” is equally inappropriate for entry-level probationary officers. We therefore recommend that it be eliminated.

b. With respect to criminal activity, the chart refers to misconduct “resulting in a Penal Law Charge for a Crime,” but does not cover uncharged criminal conduct. As the Department knows, prosecuting agencies decline to prosecute cases for a wide variety of reasons, particularly when police officers are involved. Where the conduct amounts to a crime, regardless of whether a charge has been filed, a presumption of termination should apply.

c. The reference to “Penal Law” could be construed as applying only to violations of state law, or only violations of New York State law. Violations of any law (including federal law and the criminal laws of other jurisdictions) should also presumptively be grounds for termination.

d. The inclusion of Petit Larceny (a Class A misdemeanor) on this chart tends to imply that other misdemeanors are generally not grounds for termination, even though a number of others (for example, forcible sexual touching, stalking, and intentional and repeated harassment) would seem to warrant that penalty.

To remedy these concerns, we suggest removing both “Misconduct Resulting in a Penal Law Charge for a Crime” and “Petit Larceny,” and substituting “Conduct Constituting a Crime.”

8. With respect to the chart on page 11 titled “Misconduct resulting in demotion-member on promotion probation”:

a. The concerns discussed above also apply with respect to members on promotion probation.

b. It would be helpful to repeat on page 11 the statement appearing on page 10 that the listed factors would result in a demotion prior to any final disciplinary adjudication. Because the chart on page 11 follows a list of termination offenses for other probationary officers, and because the misconduct listed on the second chart largely duplicates the misconduct listed on the first chart, the second chart might be read to suggest that demotion would be the only penalty ultimately imposed for the misconduct, when in fact much of the misconduct listed would ultimately result in termination or forced separation.

c. Among the factors listed on page 11 is “Excessive misuse of time.” We are unaware of any definition or guide used to determine when misuse of time becomes “excessive.” If some objective measure is used, it would be helpful to make reference to it in a footnote. If there is no objective measure, it would be useful to devise a measure or to provide some clarifying definition to help ensure that this factor is evenhandedly applied.

9. We have two comments concerning the section captioned “Effect of Precedent” (page 12):

a. As indicated above, we view the statements in footnote 17 as critically important. In certain respects, these Guidelines deliberately and significantly enhance the penalties that have

previously been imposed, and thus represent a clear departure from precedent. MOSs and their attorneys, as well as the staff of DAO and the Trial Commissioners, must all be placed on notice that in those circumstances, reliance on prior precedent will be unavailing. The principle set forth in footnote 17 should therefore be moved into the text of this section, as well as being mentioned in the Introduction section of the Guidelines.

b. We understand that the results of settlement negotiations may not carry the same precedential value as the results of trials, but given the high percentage of cases that are resolved by settlement, it is important that these penalties carry some precedential value. Otherwise, each settlement could essentially be viewed as a wildcard – *i.e.*, as a means of circumventing or attempting to circumvent the framework carefully set forth in these Guidelines, and starting from scratch – which would only serve to undermine the Department’s objectives. We therefore recommend that the last sentence of this section be modified as follows: “Penalties resulting from settlement negotiations do not necessarily have the same weight of precedent as penalties imposed following trials, because factors such as expediency of resolution and the strength of evidence may affect the calculation and warrant a lesser penalty. However, negotiated settlements will be given precedential weight to the extent other cases involve such factors.”

10. Some additional explanation would be useful in the “Definitions” section:

a. Under “Penalty Days,” it would be helpful to elaborate on the difference between suspension days and vacation days, as the general public is not likely to appreciate the significant distinction.

b. Similarly, under “Dismissal or Forced Separation,” a footnote explaining terminal leave would be helpful, as members of the public may not be familiar with this term.

D. Specific Penalty Guidelines

1. Improper Use of Force

a. The presumptive penalties on page 17 for non-deadly physical force resulting in a physical injury, and especially those resulting in no injury, seem very low. We wonder whether these penalties should specifically take into account whether the non-deadly physical force was likely to cause injury, and also what the person against whom the force was used was doing when the force was used (*e.g.*, resisting or otherwise behaving aggressively versus not resisting or not behaving aggressively).

b. We agree with the imposition of termination as the presumptive penalty for failure to intervene in the improper use of deadly physical force resulting in serious physical injury or death (page 18).

c. We note that under “Failure to Intervene” (page 18), the 5-day presumptive penalty for failing to intervene in the use of non-deadly physical force that does not result in injury is the same as the penalty for actually using that force (page 17). In most of the other excessive force scenarios listed, the penalty for failure to intervene is less than the penalty for using the force, and we wonder whether this was an oversight, or whether 5 days is viewed as a minimum threshold.

d. On page 17, “Intentional Application of a Chokehold” carries a presumptive penalty of termination. However, below that, a chokehold resulting in physical injury or no injury does not carry a termination presumption. Logically, this is either an inconsistency that should be corrected, or the chokehold penalties that do not carry termination only apply in situations where the chokehold was not intentionally applied. If so, this should be clarified.

e. On page 19, the list of “Additional Potential Aggravating Factors” includes “Intentional use of prohibited force (e.g. chokehold).” This example does not make sense given that the intentional use of a chokehold already carries with it a presumptive penalty of termination (page 17). If we correctly understand the chokehold penalty framework, this factor or this example should be deleted. If our understanding is incorrect, the chokehold Guidelines must be clarified.

f. We recommend that the Guidelines make specific reference to Tasers, and indicate whether the use of Tasers is considered physical force or deadly physical force.

2. Abuse of Authority, Discourtesy, and Offensive Language

a. Sexual Misconduct (page 20)

(1) We understand these provisions to apply to interactions between MOSs and members of the public. For clarity, it might be helpful to indicate that in the introductory paragraph or a footnote, and to explain that improper sexual interactions with other members of the service are covered by the Equal Employment Opportunity provisions.

(2) The Sexual Misconduct provisions fail expressly to address engaging in, or attempting to engage in, sexual conduct or a sexual relationship with an arrestee, witness, complainant or victim. To ensure that all MOSs are on proper notice, these categories of victims should be addressed specifically, whether in the text or in a footnote.

(3) If sexual misconduct was initiated by a civilian, is the penalty the same? That scenario should be considered, at least in a footnote.

b. “Improper/Wrongful” Conduct (pages 20-22)

(1) Many of the acts described in this chart constitute intentional and serious violations of *constitutional* rights.⁵ These include intentionally stopping and questioning members of the public without proper basis (*i.e.*, in bad faith); intentionally stopping and searching a vehicle in bad faith; intentionally searching a person or seizing property in bad faith; conducting an unwarranted strip search; arresting a person without basis; and unlawfully entering and/or searching premises. The presumptive penalty for each of these acts is only 20 days. In our view, a penalty of 20 days does not appropriately reflect the seriousness of this misconduct. The inadequacy of this penalty is particularly glaring when considered in light of the 20-day penalty applied to “Offensive Language” (page 22). The harm done in these two scenarios cannot be compared; the penalties are not proportionate. Where

⁵ Footnote 40 specifically mentions the Fourth Amendment and makes reference to the obligation of MOSs to study this fundamental provision.

constitutional rights are intentionally violated, the number of penalty days should be increased, and a period of dismissal probation should be included.

(2) Given the importance of constitutional protections, if a MOS *knew or should have known* of a mistake of law or fact that led to a constitutional violation such as an illegal stop, search or seizure, a penalty of only three (3) days is not sufficient.

(3) With respect to an unlawful entry or the unlawful search of a premises, the Guidelines call for only 3 penalty days if the entry is incidental or *de minimis* (such as one foot over the threshold), 10 days if the entry involves “a substantial physical presence,” and 20 days if the entry is “prolonged or includes additional proscribed conduct.” (page 21). Unlike the other misconduct described in the same chart, these provisions draw no distinction between conduct constituting a knowing and intentional violation of constitutional rights (bad faith conduct) and conduct that is premised on a mistake. Officers who gain entry to premises in bad faith, *even if they intrude only a single foot over the threshold*, have committed a serious constitutional violation that should be severely punished.⁶ These penalties – particularly the 3-day penalty – are grossly inadequate.

(4) We see no reason for the significant distinction in penalties drawn on page 22 for deleting a recording (30 days + dismissal probation) and interfering with a recording device (20 days), and we believe the higher penalty is a more appropriate starting point. Similarly, we view the 20-day penalty set forth for “Purposeful Failure to Record a Prescribed Event with a Body Worn Camera” (page 37) as insufficient.

We assume that all three scenarios involve deliberate acts, as accidental acts would not be worthy of such penalties, and “Negligent Failure to Record a Prescribed Event with a Body Worn Camera” (page 37) carries only 3 penalty days. The only apparent purpose for such a deliberate act would be to prevent the initial recording or the subsequent discovery of misconduct, including misconduct of the most serious kind. As the Department is well aware, when an allegation of misconduct is made, it is not at all unusual for a complainant and a MOS to provide vastly different accounts, and for the presence or absence of an audio or video recording to determine whether the allegation can be substantiated. It goes without saying that even in the most serious cases – for example, where deadly physical force results in death or serious injury – video recordings often determine whether that conduct was justified.

There is no legitimate reason why a MOS would intentionally fail to record an event that should be recorded, or would interfere or tamper with an existing recording. We assume, and believe the penalty framework should also assume, that when that does take place, serious misconduct is afoot. The starting point for all of these penalties should therefore be 30 days plus dismissal probation. If a given case presents significant mitigating factors, an appropriate downward adjustment can be made.

3. False, Misleading and Inaccurate Statements

The CCPC has long taken a special interest in the Department’s handling of disciplinary

⁶ Such “*de minimis*” intrusions can permit officers to observe drugs, firearms, or other contraband “in plain view.” Unfortunately, it is not entirely unknown for officers who find themselves in that position to manufacture a legal basis for the initial intrusion.

cases in which MOSs have made false statements. Over the course of many years, our annual reports have, for example, been critical of DAO's failure to charge clear lies under the "False Statements" provision of the Patrol Guide, resorting instead to "Conduct Prejudicial," which carries no presumption of termination. We have also been critical of the Department's failure to impose the termination penalty upon MOSs who have been found to have lied, and the lack of any requirement that the Police Commissioner set forth the basis for a determination that the circumstances of a given case justified a penalty less severe than termination.

The recent revision of Patrol Guide §203-08 provided improvements and clarifications in certain areas. Among other things, §203-08 now makes clear that both false denials of recollection and inaccurate statements constitute misconduct. However, in other important respects, the revision of §203-08 failed to remedy existing problems, some of which we raised with the Department in writing (see CCPC memorandum to Deputy Commissioner Reznick dated May 15, 2019). As discussed below, the draft Guidelines carry many of those problems forward, and in certain other respects, actually appear to backtrack on issues we thought had been clarified. The Guidelines also contain some significant internal inconsistencies.

We set forth below a number of comments relating to this section. We are in the process of reviewing this section of the Guidelines in greater detail, and expect to have additional comments shortly.

a. The Penalty for a "Misleading" Statement: On page 23, in the introductory section, the last sentence of the first paragraph states that the penalty for officers who make *false or misleading* official statements will be presumed to be termination or forced separation absent a finding of extraordinary circumstances. However, on page 26, the chart indicates that the presumptive penalty for making a *misleading* official statement is 30 penalty days plus dismissal probation. This internal inconsistency must be corrected.

We assume the introductory statement is incorrect, and represents an oversight left from earlier versions of both §203-08 and the penalty guidelines, drafted when the Department considered imposing termination as the presumptive penalty for both false *and* misleading statements. That assumption informs several of the comments below. If it is incorrect, and the Department's current intention is to impose termination for both types of statements, those comments should be disregarded and the chart on page 26 should be corrected.

b. Scope: Both the "Purpose" statement of §203-08 and the first sentence of the Guidelines contain indications that the scope of these provisions is limited to statements made "during an official investigation." For numerous reasons, we believe these references were included in error. Among others, such a scope limitation would represent a radical and alarming departure from earlier versions of §203-08, from past practice, and from obvious public policy considerations. If limited in such a way, these provisions would not account for what the Guidelines themselves recognize in the first paragraph as "the wide variety of contexts and circumstances" in which "the justice system relies on members of the service to provide truthful and accurate information." Additionally, both §203-08 and

the Guidelines define a “false statement” to include any statement which is material to the outcome of *“an investigation, proceeding, or other matter in connection with which the statement is made.”* This language is quite broad. The “Additional Data” section of §203-08 also describes contexts other than official investigations; it states that the circumstances in which false and misleading statements arise include, but are not limited to, statements made under oath during criminal, civil, and administrative proceedings, and in Department and non-Department forms. Because the references to statements made “during an official investigation” do not appear to belong in either §203-08 or the Guidelines, they should be deleted from both documents.

c. “Official” Statements: Section 203-08 uses the phrase “official false statement” but does not define the term “official.” The Guidelines also use this phrase without defining it. As we explained in May 2019 when we submitted comments in response to an early draft of the revised policy, the phrase “official statement” could be construed as referring broadly to all statements made by MOSs in the course of carrying out their police-related duties, or it could be construed much more narrowly to refer only to those statements made in formal as opposed to informal settings. Under the latter interpretation, “official statements” might include false statements made under oath and false statements made during interrogations under P.G. §§206-13 and 211-14, but might *not* include, for example, false statements made to prosecutors in office settings, false statements made in response to questions posed by supervisors, or false entries made on property vouchers. While reference to “the wide variety of contexts and circumstances” in which “the justice system relies on members of the service to provide truthful and accurate information” logically favors a very broad interpretation, the specific examples set forth in the “Additional Data” section of §203-08 do not clarify this ambiguity because they include only statements made pursuant to statutory and procedural requirements, statements made under oath, statements made in sworn documents, and statements made during official Department interviews. Given the fundamental importance of §203-08 and these Guidelines, it is essential that all MOSs, their supervisors, their trainers, and every person involved in the Department’s disciplinary process understand the definition of an “official statement.”

As a matter of policy, we believe the term “official statement” should be construed broadly to cover all statements made in the course of police-related duties or responsibilities. If that is indeed the Department’s intention, that intention should be clarified, and could easily be clarified by replacing the phrase “during an official investigation” in the first line of the Guidelines with “while executing their official duties or responsibilities.” We recommend a similar change to the “Purpose” section of §203-08. In addition, we urge the Department to supplement the list of examples provided in the “Additional Data” section of § 203-08, and/or to supplement these Guidelines, to ensure that the full scope of this prohibition is adequately illustrated. This does not require an exhaustive list; it simply requires a list that, in addition to including statements made under oath and statements made during interrogations under §§206-13 and 211-14, includes examples of statements (oral and written) made in the context of the everyday performance of police duties. From our perspective, given the cases we review and the issues we see on a regular basis, the list of examples should include statements made to prosecutors in connection with search warrants, arrests and other criminal matters; statements made to judges

(regardless of whether under oath); and statements made in documents such as arrest reports, reports of witness interviews and property vouchers.⁷

d. Claimed Lack of Recollection: We are disappointed that in both the revised version of §203-08 and these Guidelines, the Department rejected our comments and recommendation with respect to claimed lack of recollection. Because we view the Department's position as both logically flawed and inappropriately lenient, we restate and elaborate briefly on those views here, in hopes that the matter might be revisited.

It is apparent to us that investigations into official misconduct have long been plagued by the stubborn persistence and sheer volume of MOSs who, often quite incredibly, claim not to recall relevant information when questioned. This approach has hindered or delayed many an investigation. Moreover, it is apparent that claiming lack of recollection to avoid answering difficult questions is by no means a spontaneous approach, but has long been a clear strategy, adopted in the apparent belief that there is little if anything the Department can or will do in response.

We appreciate that the Department has now made plain that a claimed lack of recollection, if not credible under all the circumstances, can and will be punished. We also appreciate that the penalty for a false denial of recollection (30 days + dismissal probation, assuming the chart on page 26 is correct) is significant. This is a step in the right direction, as officers who might otherwise have been inclined to lie to cover up relatively minor misconduct (*i.e.*, conduct carrying a less severe penalty than falsely denying recollection) presumably now have some incentive to tell the truth. But it does not go far enough. In fact, by defining an incredible claim of failed recollection as a "misleading" statement rather than a "false" statement (a statement that, if proven, would carry a presumption of termination), the Department has, in essence, *formalized* what was previously an informal incentive to claim lack of recollection. At this point, officers seeking to avoid answering incriminating questions about very serious misconduct have a specific incentive to claim lack of recollection because the termination presumption will *not* apply if they are disbelieved.

Even more fundamentally, as we pointed out in our May 2019 memorandum addressed to Deputy Commissioner Reznick, it is simply illogical to define a false claim of failed recollection as a misleading statement rather than a false statement, *i.e.*, a lie. If a MOS **does** recall a fact or event and claims not to recall it, then he or she is **lying**. If that same officer **does not** recall the fact or event and claims not to recall it, then he or she is telling the truth; that officer **is not intentionally making a misleading statement**, or committing any misconduct whatsoever.

We well understand that proving the falsity of a claim of failed recollection can be challenging because it requires an analysis of the officer's state of mind, which typically must be proven

⁷ A previous ambiguity as to whether §203-08 was intended to apply to off-duty false statements (*e.g.*, false testimony in a divorce proceeding, submission of a false insurance claim or mortgage application) appears to have been resolved by the inclusion in the Guidelines of the section captioned "Off-Duty Conduct." It would be useful to include a statement within the Guidelines for False Statements that false statements made by a MOS while off-duty are covered separately.

circumstantially. But that difficulty provides no justification for down-grading the misconduct from a false statement to a misleading statement because in both cases, the same claim of failed recollection must be disproven. Indeed, the Guidelines themselves provide the very roadmap necessary to analyze the circumstantial evidence in a case where a failure to recall is asserted. These common-sense considerations include the time elapsed between the event and the statement; how memorable or unique the event is; the witness's ability to recall events before and after the event in question, and the witness's claimed inability to recall even after attempts have been made to prompt recollection.⁸ Where these factors point to the conclusion that a reasonable person would indeed recall the event or fact in question, the circumstantial case that the witness has falsely denied recollection has been made. It is important to note in this regard that if properly applied, the relevant standard of proof – preponderance of the evidence – is not a difficult one to meet in this context.⁹ In any event, as stated above, if the burden of proving a *false* statement cannot be met with the available evidence, then the burden of proving a *misleading* statement likewise cannot be met.

Police officers who make provable false statements should presumptively be terminated. No exception to that policy should be made to accommodate the single most common false statement offered by officers under internal investigation. We therefore recommend that false denials of recollection specifically be included in the definition of false statements, and be deleted from the definition of misleading statements.

e. The Definition of “Material Fact”: The definitions of a “material fact” in §203-08 and in the Guidelines are similar, and they share the same problems: The first sentence of the definition is inconsistent with the second sentence, and the second sentence is inappropriately narrow.

The first sentence defines a “material fact” very broadly to encompass any fact that is “relevant” to the subject matter. It does not require any particular impact on the outcome or determination of the issue at hand, but instead focuses on the *potential* for that fact to have an impact in resolving the issue. The second sentence, in contrast, defines a material fact very narrowly, as one that is “*essential* to the determination of the issue, where the suppression, omission or alteration of such fact would reasonably result in a different decision or outcome.” (page 23). For the reasons below, the very broad definition makes sense, while the second definition makes little sense, and would inappropriately hinder the use of §203-08 in a wide variety of plainly appropriate situations.

In the context of an official Departmental investigation, or virtually any other type of matter covered by §203-08 and these Guidelines, a very broad interpretation is both appropriate and necessary. Good police work requires, and good investigators are trained, that when questioning witnesses or subjects, they should cover all topics that could lead, directly or indirectly, to useful information. Particularly in the early stages of an investigation, questioning might cover a great number of topics that have the potential to yield relevant information, but ultimately lead nowhere. In fact, in assessing the credibility of witnesses, investigators commonly ask questions to which they already know

⁸ This list should include *all* of the factors listed on page 23 under the heading “Intent,” because all of those factors – specifically including the significance of the facts at the time of the event and the witness's motive to lie or deceive -- are equally relevant in the context of alleged failures to recall.

⁹ Police officers have been prosecuted criminally and convicted under the much higher standard of proof beyond a reasonable doubt on the basis of claimed failures of recollection. See, e.g., United States v. Regan, 103 F.3d 1072 (2d Cir. 1997).

the answers. These techniques are used, of course – and these techniques *should* be used -- when Department personnel and CCRB investigators question MOSs about allegations of misconduct.

On the other hand, requiring a “material” fact to be “essential” to the outcome of a matter would, for example, effectively prevent the Department from prosecuting a disciplinary charge of making a false statement in a situation where a MOS denied misconduct about which the Department already possessed sufficient evidence to file charges. It would prevent the Department from prosecuting a false statement charge against a member who manufactured details in support of a search warrant application or a complaint affidavit if, setting aside the manufactured details, there was sufficient evidence to establish probable cause. It might even prevent the Department from pursuing a false statement charge against an officer who committed perjury during a criminal trial, if it could be shown that the evidence of the defendant’s guilt was otherwise overwhelming, and the officer’s perjury therefore would not have impacted the outcome.

To remedy this situation, the Department should eliminate the second sentence of the “material fact” definition.

f. Denial: The discussion of denials in §203-08 states that the Department will not bring false statement charges where a MOS “merely pleads not guilty in a criminal matter, or merely denies a civil claim or an administrative charge of misconduct.” These are all situations in which a MOS is required, procedurally, to either admit or deny a charge or other claimed basis for liability. We made this very point in our May 2019 memorandum to the Department in connection with the proposed revision to §203-08, referring to these as “procedural” as opposed to “substantive” denials. (See Memorandum dated May 15, 2019 to Deputy Commissioner Reznick at p. 4). In that memorandum we said:

We suggest that general denials apply only to a context akin to a plea, where an officer who has been indicted or arraigned, or an officer presented with disciplinary charges, is required to admit or deny conduct in a general way. Such statements are made as a procedural requirement. Statements made in the course of official Department or CCRB interviews, on the other hand – which are substantive rather than procedural – should not be excluded from the policy regardless of the specific wording of the denial.

The Guidelines provision concerning denials (at page 24) covers not only the denial of an administrative *charge*, which would merely be “procedural,” but also the denial of an *allegation*. In doing so, it permits a MOS to make a *false denial of facts* if that denial is made in a general or conclusory way. In our view this exemption from the false statement policy is entirely inappropriate.

An investigative interview is a *substantive* rather than a *procedural* step. It is not like a plea or an answer to formal charges, because the purpose of those steps is to enable the parties to proceed to the fact-finding process, whereas *fact-finding is the very purpose of an investigative interview*. In the context of an investigative interview, exempting any denial of facts from the scope of the Department’s false statement policy amounts to issuing a license to lie.¹⁰

¹⁰ In our view, the specific example provided in this section makes no sense. In the context of an official Departmental interview, there is simply no meaningful difference between “I didn’t do anything wrong” and “I did not take any money from the location.” Both statements constitute lies, and if it can be shown by a preponderance of the evidence that the officer improperly took money from the location, both statements should result in a charge of making a false statement, in addition to a charge of taking the money.

In addition, the “Denial” provision creates some confusion by stating that a MOS who denies specific facts “after being afforded the opportunity to recollect” has made a false statement. This clause could be read as *requiring* an investigator to try to refresh the member’s recollection by providing prompts or revealing information or evidence gathered during the course of the investigation before any denial of facts can be charged as a false statement. If that is the intended meaning of this clause, we object to its inclusion. In many situations, an event is sufficiently memorable and/or sufficiently recent that no prompt or attempt to “refresh recollection” is reasonably necessary. In other words, an investigator *should not be required* to disclose other information gathered during the course of an investigation to a MOS who is patently lying.

Whether to reveal some or all of the evidence in the hands of investigators is a question that should be decided on a case-by-case basis, in light of such factors as whether the investigation is complete; whether witnesses might be threatened, harmed or otherwise tampered with; whether evidence might be destroyed; and whether revealing the evidence will assist the subject in fabricating a defense. If, in the end, an investigator’s decision not to reveal some or all available information to the subject officer leaves open a *real* question as to whether a denial of misconduct or any other statement constitutes a provable false statement, then a false statement should not be charged. This logic is already clearly reflected in the lists of considerations on pages 23 and 25. Because no such requirement should be implied, the quoted phrase should be removed.

g. Intentionally Omitting a Material Fact: In both §203-08 and these Guidelines, the intentional omission of a material fact is defined as a “Misleading Statement” rather than a “False Statement.” (page 24). We recognize that in many situations, the omission of a material fact will *not* constitute a lie. Generally, this is true where the question or questions posed do not clearly and specifically call for the MOS to provide the omitted fact. However, a thorough questioner will often pose questions in a manner that *does* specifically call for the omitted fact, and thus render an answer that omits that fact *false* when viewed in context.

The following example illustrates the point:

A complainant alleges that after he was arrested and handcuffed, he used an expletive to refer to the arresting officer, and the officer responded by punching him in the face, breaking his nose and three teeth. The officer is questioned about the incident by a CCRB investigator one week later.

In one scenario, the investigator directs the officer’s attention to the night of the arrest, and asks the officer, “Tell me about the arrest you made that night.” In response to this general question, the officer describes the circumstances leading up to the arrest, and describes transporting the complainant to Central Booking, but leaves out any mention of having punched the complainant. The officer has certainly omitted a material fact, but did not lie.

In a second scenario, the investigator – who perhaps has managed to obtain a videotape of the incident -- poses the question differently. The investigator tells the officer to describe “everything that happened from the moment you first saw the complainant until the moment you left the scene.” Again, the officer describes the circumstances leading up to the arrest. He

describes placing the complainant in a squad car and heading for Central Booking, but omits

any mention of having punched the complainant. Because in this scenario the investigator's question *specifically* called for the officer to relate "everything that happened" at the scene, the officer's answer, viewed in the context of the question, *is a lie*.

As this example illustrates, when determining whether a statement constitutes a *false* statement, the statement must be viewed in proper context.

To clarify this situation, and ensure that an actual false statement is properly penalized, we recommend amending the first point under the definition of "Misleading Statement" in §203-08 and/or the first bullet point under the definition in the Guidelines to state that a misleading statement is one that materially alters the narrative "by intentionally omitting a material fact or facts, as long as the statement, viewed in context, is not false." Such a clarification would reduce the number of situations in which the same statement could be viewed as both false and misleading, and would thus reduce the opportunity for penalty manipulation.

h. Inaccurate Statements and the Penalty for "Impeding": An inaccurate statement is defined in both §203-08 and the Guidelines as one that a MOS either knows or should know includes incorrect material information. Such statements are grossly negligent, according to the definition, but there is *no intent to deceive*. The penalty for making an inaccurate statement is 10 days, which is far less than the penalty for making a false or misleading statement (page 26).

However, the definition of "Impeding an Investigation" includes not only making false and misleading statements (which both require an intent to deceive), but also making inaccurate statements, and the presumptive penalty for impeding an investigation is 30 days + dismissal probation. Thus, depending on whether an inaccurate statement is charged solely as an inaccurate statement, or is instead (or also) charged as impeding an investigation, the MOS could be facing substantially different penalties. This discrepancy should be resolved, especially because the disciplinary framework anticipates that all provable misconduct will be charged.

i. The Guidelines state on page 23 that each false statement should be charged separately, a principle with which we agree. However, we wonder whether, consistent with the "Calculation of Penalties" section on page 9, the penalties for multiple misleading or inaccurate statements would be calculated consecutively. For example, if a MOS gave misleading answers to four separate questions (*i.e.*, questions that do not call for overlapping answers) in a single Departmental interview, would the presumptive penalty be increased to termination or forced separation?

j. On page 26, the second potential mitigating factor is that the underlying misconduct is not a termination offense and the false statement was made to avoid embarrassment, particularly in the context of interpersonal relationships. We think this factor should mitigate the penalty only in rare circumstances, and we suggest adding that the "statement was made *solely* with the intent to avoid personal embarrassment (particularly in the context of interpersonal relationships), and not for the purpose of avoiding the discovery of any MOS's misconduct or the imposition of discipline. Alternatively, and perhaps more practically, this unusual factor could be removed from the list, and if this situation were to arise, the Police Commissioner could deem it an extraordinary circumstance that would justify a penalty short of termination.

k. As mentioned above, as a rule we do not believe that a MOS's positive service record, positive performance evaluations, or lack of a disciplinary history, should mitigate the penalty for making a false or misleading official statement. This misconduct is so egregious that an individual's history or performance record simply cannot alleviate the harm done. In addition, if permitted, these factors would swallow the applicable presumptive penalties.

These factors might mitigate the making of an inaccurate statement, and in the context of false and misleading statements, they might conceivably be given some weight when considered *together with other unusual circumstances that specifically mitigate the seriousness of the particular false or misleading statement*. But on their own, or in combination with each other, these three factors should not reduce the otherwise applicable penalty for a false or misleading statement.

4. Domestic Violence

- a. The Guidelines should provide a definition of "Physical Act of Domestic Violence."
- b. For a first *intentional* violation of an order of protection (page 28), dismissal probation should be imposed as part of the penalty.
- c. Pages 29 and 30 include reference to "SPI." We assume this refers to serious physical injury, but unless we have overlooked an explanation for the abbreviation, we believe one should be added.¹¹

5. Driving While Ability Impaired/Intoxicated Incidents

- a. Among the aggravating factors for DWI is having a child in the vehicle (page 32). This factor carries an enhanced penalty of 10 suspension days. We believe this factor should carry a higher additional penalty because unlike adults, children have no capacity to remove themselves from this life-threatening situation. We note, as well, that this conduct constitutes a crime.
- b. Among the other DWI aggravating factors, leaving the scene of an accident with injury to another person carries an enhanced penalty of 5 suspension days plus 5 penalty days. While this enhancement might be sufficient in circumstances where a MOS leaves the scene of an accident after ascertaining that there is no serious physical injury, it is not sufficient where the accident could have resulted in serious injury or death, and the MOS leaves the scene without ever seeking to ascertain the nature or extent of possible injuries. In that situation, the MOS has callously disregarded *the potential* for serious injury or death, and termination is the appropriate remedy regardless of whether serious injury or death actually resulted.

6. Firearm-Related Incidents

- a. The presumptive penalty on page 33 for failure immediately to report an improper

¹¹ On page 29, in the aggravating factor of coerce/threaten/etc., an "i" is missing from the word "including."

discharge is only 10 days. We view that penalty as insufficient, and believe the presumptive penalty should be termination unless there are extraordinary mitigating circumstances. The Commission has historically advocated for the presumptive penalty of termination in failure to report discharge cases. As noted by the Commission in its *Seventeenth Annual Report*, “Prompt reporting of a discharge is necessary for a thorough and adequate investigation into the propriety of the discharge. Delaying or failing to report the discharge can result in the loss of physical evidence and witness statements. This may then lead to unreliable conclusions about how the discharge occurred and whether anyone was injured. . . . [T]he failure to report a discharge might also affect or taint the investigation of subsequent discharges.”¹²

b. Given the harm that can flow from a lost firearm, we believe the failure promptly to report a lost firearm should carry a higher penalty than 10 days. In addition, to encourage MOSs to report such incidents immediately, it might be useful to have escalating penalties based on how long it takes for the loss to be reported, or whether the loss went unreported by the MOS and was only discovered through other means.

7. Ingesting Controlled Substances, Marijuana/THC, Banned Substances and Excessive/Unexcused Use of Prescription Drugs

The presumptive penalty at the top of page 35 for a “Drug Screen Test Showing Positive For Marijuana/THC With No Prescription or With No Legitimate Medical Reason” is termination. There is no presumptive penalty for using medical marijuana with a prescription, which tends to imply that the Department permits the use of marijuana for medical purposes. If that is not correct, this should be clarified.

8. Violations of Department Rules and Regulations

a. We believe that accessing and/or disseminating confidential information (page 36) should have a higher penalty than 10 days. There should be a significantly higher penalty if the information disseminated involves personal information of a witness or complainant, or if information is provided to an individual known to have a criminal record, or known to be involved in criminal activity.

b. As discussed above, the presumptive penalty of 20 days for the purposeful failure to record a prescribed event with a body worn camera (page 37) is not sufficient. The Department should view the failure to turn on a body worn camera as evidence of an officer’s intent to commit misconduct, or to prevent the discovery of misconduct by others.

9. Off-Duty Conduct

a. We continue to recommend that the presumptive penalty for any unjustified off-duty display of a firearm (page 38) should include dismissal probation. The escalation of disputes and the potential consequences of displaying a firearm warrant a period of monitoring.

b. Causing an incorrect rate to be applied to one’s vehicle insurance (page 39) is a form of insurance fraud and the amount of the fraud loss could accumulate substantially over many years. The

¹² *Seventeenth Annual Report of the Commission* (November 2015) at p. 144.

penalty should therefore be greater than 10 days.

10. Violations of Crimes Specified in the NYS Penal Law

We note that the first penalty under “Violation of Criminal Statutes” (page 40) applies to “conviction of conduct proscribed by NYS law (or analogous statute of another state) *or Federal Law* that is classified as a Felony.” However, none of the remaining categories on the chart at pages 40-41 contains the same reference to federal law. We suspect this is an oversight and that reference to federal law should be included throughout. If for some reason these references were deliberately left out, a footnote explaining the distinction would be helpful.

11. Equal Employment Opportunity Division and the Discipline System

a. We believe that overall, the presumptive penalties set forth on pages 42-43 are too low. This is especially true for sexual harassment with any form of touching. Each of the two “sexual touching” offenses should be stepped up one level, so that the presumptive penalty for overt touching is termination, and the presumptive penalty for suggestive touching includes dismissal probation.

b. We also recommend the inclusion of definitions or examples of these two types of touching, as these are not terms commonly used by members of the public.

12. Misconduct Adjudicated by Command Discipline

On page 47, Schedule C command disciplines should not be available for computer misuse and disseminating confidential Department information except in limited circumstances. This level of discipline also should not be available for misclassifying complaint reports or failing to prepare those reports and for failing to supervise.

Conclusion

As we noted at the outset, we very much appreciate the opportunity to comment on the draft Guidelines. All of the current members of the Commission, and its Executive Director, have been reviewing disciplinary outcomes and files for many years. During that time, we have made note of concerns in meetings, in our Annual Reports, in prior correspondence and in discussion with the Independent Panel. As a result, you may recognize many of the concerns and suggestions we have made in this letter. In the interest of getting this to you sooner rather than later, we have not always referenced prior iterations of these suggestions, but can provide those if it would be helpful. We feel strongly about the importance of these issues, and look forward to working with you and your team on the Guidelines.

Sincerely,
The Commission to Combat Police Corruption

APPENDIX C

SEPTEMBER 30, 2020 LETTER TO THE DEPARTMENT



THE CITY OF NEW YORK
COMMISSION TO COMBAT POLICE CORRUPTION

17 Battery Place • New York, NY 10004
(212) 806-5370 • Fax (212) 487-7361

Commissioners
Kathy Hirata Chin, Acting Chair
Deborah E. Landis
James D. Zirin

Marnie L. Blit
Executive Director

September 30, 2020

Chief Matthew Pontillo
New York City Police Department
One Police Plaza
New York, New York 10007

Re: Draft Disciplinary Guidelines

Dear Chief Pontillo:

In our letter dated August 31, 2020, we indicated that we were continuing to review the Department's draft Guidelines, and that we planned to submit some additional comments. We write today to supplement our earlier letter. Once again, we appreciate the opportunity to provide input into this important process, and we hope you will find our comments helpful.

I. Additional Comments on the False Statement Provisions

A. "Material Fact" Definition:

In our earlier letter, we discussed the definition of "Material Fact" in §203-08. We explained (at pages 17-18) that the first sentence and the second sentence of that definition conflict, and that the second sentence should be deleted because it might well prevent the Department from bringing false statement charges in even the most obvious cases.

As we observed, thorough investigators often ask questions (and should ask questions) that cover a wide variety of topics, including questions to which they already know the answers. Sometimes their questions go directly to the matter at issue, and sometimes they go indirectly to the matter at issue (for example, where questions seek background information or context, leads to other evidence, or tangential corroboration for other witnesses). Where the questioner already knows the answer to a question, the inquiry might, for example, be aimed at testing the

credibility of the subject, eliciting further details that would add to the strength of a case, or eliciting a false exculpatory story or excuse that could readily be disproven. All of these are legitimate and appropriate investigative pursuits, and in all of these situations, an intentional false answer should be deemed “material.” Section 203-08 and the Guidelines should make that clear.¹

To help provide that clarity, in addition to our prior recommendation, we recommend that additional examples be provided on page 24 of the current draft of the Guidelines. These Guidelines should help identify the line between what is material and what is not material. To that end, we suggest adding one or more examples of scenarios where the materiality of the particular questions is less obvious than the examples currently provided on page 24. One possibility appears below:

The Department has been investigating the subject officer (S/O) for criminal association with a known narcotics dealer (“Dealer”), and possible involvement in narcotics trafficking. Investigation to date (including surveillance, interviews and document collection) has revealed that the two men grew up together, that Dealer has a felony narcotics conviction, that the S/O visited Dealer in an upstate prison two years ago, that the S/O’s car has been registered at Dealer’s home address for the last three years, that the two men have telephoned each other daily since Dealer was released from prison six months ago, and that the two men get together regularly at a club where ongoing narcotics sales have been reported.

The S/O is questioned by IAB. He is shown a photo of Dealer and asked whether he knows Dealer. He replies that he does. Asked how long he has known Dealer and how the two men met, the S/O states that he met Dealer approximately one month ago, and that they were introduced by mutual friends. Asked how often they have contact, the S/O replies that he has seen Dealer only once or twice at a club. Asked whether he knows where Dealer lives, the S/O claims that he does not. Asked whether he knows anything about Dealer’s having a criminal record, the S/O claims that he has no such knowledge.

In this example, all of the lies told by the S/O conceal facts that are already known to IAB. Some of the questions are background questions, the answers to which are not “essential” to a determination of whether the S/O engaged in criminal association or narcotics trafficking, as required by the current definition of a “material fact.” Moreover, because the answers to these questions are known, the suppression of these facts would *not* “reasonably result in a different decision or outcome.” Presumably, then, these false answers would not be deemed “material”

¹ In our experience, MOSs often are not questioned by investigators until most or all other witnesses have been interviewed and other evidence has been collected and reviewed. Therefore, it is quite commonly the case that investigators already have answers to many of the questions they pose.

for purposes of determining whether the S/O could be charged with making a false statement. That is plainly the wrong result. These questions were asked for several legitimate investigative purposes: 1) to ascertain whether the S/O would be truthful about his relationship with Dealer; 2) to help cement the criminal association charge (if the S/O were to tell the truth); and 3) to further the investigation into the S/O's potential narcotics dealing with Dealer (again, if the S/O were to tell the truth). The S/O's answers revealed his clear purpose to conceal the nature and extent of his relationship with Dealer, and thereby to defeat the Department's efforts to ascertain whether he has engaged in any misconduct.

In addition to bringing a charge of criminal association against the S/O in this example, the Department should bring a charge under §203-08. To forego a false statement charge on these facts would be to disregard the S/O's most serious provable misconduct (blatantly lying to IAB), abrogate its responsibility to deter such misconduct, and demean the importance of IAB's function and the professional competence of its investigators.

B. Retractions

A close examination of §203-08 and the Guidelines relating to retractions reveals numerous internal inconsistencies. Apparent inconsistencies exist within §203-08, and additional inconsistencies appear when the Guidelines are layered on top of §203-08. As discussed below, §203-08 should be amended to conform to the "Retraction" section of the draft Guidelines.²

The "Additional Data" section of §203-08 states:

When a member of the service is afforded an opportunity to recollect with the benefit of credible evidence, and the member makes a statement consistent with the evidence, the member's prior statement *will not be considered a false statement*. However, it may be considered a misleading statement or an inaccurate statement, or in cases where further investigative steps were required after the statement was made, may also be considered an action impeding the investigation.

This paragraph appears to establish that if a MOS initially lies about a fact, and tells the truth after being confronted with evidence of the lie ("makes a statement consistent with the evidence"), the MOS will *not* be charged with making a false statement.

As an initial matter, if that is a correct interpretation of the quoted language, we object to this approach. It does nothing to encourage a MOS to be truthful in the first instance; to the contrary, it actually encourages a MOS to lie at the outset, and wait to see whether investigators have any evidence proving the lie. If presented with evidence of the lie, the MOS need only

² Throughout this discussion, italics have been added to the text of §203-08 and the Guidelines for emphasis.

conform the story to that evidence, secure in the knowledge that no false statement charge and no presumption of termination will follow. In essence, this section provides immunity from a false statement charge so long as an MOS tells the truth when confronted with proof of the lie. We are concerned that this approach does not foster greater honesty and integrity among its officers. A MOS who intentionally lies and only tells the truth when confronted with proof should not be rewarded.

Moreover, the language quoted above is inconsistent with the language that immediately follows it. The next paragraph of §203-08 states:

If, during an investigation or proceeding, a member of the service intentionally makes a false statement, but then retracts the statement and substitutes a truthful statement during the same interview, deposition or other session of oral testimony, a charge of false statement *may not be* appropriate. (Emphasis added)

This paragraph seems to say that if a MOS intentionally lies, but tells the truth within the same session, the Department *may or may not* decide to bring a false statement charge under §203-08. If this paragraph is intended to apply regardless of whether the MOS was shown proof of the lie before recanting, then it is inconsistent with the prior paragraph, which grants apparent immunity from a false statement charge if the MOS conforms his or her testimony to the evidence after being confronted. If, on the other hand, this paragraph only applies in situations where the MOS recants *without* being confronted with proof of the lie, then it calls for the potential imposition of a more serious penalty upon a MOS who spontaneously and promptly recants (possible charge under §203-08, with presumption of termination) than it does upon a MOS who only recants after being shown proof of the lie (no charge under §203-08, and no presumption of termination, according to the “immunity” paragraph discussed above).

The confusion generated by these two paragraphs is amplified further by the “Retraction” section of the draft Guidelines. That section states:

In an investigation or proceeding, if a member of the service intentionally makes a false statement, but then retracts the statement and substitutes a truthful statement during the same interview, deposition, or other session of oral testimony, a charge of false statement is not appropriate *if each of the following circumstances is present*:

1. The retraction occurs within the same interview or proceeding as the false statement;
and
2. The member retracts the false statement before the fact-finder has been deceived or misled to the harm and prejudice of the investigation or proceeding (i.e., the false statement is retracted before it has substantially affected the investigation or proceeding);
and

3. The retraction and substituted truthful statement are made before the member knows or has reason to know the fact-finder is or will be aware of the false statement. The substituted truthful statement must occur at a time when no reasonable likelihood exists that the member has learned that his or her falsehood has become known to the fact-finder.

The text continues, focusing on the limited availability of this benefit and the initiative of the MOS to make the correction:

The purpose of this *extremely narrow exception* is to foster truthfulness when a member provides information in an investigation or proceeding. It encourages and allows the member, *on their own initiative*, to correct and retract a false statement before it has the potential to do irreparable harm.

In addition, a footnote to the third requirement listed above (footnote 46) provides that if the MOS retracts the statement after he or she is confronted with evidence that demonstrates its falsity, the third requirement will not be met. In other words, if the retraction or correction follows revelation of the evidence of falsity, a false statement charge *is appropriate*.

Thus, the “Retraction” section of the Guidelines is utterly inconsistent with the two paragraphs of §203-08 quoted above. Contrary to §203-08, it establishes an “extremely narrow” set of circumstances under which a MOS who has lied will *not* be charged with making a false statement.

In our view, the approach taken in the “Retraction” section of the Guidelines is the correct approach. It specifically focuses on the Department’s need to foster truthfulness, and the need for MOSs to provide the truth promptly. Unlike §203-08, it benefits only those MOSs who recant their lies on their own initiative, before being confronted with proof that they have lied. Importantly, this framework serves to distinguish those MOSs who are fundamentally honest (albeit, perhaps, a bit belatedly) from those who only admit the truth when they know the truth is already known.

The Department has a long-standing and serious problem with MOSs who lie during official investigations. To deter that misconduct, and to deter false statements made in a wide variety of other official contexts, the Department must send a clear message that provable false statements will be charged and pursued vigorously and consistently. No other approach has worked in the past, and no other approach is likely to work in the future.

II. Additional Comments on Prior Disciplinary History

In our prior letter, we took issue with the Department’s proposal to disregard certain prior disciplinary actions as aggravating factors. We also disagreed with the 5-year and 10-year

limitations periods set forth at page 8 of the draft Guidelines. While we appreciate that the Department has carved out certain types of misconduct (such as DWI) from this proposal, that carve-out will not suffice to ensure that all relevant factors are taken into account when discipline is imposed in the future.

We offered to provide case examples to illustrate why it would be inappropriate to disregard a MOS's prior disciplinary history if that MOS were to commit additional misconduct. Although numerous cases would make the point, for the sake of brevity we offer two case examples below.

A. Case 2016-15035

Facts: The S/O – a detective who had been with the Department for 23 years when the incident occurred and had no disciplinary history – used a CI to set up the purchase of a large quantity (310 grams) of heroin. The heroin dealer arrived at the location and met with the CI in the dealer's car, whereupon officers descended and arrested the dealer. (To allay suspicion, the SO arranged a fake arrest of the CI as well). Officers recovered heroin from a pocket in the vehicle.

In describing the facts of the case to the ADA the same day, the S/O explained that a CI had arranged the sale, but falsely claimed that the CI was outside the car, sitting on a nearby stoop, when the arrest took place. Counsel for the drug dealer thereafter informed the ADA that the person who had arranged the transaction had been inside the dealer's car when the arrest was made. The ADA then spoke with the S/O again, by phone and in person, and each time the S/O denied that anyone else was present in the dealer's car. However, video surveillance revealed that the CI was in fact present in the dealer's car when the arrest was made. The ADA declined to present the matter to the grand jury, and the case was dismissed.

The S/O was charged with Conduct Prejudicial for providing "inaccurate" information to the ADA regarding the circumstances of the arrest. He was not charged with making false statements, in itself of concern. The disciplinary case was resolved in 2017 with a penalty of 18 vacation days.

Comment: The S/O's conduct here – repeatedly lying to the prosecutor about the circumstances surrounding the arrest in a significant heroin case, which resulted in the dismissal of that case – was extremely serious. Under the Department's current proposal, given that the penalty imposed was less than 20 days, this matter would presumptively be disregarded in 2022, regardless of the seriousness or frequency of any subsequent misconduct by this officer. That prospect is quite troubling.

This case also illustrates the point made in our earlier letter (at page 6) that where *past* inadequacies or inefficiencies in the disciplinary system have resulted in unwarranted leniency in

a particular case or type of case (*e.g.*, false statement cases), those inadequacies and inefficiencies are incorporated into, and thus carried forward or re-animated by the current framework. Specifically, this S/O's penalty of 18 vacation days was inappropriately lenient, and because that inappropriate leniency resulted in a penalty of less than 20 days, the penalty will be disregarded if he commits additional misconduct after only 5 years have elapsed. As a result, the penalty imposed for the new misconduct will again be inappropriately lenient. Even worse, that new penalty will likely become precedent for future cases of similar misconduct by other officers.

B. Case 2012-8631

Facts: The S/O – who had been with the Department for 7 years when the incident occurred and had no disciplinary history – saw the Complainant running away from what appeared to be a possible assault. The S/O and his partner chased the Complainant, caught him, and handcuffed him. The S/O asked the Complainant why he had run away, and when the Complainant responded that he was running because the officers were chasing him, the S/O punched him in the left eye with a closed fist, fracturing his left orbital wall and causing a loss of vision. The Complainant also suffered a broken finger. The two officers drove the Complainant back to the location of the assault, and after conferring with the potential assault victim, released the Complainant without issuing any summons. The Complainant went home and called an ambulance.

During their official Department interviews, the S/O and his partner both denied punching or striking the Complainant. Both also conceded that the Complainant was cooperative before and after being handcuffed. The S/O's denial that he had punched the Complainant was contradicted by the Complainant himself and by an independent witness who heard the exchange between the S/O and the Complainant, and saw the S/O punch the Complainant in the face while the Complainant was on his knees, handcuffed behind his back.

The S/O was charged with improperly using physical force against the Complainant without police necessity by punching the Complainant in the face. Upon a plea of *nolo contendere*, he agreed to forfeit 12 vacation days. That penalty was formally imposed in July 2013.

Comment: In this case, the S/O assaulted and seriously injured an individual without provocation, and lied about it during his official Department interview. He was not charged under §203-08 with making a false statement. As we commented in our 16th Annual Report, this S/O's behavior demonstrated a lack of judgment, a lack of impulse control, and a propensity for violence. These characteristics alone raised a fundamental question about his fitness to serve; his subsequent dishonesty should have tipped the scales even further toward termination. As we concluded previously, *at a minimum*, this S/O should have been placed on dismissal probation.

Because this case was adjudicated in 2013 and the penalty imposed was less than 20 days, this case would presumptively be disregarded as an aggravating factor under the proposed Guidelines if this S/O were to engage in another instance of gratuitous violence, or even multiple instances of gratuitous violence now. That result is inappropriate and unacceptable. The S/O's conduct put the Department on notice that he posed a risk to public safety; such a risk should never be forgotten, let alone deliberately disregarded.³

Moreover, because this S/O was never charged with making a false statement, or with any violation capturing his fundamental dishonesty, that highly relevant trait would also presumably be overlooked, *by design*, were he to commit further misconduct in the future. That result is also inappropriate and unacceptable.

Finally, we note that if this conduct were to occur today, and were to be governed by the Department's proposed Guidelines, this S/O would likely receive a significantly higher penalty than the 12 vacation days he lost. Assuming the Complainant's loss of vision was protracted and therefore constituted "serious physical injury," the presumptive penalty (without considering any aggravating factors) would be 30 suspension days, 20 penalty days, and dismissal probation. In addition, three of the potential aggravating factors identified on page 22 of the draft Guidelines are present here: 1) the Complainant was handcuffed when the S/O punched him, making him a "vulnerable subject"; 2) the S/O's action was "gratuitous, retaliatory [and] intentional"; and 3) the S/O "failed to report the incident"; indeed, he went further and lied about it when questioned. To the extent the Department now seeks to penalize unjustifiable force cases more harshly than it has done in the past, that effort – which in our view is laudable – is undermined by a framework in which past instances of misconduct (and particularly, instances of similar misconduct) will generally be disregarded as irrelevant.

* * *

The only way for the Department to ensure that its new disciplinary regime is administered effectively and consistently, and to achieve the other important objectives of this significant undertaking, is to examine a MOS's entire prior disciplinary record when determining an appropriate penalty for misconduct.

³ This particular officer had apparently filed for disability when the case was adjudicated, and is likely no longer employed by the Department. However, our concerns apply equally to every similarly situated MOS.

Conclusion

If you have questions or concerns about any of the suggestions we have made in this or our prior letter, please let us know. We would appreciate the opportunity to discuss these suggestions with you via telephone or video call, and we of course stand ready to review any further proposed revisions of the draft Guidelines or any written responses to our suggestions. Also, if we can be of assistance as you sort through any public comments you have received, we would be pleased to participate in the process in that way as well, and would appreciate the opportunity to review such comments with you. Again, many thanks for sharing the draft Guidelines with us and considering our views.

Sincerely,

The Commission to Combat Police Corruption