

REPORT OF THE CHIEF LEGISLATIVE ANALYST

DATE: January 6, 2017

TO: Honorable Members of the City Council

FROM: Sharon M. Tso *SMT*
Chief Legislative Analyst

Council File No: 16-1331
Assignment No: 16-11-0934

Options Related to Charter Section 1070 – Police Department Board of Rights Panels

SUMMARY

On December 15, 2016, the City Council approved a Motion (Wesson - Buscaino - Price) directing the Chief Legislative Analyst (CLA), with the assistance of the City Administrative Officer (CAO) and City Attorney's Office, to report with options relative to the composition of the Police Department's (LAPD) Board of Rights panels, which conduct quasi-judicial administrative hearings on police officer disciplinary matters. Currently, as prescribed in Charter Section 1070(h), a Board of Rights panel consists of three members: two command-level LAPD Officers with the rank of Captain or above chosen at random and one civilian chosen at random from a pool of civilian Hearing Examiners hired by the Board of Police Commissioners. The Motion directs the CLA to report on potential options to create an all-civilian Board of Rights panel through an ordinance, with a three-year period to review its effectiveness. Sworn officers of the LAPD facing disciplinary hearings could opt to try their case in front of this civilian panel instead of the currently existing one. The Council also adopted an Amending Motion directing the CLA, with the assistance of the CAO and City Attorney's Office, to report on the current selection process for civilian members of the Board of Rights, and to provide analysis on how to promote accountability and transparency in Board of Rights decisions. The Amending Motion also directs the CLA to report at the end of the three-year period with an analysis of cases heard by the Board of Rights and their outcomes, the voting records of Board members and a historical analysis of how Boards in other jurisdictions compare to LAPD.

This report provides an overview of the Board of Rights, addresses the disciplinary hearing process in other jurisdictions in California, provides an analysis of the Board's voting patterns and civilian member voting history, as well as a series of options regarding the composition of the Board of Rights for Council consideration. Because the composition of the Board of Rights is specified by the Charter, a ballot measure would be necessary to make changes. The potential actions the Council could take include, but are not limited to, presenting a ballot Proposition to the voters to amend Charter Section 1070 to:

- Enable Council to adopt an ordinance to give officers accused of misconduct the option to have their cases heard by an all civilian panel, selected from a list of Hearing Examiners maintained by the Board of Police Commissioners, that would be in place for a minimum of three years, and be evaluated for effectiveness at the end of the three-year period.
- Enable the Council to adopt an ordinance to give officers facing disciplinary hearings the option of going before an all civilian panel, selected from a list of Hearing Examiners maintained by the Board of Police Commissioners, when they are appealing a demotion or a suspension of less than 22 days. As in Option 1, this panel would be in place for a minimum of three years and be evaluated for effectiveness at the end of the three-year period.
- Enable the Council to adopt an ordinance to change the composition of Board of Rights panels to one sworn officer with the rank of Captain or above and two civilians hired from a list maintained by the Board of Police Commissioners, subject to review at the end of a three-year period.

- Enable the Council to adopt an ordinance to change the composition of Board of Rights panels to one sworn officer with the rank of Captain or above and two civilians hired from a list maintained by the Board of Police Commissioners for demotion or suspension cases only, subject to review at the end of a three-year period.
- Enable the Council to create a new disciplinary review process through ordinance. This would enable the City to completely restructure the disciplinary hearing process, and adopt a new system after soliciting input from management, labor, members of the public and various stakeholders on a new framework for discipline and disciplinary review.
- Take no action and maintain the current composition of Board of Rights panels.

BACKGROUND

Over the last several months, discussions between the Los Angeles Police Protective League and City officials have been held regarding the composition of the LAPD's Board of Rights (BOR) panels. Specifically, these discussions focused on ways in which civilian oversight of the hearing process could be strengthened. As a result of these discussions, the CLA's Office was directed by the Council to provide a report with options to amend Charter Section 1070 to provide the Council with the discretion to enact an ordinance to establish an optional all-civilian BOR panel.

The BOR is modeled after the Court Martial process for military personnel provided for in the Uniform Code of Military Justice. An accused officer appears before a panel of three individuals, where their case is argued. The Department is represented by an Advocate, usually a Sergeant or a Detective, and the accused officer is able to retain outside counsel for representation. The ultimate decision on whether the accused officer is guilty, or what discipline is appropriate, lies with the BOR panel, not the Chief of Police. BOR panels were originally made up of three LAPD officers with the ranks of Captain or above. In 1992 voters approved a series of reforms recommended by the Christopher Commission for the Police Department, including a change to the composition of BOR panels, replacing one sworn officer with a civilian member.

There are two types of BOR hearings. The first is a directed hearing, where the Chief of Police has concluded that an officer has committed serious misconduct and should be terminated from employment. The Chief must "direct" the officer to a BOR hearing, with a recommendation that the officer be removed from employment. The accused officer remains an employee of the Department until the hearing is concluded. If the BOR finds that an accused officer is guilty of misconduct, they then enter a penalty phase, where they determine what penalty is appropriate. The Chief may remove an officer only if the BOR has found an individual officer guilty and recommends termination of their employment. The Chief is able to impose a lesser penalty than the BOR recommends, but not a harsher one.

The second type of BOR hearing is an "opted" hearing. Charter Section 1070(b) allows for the Chief of Police to demote an individual or impose a suspension of up to 22 days, but also allows for an officer who has been notified of such a forthcoming demotion or suspension to request a hearing before a BOR to contest the charges. Opted hearings are conducted in the same manner as a directed hearing, with the BOR panel having the authority to determine the appropriate punishment, if any.

It should be noted that a BOR only occurs if the Chief, through an internal investigative process, has determined that an officer is guilty of misconduct that warrants termination or a lesser punishment. BOR hearings are not conducted in cases where the LAPD has investigated possible misconduct but does not recommend any disciplinary measures be taken.

BOARD OF RIGHTS COMPARED TO OTHER JURISDICTIONS

The California Public Safety Officer's Procedural Bill of Rights requires that police officers be granted an appeals process when serious disciplinary measures are taken, but does not prescribe a specific model. Most jurisdictions in the State allow a Department or Sheriff's Office to impose discipline first, and provide for an appeals process after the discipline has been imposed. However, the City Charter does not allow for the pre-imposition of discipline in LAPD. All Peace Officers in California are also able to appeal the outcomes of their hearing or appeal to the State Superior Court.

Cities across the State also utilize various types of appeals processes, the model utilized by LAPD is unique. Some jurisdictions allow for binding mediation when an officer is terminated, while others, such as the City of San Diego, the City of Long Beach and the Los Angeles County Sheriff's Department, allow officers who have been terminated or demoted to appeal their discipline to Civil Service Commissions or other similar bodies, much like other civil servants. Both the Los Angeles World Airport Police Department (LAWAPD) and the Los Angeles Port Police (Port Police) follow this model for disciplinary appeals.

LAPD's Board of Rights (BOR) system, is distinct among other appeals processes in the state, as the Chief of Police cannot terminate or suspend an employee for more than 22 days without first receiving approval from a BOR. Further, in cases where the Chief does suspend for 22 days or less or demotes an officer pursuant to Charter Section 1070(b), that officer can appeal the decision to a BOR, and the decision is stayed until the a ruling is made. The Los Angeles Fire Department similarly maintains a BOR process, though without a civilian member.

BOARD OF RIGHTS PANEL SELECTION PROCESS

Sworn Selection Process

All LAPD officers with the rank of Captain and above may be called to serve on a Board of Rights, with some exceptions for officers in certain positions or those who may be conflicted out of specific hearings. Pursuant to the Charter, the accused officer is presented a box containing the names of every Captain and above eligible to serve on their BOR, and randomly selects four names. The accused is then able to choose two of them to serve on their Board of Rights.

Civilian Hiring and Selection Process

Civilian members of Boards are hired by the Board of Police Commissioners as Civilian Hearing Examiners. Currently, the Commission employs 38 individuals on an as-needed basis for three-year terms. Examiners must have at least seven years' experience with arbitration, mediation, administrative hearings or comparable work. Examiners are offered a position only after applying for a position and being interviewed by the Executive Director of the Board of Police Commissioners. There is no limit on the number of terms an Examiner can be appointed to, and the average examiner has served for multiple terms. Of the current pool, five Examiners were appointed in September 2016, 17 have served for nine years, and the remaining 16 have served on average 20 years.

Civilian Hearing Examiners are often retired judges, mediators, or other professionals with significant administrative law experience or human resources backgrounds. When a Board is to be convened, the Executive Director of the Police Commission randomly selects three names for consideration by the Department's Advocate and the accused officer. Each side is allowed to excuse one member, until they arrive at a name that both sides agree to. Civilian members are paid \$900 for a full-day hearing, \$450 for a half-day hearing, and \$900 for a final report. Hearings can last for multiple days. The same civilian members can, and have, appeared on multiple panels throughout their terms.

ANALYSIS OF OUTCOMES

According to the LAPD, the Department concluded 287 BOR hearings from 2011 to November 2016. In 229 cases, the Chief directed an officer to a BOR hearing with the recommendation that the officer be terminated. The remaining hearings were cases in which an officer opted to have a hearing on a demotion or suspension.

According to LAPD, BORs returned a guilty verdict in 190 cases, but only recommended removal of the officer in 112 cases. Less than half of the officers directed to a BOR by the Chief with a recommendation that they be removed from employment were actually terminated after the hearings. Similarly, in the 58 Opted Boards for demotion or suspension cases over the last six years, BORs have acquitted 15 officers and have concurred with the Chief's recommended disciplinary measures in only 12 cases.

Civilian Voting Patterns

When evaluating the merits of an all-civilian or majority-civilian BOR panel over a panel made up of sworn officers and a civilian, the Council may wish to consider the voting history of civilian Hearing Examiners. During the period from 2011 to November 2016, civilian Hearing Examiners were consistently more lenient than their sworn officer counterparts. In the 39 Directed BOR cases where the Chief recommended termination but a BOR acquitted accused officers, the civilian member voted for acquittal in every case. During this period, 16 of the remaining 190 termination cases heard by BORs were decided by 2-1 margins. In each case, the Hearing Examiner voted for the more lenient option.

Civilian BOR members have also voted for reduced penalties in every case where a BOR found an officer guilty of misconduct, and have also consistently voted for lesser punishments or acquittals in Opted Boards dealing with demotions or suspensions. As in Directed Boards, civilian BOR members did not vote in the minority in demotion or suspension cases, and have been reliable votes for either lesser penalties for misconduct or for acquittal. During this period, there were 4 demotion or suspension cases decided by a 2 to 1 margin. In all cases, the civilian voted for the more lenient outcome.

OTHER ISSUES RELATED TO THE BOARD OF RIGHTS

While the Council has directed the CLA to report on proposed changes to the makeup of BOR panels, the Council may wish to consider other changes that could be made to the BOR process in the future to modernize it.

Currently, the Department's case in BOR hearings is presented by a sworn supervisor acting as the Department's Advocate. However, an accused officer is able to retain outside counsel, which can place the Department's Advocate at a disadvantage. While these cases are administrative in nature, and not criminal, an attorney may be better suited to argue these cases in front of BORs. Further, if accused officers are concerned about the Department's influence over their case, it may be worthwhile to consider utilizing the City Attorney's Office or others not employed by the LAPD to try these cases.

The CLA's Office was directed to report back with options on increasing transparency in the BOR process. Prior to 2006 BOR hearings were open to the public, but as a result of State Supreme Court decision, they were closed. In *Copley Press v. Superior Court*, the Court held that records of an administrative appeal of sustained misconduct charges against a police officer are confidential and may not be disclosed to the public. This decision prevents the public disclosure of disciplinary hearings, and as a result LAPD does not make public the results of hearings. New state legislation would be necessary to make the process transparent and information on these cases available to the public. However, the requirements for this data to be confidential may not preclude the release of BOR decisions with the officer's information redacted, or the names of the hearing officers. The LAPD currently releases redacted reports on Officer Involved Shootings (OIS), which also require information identifying an officer to be removed.

Finally, the BOR process is significantly different than disciplinary processes used by other jurisdictions. One option the Council may consider is to place a proposition on the ballot to ask the voters to enable the Council to establish a new disciplinary review process through ordinance. This would enable further analysis of best practices across the state and would allow City staff to solicit input from management, labor, and other stakeholders.

BALLOT DATES

In order to meet the legal deadline to place a proposition on the May 2017 ballot, the Council must request the City Attorney prepare a resolution to place a measure on the ballot by January 11, 2017. Council would need to approve such a resolution no later than January 25, 2017 (practical deadline).

OPTIONS FOR A MAY 2017 BALLOT PROPOSITION

If the Council wishes to place a measure on the May 2017 ballot, it could consider one of the following options for restructuring the Board of Rights. These options revolve around the number of civilians on the panel, and the types of hearings that an all-civilian or majority civilian panel could be asked to consider and include, but are not limited to presenting a ballot proposition to the voters to amend Charter Section 1070 to:

OPTION 1: Enable the Council to adopt an ordinance to give officers accused of misconduct the ability to have their cases heard by a three member civilian Board of Rights panel. Panel members would be appointed in the same manner as the civilian member of the panel is currently selected. The new optional civilian panel would be in place for a minimum of three years, and would be evaluated for effectiveness and fairness at the end of the three-year period. This amendment would result in accused officers having the ability to choose a panel made up of all civilians, as opposed to the current panel of two sworn officers and one civilian.

OPTION 2: Enable the Council to adopt an ordinance giving officers facing disciplinary hearings the option of going before a three member all civilian panel when they are appealing a demotion or a suspension of less than 22 days. The new optional civilian panel would be in place for a minimum of three years, and would be evaluated for effectiveness and fairness at the end of the three-year period. This ordinance would be similar to the one proposed in Option 1, but would only grant accused officers the right to an all civilian panel in disciplinary cases subject to Charter Section 1070(b).

OPTION 3: Enable the Council to adopt an ordinance changing the composition of Board of Rights panels to one sworn officer with the rank of captain or above and two civilian Hearing Examiners appointed by the Board of Police Commissioners. This option would reduce the number of sworn officers, but still maintain one sworn BOR member provide valuable knowledge and experience to the civilian members of the panel. As in Options 1 and 2, this Ordinance would be in place for a minimum of three years, and evaluated for effectiveness and fairness at the end of the three-year period.

OPTION 4: Enable the Council to adopt an ordinance to change the composition of Board of Rights panels to one sworn officer with the rank of captain or above and two civilian Hearing Examiners appointed by the Board of Police Commissioners when the accused officer is appealing a demotion or suspension of 22 days or less. This Option is similar to Option 3, but would only apply to hearings brought before a Board of Rights under Charter Section 1070(b). This ordinance would be in place for a minimum of three years, and evaluated for effectiveness and fairness at the end of the three-year period.

OPTION 5: Enable the Council to create a completely new disciplinary review process for the Police Department through an ordinance. This would enable the City to restructure the disciplinary hearing

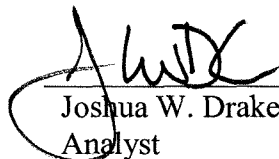
process, and adopt a new system after soliciting input from management, labor, members of the public and various stakeholders on a new framework for discipline and disciplinary review. This could include binding arbitration, the use of the Civil Service Commission for termination hearings, or other such hearing processes.

OPTION 6: Take no action and maintain the current structure of the Board of Rights, with two LAPD officers with a rank of Captain and above and one civilian Hearing Examiner appointed from a list maintained by the Board of Police Commissioners.

POTENTIAL FISCAL IMPACT

There are salary costs associated with civilian members of the Board of Rights. Each member is paid \$450 for a half day of hearings, \$900 for a full day, and \$900 for the final report. Hearings often last for multiple days. The cost of civilian hearing officers for FY 2015-16 was approximately \$137,700.

The City Clerk's 2016-17 Adopted Budget assumes the placement of ballot measures on the May 2017 ballot. There would be no additional fiscal impact created by placing a Measure to reform Charter Section 1070 on the May ballot. However, if there are no other City-wide races on the May 2017 ballot, placing a Proposition on the ballot would result in a loss of potential cost savings the City could realize from not holding a City-wide May 2017 election.


Joshua W. Drake
Analyst

SMT:jwd

Attachments: Motion (Wesson – Buscaino – Price)

Amending Motion (Wesson – Price – Buscaino)

Los Angeles Charter Section 1070

MOTION

I MOVE that the matter of Consideration of Motion (Wesson-Price-Buscaino) relative to a possible May 2017 ballot measure regarding an all-civilian Board of Rights panel for disciplinary matters involving Los Angeles Police Department officers, Item No. 40 on today's Council agenda (CF 16-1331) BE AMENDED to include the following recommendations:

2. INSTRUCT the Chief Legislative Analyst (CLA), with the assistance of the City Attorney and the City Administrative Officer (CAO), to include in the report back an analysis of the application and selection process for civilian members of the LAPD Board of Rights. This analysis should include the number of civilians who apply, how they are selected by the Police Commission staff, how they are selected for cases, how many cases they serve on, how long they remain members of the Board of Rights pool of civilian members, and options available to promote accountability and transparency of Board of Rights decisions, including public disclosure of determinations, to the extent lawful and consistent with protecting the confidentially rights of officers.

3. INSTRUCT the CLA to provide an analysis of cases, including rank of charged officer, and how Command Officers and Civilian Board of Rights members have ruled on matters, compared to the findings of the Chief of Police after the third year of the program if approved by the voters and implemented by the Council. The CLA should also include a historical analysis between other jurisdictions who have civilian members on their Board of Rights panels (whether all civilian or part civilian) and have the same, or very similar, selection process as the City of Los Angeles.

PRESENTED BY: _____
HERB J. WESSON, JR.
Councilmember, 10th District

SECONDED BY: _____

MOTION

RULES, ELECTIONS & INTERGOVERNMENTAL RELATIONS

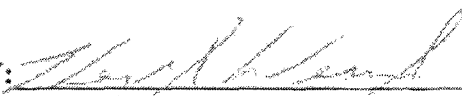
The California Public Safety Officers Procedural Bill of Rights requires, among other protections, that all police officers be offered an administrative appeals process before a punitive action or denial of promotion on grounds other than merit can be undertaken. Consistent with the State and Federal constitutions and the Public Safety Officers Procedural Bill of Rights, Los Angeles Police Department (LAPD) officers are afforded a Board of Rights hearing for all matters involving suspension, demotion in rank, removal, or other matters wherein police officers are separated from the service of the Police Department. Pursuant to the current Charter, the Board of Rights is composed of two officers of the rank of captain or above and an individual who is a civilian, and not a member of the Department.

City staff, in discussions with LAPD, have discussed the possibility of adding language in the Charter to allow the City Council to adopt an ordinance that provides an additional option for a Board of Rights comprised solely of civilians. Such an option would be implemented by an ordinance of the City Council and remain in place for a minimum of three years, while being evaluated for effectiveness, fairness, transparency, and similar factors. Nothing in the proposal would alter any substantive or procedural right set forth in the Charter.

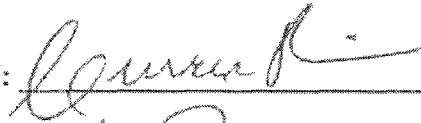

It is important that the electorate should be given the opportunity to decide whether LAPD officers are granted an option to be heard either by the current Board of Rights body or an entirely civilian body.

I THEREFORE MOVE that City Council REQUEST the Chief Legislative Analyst, in consultation with the City Attorney and City Administrative Officer, to report back in 15 days with options for a May 2017 ballot measure that would address the relevant Charter provisions for the proposed amendments outlined in the motion.

PRESENTED BY:


HERB J. WESSON, JR.
Councilmember, 10th District

SECONDED BY:

NOV 23 2016

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ORIGINAL

Los Angeles Charter and Administrative Code

Sec. 1070. Rights and Due Process Procedures.

(a) **Applicability; Rights.** As used in this section, member shall mean an employee of the Police Department who has peace officer status as defined in California Penal Code Section 830.1. The provisions of this section shall not apply to any member of the Police Department who has not completed the period of probation in his or her entry level position, as provided in Section 1011(a). Non-tenured Police officers, where otherwise entitled by law to a hearing or appeal with regard to proposed or imposed discipline, shall be provided a hearing or appeal under procedures promulgated by the Chief of Police.

The rights of a member, except the Chief of Police and any other member in a position exempt from civil service, to hold his or her office or position and to receive compensation attached to the office or position is hereby declared to be a substantial property right of which the holder shall not be deprived arbitrarily or summarily, nor other than as provided in this section. No member shall be suspended, demoted in rank, suspended and demoted in rank, removed, or otherwise separated from the service of the department (other than by resignation), except for good and sufficient cause shown upon a finding of guilty of the specific charge or charges assigned as cause or causes after a full, fair, and impartial hearing before a Board of Rights, except as provided in subsections (b) and (i). No case of suspension with loss of pay shall be for a period exceeding 65 working days.

(b) **Temporary Relief from Duty; Suspension; Demotion.** After following predisciplinary procedures otherwise required by law, the Chief of Police may:

(1) temporarily relieve from duty any member pending a hearing before and decision by a Board of Rights on any charge or charges pending against the member, except that a member so relieved shall not suffer a loss of compensation until 30 days after the date on which the member was served with the charge or charges, except as provided for in subsection (q) or whenever the employee is temporarily relieved of duty on a new charge or charges while relieved of duty or serving a suspension based on a prior charge or charges. There shall be a calendar priority for Board of Rights hearings when a member is subject to relief from duty pending a hearing. The Chief of Police in his or her sole discretion shall have the power to cancel temporary relief from duty, or following relief from duty, to restore the member to duty with or without restrictions pending hearing; or

(2) suspend the member for a total period not to exceed 22 working days with loss of pay and with or without reprimand, subject to the right of the member to a hearing before a Board of Rights as provided in this section; or

(3) demote the member in rank, with or without suspension or reprimand or both, subject to the right of the member to a hearing before a Board of Rights as provided in this section; or

(4) demote the member in rank, with or without temporary relief from duty or cancellation of such relief from duty, subject to the right of the member to a hearing before a Board of Rights as provided in this section.

In the event the member suspended and/or demoted in rank under this subsection files an application for a hearing by a Board of Rights as provided in this section, the suspension and/or demotion shall automatically be stayed pending hearing and decision by the Board of Rights. Provided, however, in the case of any member demoted in conjunction with a temporary relief from duty or cancellation of such relief from duty, the demotion shall not be stayed pending a hearing before and decision by a Board of Rights unless the accused specifically requests in the written application that the Board consider the demotion in

conjunction with the appeal of the temporary relief from duty or cancellation of such relief from duty. In the event that the member fails to apply for a hearing within the period prescribed, the member shall be deemed to have waived a hearing, and the suspension and/or demotion shall remain effective unless the Chief of Police requires that a hearing be held.

(c) **Limitations Periods.** No member shall be removed, suspended, demoted in rank, or suspended and demoted in rank for any conduct that was discovered by an uninvolved supervisor of the department more than one year prior to the filing of the complaint against the member, except in any of the following circumstances:

(1) If the act, omission, or allegation of misconduct is also the subject of a criminal investigation or criminal prosecution, the time during which the criminal investigation or criminal prosecution is pending shall toll the one-year time period.

(2) If the member waives the one-year time period in writing, the time period shall be tolled for the period of time specified in the written waiver.

(3) If the criminal investigation is a multi jurisdictional investigation that requires a reasonable extension for coordination of the involved agencies.

(4) If the investigation involves more than one employee and requires a reasonable extension.

(5) If the investigation involves an employee who is incapacitated or otherwise unavailable.

(6) If the investigation involves a matter in civil litigation where the member is named as a party defendant, the one year time period shall be tolled while that civil action is pending.

(7) If the investigation involves a matter in criminal litigation where the complainant is a criminal defendant, the one-year time period shall be tolled during the period of that defendant's criminal investigation and prosecution.

(8) If the investigation involves an allegation of workers' compensation fraud on the part of the member.

(9) If a predisciplinary notice is required or utilized and the response results in additional investigation, the one-year period shall be tolled while the additional investigation is pending.

(d) **Complaint.** Any order of relief from duty, cancellation of relief from duty pending a Board of Rights hearing, suspension, demotion in rank, or suspension and demotion in rank shall contain a statement of the charges assigned as causes. The Chief of Police shall, within five days after the order is served as provided in subsection (e), file with the Board of Police Commissioners a copy of a verified written complaint upon which the order is based, with a statement that a copy of the order and verified complaint was served upon the accused. The complaint shall be verified by the oath of the Chief of Police and shall contain a statement in clear and concise language of all the facts constituting the charge or charges.

(e) **Service.** The service of any notice, order, or process mentioned in this section, other than service of subpoena, may be made by handing the accused a copy personally. If a copy of any notice, order or process cannot with reasonable diligence be personally served, service may be made by United States mail.

(f) **Application for Hearing.** Within five days after personal service upon the accused of a copy of the verified complaint, or within ten days after service in any other manner provided for in this section, the member may file with the Chief of Police a written application for a hearing before and decision by a Board of Rights. A Board of Rights is considered a *de novo* hearing.

(g) **Time and Place of Hearing.** Upon the selection of a Board of Rights, the Chief of Police shall set the time for (not less than 10 nor more than 30 days thereafter) and designate a place where the hearing is to be held, and shall cause notice thereof to be served upon the accused. After the Board of Rights has first convened, the Board may continue the hearing of the matter to a specific date, and no other notice need be given, except as may be required by order of the Board.

(h) **Composition of Board of Rights.** The Board of Rights shall be composed of two officers of the rank of captain or above and an individual who is not a member of the department (the civilian member). The members selected as prescribed in this section shall constitute the Board for the purpose of hearing and deciding upon the matter for which it was specially drawn. The qualifications of, selection procedures for, and compensation of the civilian members shall be established by ordinance. Upon the filing of the request for a hearing before a Board of Rights, as provided in subsection (f), the accused shall draw four cards from a box containing the names on cards of all officers who are qualified to be members of the Board of Rights (except the names of the accused, accuser, the Chief of Police, any staff or command officer specifically exempted by the Chief of Police in accordance with the provisions of the Board of Rights Manual or successor document, and any other officer who may be prejudiced or disqualified by reason of being a material witness to the facts constituting the charges made, otherwise disqualified for cause as determined by the Chief, or who has a conflict of interest). The accused shall select any two of the four names drawn to be members of the Board of Rights.

(i) **Failure to Request a Hearing; Failure to Appear.** In the event the accused fails to request a hearing before a Board of Rights as provided in subsection (f) within the period prescribed, the Chief may require a hearing to be held before a Board of Rights and may for that purpose, within five days after the expiration of such period, draw two names from a box to sit on the Board.

If a Board of Rights has been constituted for the purpose of hearing and the accused, without reasonable excuse, fails or refuses to appear before the Board at the time and place designated, the Chief of Police may, at his or her discretion, either direct the Board of Rights to proceed with the hearing in the absence of the accused, or the Chief may, without a hearing, impose a penalty of suspension, demotion in rank, suspension and demotion in rank, or removal as he or she deems fit and proper. The Chief shall cause notice of the action to be served upon the member and shall file a statement of the action with the Board of Police Commissioners within five days.

If the accused and Chief both fail to draw and create a Board of Rights within the period prescribed, the complaint shall be null and void.

(j) **Oaths, Affirmations and Subpoenas.** During an internal investigation, prior to a Board of Rights hearing, or prior to or during other administrative proceedings, the Police Commission may compel the attendance of witnesses and the production of evidence by subpoena. Upon demand of the Police Commission, the City Clerk shall issue a subpoena in the name of the city and attest the same with the corporate seal. The subpoena shall direct and required the attendance of the witnesses or the production of evidence, at the time and place specified. A request to quash a subpoena may be filed with the Police Commission who shall decide the matter. Each Board member shall have the power to administer oaths and affirmations in any investigation or proceeding pending before a Board of Rights, examine witnesses under oath, and compel the attendance of witnesses and the production of evidence by subpoena. Upon demand of any Board member, the City Clerk shall issue a subpoena in the name of the City and attest the same with the corporate seal. The subpoena shall direct and require the attendance of the witnesses or the production of evidence, at the time and place specified. It shall be the duty of the Chief of Police to cause all such subpoenas to be served upon the person or persons required to attend or produce evidence. It shall be the duty of the Council to provide suitable penalties for disobedience of such subpoenas and the refusal of witnesses to testify or produce evidence.

(k) **Legal Advice; Ex Parte Communication.** Upon the request of any two Board members, the Board's chairperson shall request an attorney from the City Attorney's office who shall advise the Board on

legal matters during or between any session of the hearing. The attorney need not be physically present at the hearing, but may advise the Board telephonically or through other means of communication. The attorney who advises the Board may not advise the department's advocate in the same matter.

Ex Parte communication with members of a Board of Rights regarding the subject matter of the hearing while proceedings are pending is prohibited. No person shall attempt to influence the decision of a Board of Rights except during the hearing and on the record.

(l) **Burden of Proof.** In Board of Rights proceedings, the department shall have the burden of proving each charge, including those based on conduct punishable in whole or in part as a crime, by a preponderance of the evidence.

(m) **Representation; Transcript; Evidence.** At the hearing, the accused shall have the right to appear in person and by counsel or representative, (at his or her expense) and make defense to the charge or charges and may produce witnesses and cross-examine witnesses.

All testimony at the hearing shall be given under oath and shall be reported by a stenographer for possible transcription. Upon prepayment of the fee for the preparation thereof, the accused shall be entitled to a certified copy of the transcript; provided, however, when the department has previously had all or a portion of the report transcribed, a copy of the previously prepared report(s) shall be given to the member without charge. When the report is transcribed, the original transcript shall be placed on file in the department.

Evidence of acts, irrespective of whether they were associated with a personnel complaint against the accused and irrespective of the resolution of the complaint, may be considered in the discretion of a Board of Rights if relevant to the charges, such as, if the acts tend to prove that the conduct charged is consistent with a pattern of conduct. The acts may have occurred either before or after the conduct concerning which the member is presently charged.

(n) **Finding and Decision.** The Board of Rights shall at the conclusion of the hearing make findings of guilty or not guilty on each charge, which findings shall be based only upon the evidence presented at the hearing. If the accused is found not guilty, the Board shall order the member's restoration to duty without loss of pay and without prejudice, and the order shall be self-executing and immediately effective. If the accused is found guilty, the Board of Rights shall prescribe its penalty by written order of:

- (1) suspension for a definite period not exceeding 65 working days with total loss of pay, and with or without reprimand; or
- (2) demotion in rank, with or without suspension or reprimand or both; or
- (3) reprimand without further penalty; or
- (4) removal.

The decision of the Board must be certified in writing and a copy delivered to the Chief of Police as soon as practicable, but in no event later than ten days after the decision of the Board of Rights. Whenever a Board of Rights prescribes a penalty of suspension or removal and the member is not currently relieved from duty, the Chief may temporarily relieve the member from duty pending execution of the order.

For purposes of this section, demotion in rank shall mean reduction in civil service classification. The provisions of this section shall not apply to reductions in pay grade or similar personnel actions caused by reassignment, deselection from bonused positions, and the like. Such personnel actions shall be administered under policies adopted by the department.

(o) **Personnel History and Records.** The departmental personnel history and records of the accused shall be available to the Board of Rights only if the accused has been found guilty of any charge upon which the member was heard or tried by the Board of Rights, and then only for the purpose of determining a proper penalty. At the penalty stage, the Board may consider the entire departmental personnel history and record of the accused which shall include, among other things, information concerning personnel complaints against the accused that were sustained and information derived from complaints against the accused that were not resolved, to the extent and in the manner allowed by department policy except that the medical package of the accused shall not be considered by the Board with regard to penalty unless such information is relevant to a charge as to which there was a finding of guilty. In prescribing the penalty, the Board shall look to the nature and gravity of the offense of which the member has been found guilty and may at its discretion review the departmental personnel history and record of the member. No item or entry in the record may be considered by the Board except in the presence of the member and only where the member has been given a fair and reasonable opportunity to explain any item or entry unless the member has failed or refused to be present. Personnel records introduced at or considered by the Board are confidential except for any document or information from a document that was publicly disclosed during the hearing.

(p) **Imposition; Reduction of Penalty.** Within ten days of delivery of a certified copy of the decision of a Board Rights to the Chief of Police, the Chief shall either uphold the recommendation of the Board of Rights or may, at his or her discretion, impose a penalty less severe than that ordered by the Board Rights, but may not impose a greater penalty. In the case of a demotion, suspension, demotion and suspension, or removal, the Chief shall cause a copy of the notice of the penalty to be served upon the member and shall file a statement of this action with the Board of Police Commissioners within five days.

(q) **Effective Date of Penalty.** A removal prescribed by the Board of Rights, or by the Chief of Police if no hearing is had before a Board of Rights, shall relate back to and be effective as of the date of the relief from duty without pay pending hearing before and decision by the Board; however, where a final decision has been made by the Chief of Police prior to the end of the 30 day period referred to in subsection (b)(1), the removal shall be effective immediately. When there has been no relief from duty, the removal shall be effective upon service of the order. The effective date of any suspension and/or demotion prescribed by the Board of Rights, or by the Chief of Police if no hearing is had before a Board of Rights, shall be determined by policies adopted by the department; provided, that in case of suspension where there has been a temporary relief from duty, the 30 day period referred to in subsection (b)(1) or any portion thereof in which the member received compensation shall not be counted as part of the suspension. Nothing in this section shall preclude the imposition of a suspension without pay when a final decision is made prior to the end of the 30 day period. Practices in effect on the effective date of the most recent amendment to this section shall remain in effect until the adoption of any modification to the policies.

(r) **Calendar Days.** Except as otherwise provided in this section, all time periods, including those of limitation, shall be calculated in calendar days. When the last day of any such period falls on a weekend or City holiday, the period shall extend to the next business day.

(s) **Not Guilty.** In any case of a finding of Not Guilty of the accused after a hearing before a Board of Rights, the finding of Not Guilty shall be without prejudice to the member.

(t) **Rehearing.** At any time within three years after the effective date of removal, the removed member may file a request with the Chief of Police to be reheard or to be heard on the cause of the member's removal, together with a supporting affidavit setting forth in clear and concise language the reasons or grounds for a hearing or rehearing. The Chief shall consider and make a decision on the request and affidavit within 30 days after filing. If the Chief determines that good reason or cause exists for a hearing or rehearing, the Chief shall, without unnecessary delay, cause a Board of Rights to be constituted for the purpose of hearing and deciding upon the matter. The Board of Rights shall, at the conclusion of the hearing, render and certify its findings (independent of any previous findings by any other Board of Rights, or any other court, Board, or other tribunal, or any investigation or report of or discretion exercised by the

Chief in such cases where no hearing was had before a Board of Rights) based only upon the evidence presented at the hearing. The Board shall make and certify its decision and order in writing and deliver a copy to the Chief. The Chief shall proceed in the same manner as provided for above after decision by a Board of Rights.

(u) **Modification of Penalty.** Following the filing of the notice of penalty with the Board of Police Commissioners as required in subsection (p), the Chief of Police may correct a technical error, or where there is good cause shown, may reduce a penalty, including restoration of a person following removal. The provisions of subsection (w) shall not apply to this subsection; however, the member shall receive full compensation for any penalty or portion thereof already served which has been reduced or nullified by the Chief of Police. The Chief of Police shall file a copy of the modified order or statement of his decision with the Board of Police Commissioners.

(v) **Other Legal Rights.** This section shall not be construed to affect any rights a member may have to assert other legal rights or remedies in relation to his or her office or position or to the compensation attached thereto, or to appeal to or be heard or tried by any court or other tribunal of competent jurisdiction.

(w) **Restoration to Duty.** A member restored to duty after removal or temporary relief from duty, or whose suspension or demotion has been overturned in whole or in part, shall be entitled to receive full compensation from the City as if the nullified penal action had not been taken; except that such compensation shall not exceed one year's salary unless otherwise required by law.

(x) **Decisions Based on Evidence.** Members of a Board of Rights are to make decisions based solely on the evidence before them.

(y) **Public Records.** The order referred to in subsection (d) and the notice of the penalty referred to in subsection (p) are considered to be a public record at the time of filing of such documents with the Board of Police Commissioners. The Chief of Police or his or her designee shall be the custodian of public records referred to in this section.

(z) **Effects of Amending This Section.** This section shall not apply to the discipline of any member who was relieved from duty or who appealed a demotion or suspension or both to a Board of Rights prior to its effective date. Matters arising out of such relief from duty, demotion or suspension shall be adjudicated in accordance with applicable prior Charter provisions.

SECTION HISTORY

Amended by: Charter Amendment 1, approved April 10, 2001, effective May 5, 2001.