

REPORT OF THE CHIEF LEGISLATIVE ANALYST

DATE: February 15, 2018

TO: Honorable Members of the City Council

FROM: Sharon M. Tso *SMT* Council File No: 17-0071-S1
Chief Legislative Analyst Assignment No: 17-04-0421

Police Department Board of Rights Hearings, Hearing Examiners, Liability & Legal Issues

Summary

On January 24, 2017, the Council placed Charter Amendment C, relative to civilian membership on the Police Department's Board of Rights (BOR) panels, on the May 16, 2017 General Municipal Election ballot. That same day, the Council adopted two Motions related to this issue: one (Wesson – Englander – Koretz, Council File No. 17-0071) to create an Ad Hoc Committee on Police Reform, to review the criteria, selection process and enabling ordinance that governs civilian Hearing Examiners, and another (Wesson – Koretz – Price – Bonin – et al., Council File No. 17-0071-S1) instructing the Office of the Chief Legislative Analyst (CLA), with the assistance of the City Administrative Officer (CAO), City Attorney, and the Police Department (LAPD) to report on issues related to the LAPD's BOR disciplinary procedures. On May 16, 2017, the City's voters approved Charter Amendment C.

This Office was directed to report on the below items in Motion (17-0071-S1):

1. An implementation plan to conduct hearings throughout the City with respect to BOR issues;
2. A review of Civilian Hearing Examiners, including the application process, criteria for selection and options to increase the pool of civilian Hearing Examiners from the City, and the role of the Police Commission;
3. A report on liability claims, payouts and pending actions related to the LAPD, including recommendations to reform risk management and budgetary practices with respect to LAPD-related liability claims; and
4. A legal analysis of *Copely v. Superior Court* and other cases related to increasing transparency with respect to the BOR.

Recommendations

As the Council considers issues related to reforming the disciplinary process for the LAPD, it may wish to take some or all of the following actions that could result in more transparency and citizen participation in police disciplinary hearings:

1. Instruct the CLA to work with the Office of the Chair of the Ad Hoc Committee on Police Reform to identify suitable locations for meetings to be held throughout the City, develop a schedule for meetings and ensure public notification.
2. Request the City Attorney to report on what changes to Hearing Officer job requirements may be made to encourage more residents of the City to apply for these positions which conform with legal requirements for administrative hearings.

3. Support and/or sponsor state legislation that would open up disciplinary hearings of police officers to the public.
4. Direct the LAPD, with the assistance of the City Attorney, to report on options to make anonymized reports on police disciplinary matters available to the public.

Background

In the wake of the 1991 Rodney King decision and resulting civil unrest, then-Mayor Tom Bradley formed the Independent Commission on the Los Angeles Police Department, chaired by Warren Christopher, who later went on to serve as Secretary of State under President Clinton, to review issues within the LAPD. The Independent Commission made various recommendations for reform. In response to the Independent Commission's report the City Council placed Charter Amendment F on the June 1992 ballot to implement many of the proposed changes. Charter Amendment F passed with nearly 67 percent of voters in favor of the changes. Among these changes was a reconstitution of the Police Department's Board of Rights to include civilians in the process. As described in the CLA's January 6, 2017 report (Council File No. 16-0331), the Board of Rights hears cases where an officer is accused of misconduct by the Chief of Police and recommended for termination, or cases where the Chief has decided that an officer be suspended or demoted and the officer appeals that decision. Prior to Charter Amendment F, a Board of Rights was composed of three command-level police officers with the rank of Captain or above. Charter Amendment F reduced the number of police officers to two, and added a civilian Hearing Examiner appointed by the Police Commission.

No changes to the composition of the Board of Rights have been made since Charter Amendment F. In January 2017, the Council approved the placement of a proposed Charter Amendment on the May 2017 City ballot, which would give the Council authority to enact an ordinance to give an officer accused of misconduct the right to have their case heard by an all-civilian Board of Rights panel. On January 24, 2017, the Council approved the creation of an Ad Hoc Committee on the Board of Rights, which is tasked with finding ways to increase transparency, fairness and accountability in police disciplinary matters. Charter Amendment C was approved by the voters on May 16, 2017.

Public Hearing Implementation Plan

In recent years, a number of Council Committees have held special meetings on issues of particular concern to the residents of the City, such as commercial cannabis activity, street vending, sidewalk repairs, The Department of Water and Power and the minimum wage. Many of these meetings took place in locations across the City, and were often scheduled for weekday evenings in order to ensure the broadest public participation possible. The Ad Hoc Committee on Police Reform can hold meetings in a similar manner on this issue. The CLA's Office could work with the Chair of the Ad Hoc Committee to identify appropriate locations for these meetings across the City, and could work to assist in identifying dates and times for these meetings that enable the public to fully participate in the proceedings.

Review of Civilian Hiring Examiners and Options for Reform

Civilian Hearing Examiners are "as-needed" employees of the Board of Police Commissioners (Commission). When the Commission determines that there is a need for additional examiners, the Executive Director of the Police Commission posts the position on the City's website, where

applicants can apply. Applicants are required to submit their resume, application and cover letter to the Commission. Currently, the minimum qualifications for Civilian Hearing Examiners are:

1. Shall not have a criminal record that would impact the Hearing Examiner candidate's ability to act impartially as a BOR member;
2. Should have a record of responsible community service;
3. Shall not be presently employed as a full-time law enforcement officer;
4. Preferably a resident of the City of Los Angeles; and
5. Shall have at least seven years' experience with arbitration, mediation, administrative hearings or comparable work.

The application for Civilian Hearing Examiners asks questions related to interactions with the LAPD or other law enforcement agencies, as well as questions about educational background and membership in professional organizations. If an applicant meets the requirements, they are interviewed by the Executive Director of the Police Commission. Successful candidates are then offered an "as-needed" position, and can be called upon to serve as a Hearing Examiner at BOR hearings.

The Civilian Hearing Examiner position, and the role of the Commission in hiring them, was established by an ordinance adopted by the City Council in September 1994. As these regulations were established by Ordinance, the Council could change or amend the requirements for Civilian Hearing Examiners in order to encourage the participation of City residents. Any changes proposed by the Council should be vetted by the City Attorney to ensure continued compliance with the Administrative Hearing requirements for disciplinary procedures in the Peace Officer's Procedural Bill of Rights.

The role of the Commission is limited to the hiring of Civilian Hearing Examiners, the provision of orientation and training for Civilian Hearing Examiners, and the maintenance of a pool of qualified Examiners, scaled to the needs of the Department. The Commission also has the authority to remove members of the pool at its discretion. Other than providing a pool of Civilian Hearing Examiners for BOR hearings, the Commission has no role in the disciplinary process of the Department.

Currently, the Commission employs 37 individuals on an as-needed basis for three-year terms. There is no limit on the number of terms an Examiner can be appointed to, and the average Examiner has served for multiple terms. Civilian Hearing Examiners are paid \$900 for a full-day hearing, \$450 for a half-day hearing, and \$900 for a final report. BOR Hearings can last for multiple days. There were 28 BOR hearings in 2017.

Liability and Risk Management Issues

According to the CAO, each year the City's budget includes an appropriation to the Liability Claims Account, which is intended to cover the costs of payments or settlements for claims against the City. The total budgeted for this purpose in 2017-18 was \$89.09 million. This amount was determined based on a combination of factors, including historical spending trends, an assessment of pending cases and the related City exposure, and the availability of funds. In recent years, actual payouts have exceeded this budgeted amount, and the City has been required to transfer funds from other accounts in order to meet the obligation. In 2017-18, for example, it was anticipated that total

payouts may exceed \$89.09 million, so an additional \$20 million was budgeted in the Unappropriated Balance, Reserve for Extraordinary Liability for payouts exceeding the regular liability payout budget, for a total of \$109.09 million. The CAO has reported in the Financial Status Reports that there remains potential unbudgeted expenditures for liability claims in 2017-18. For comparison purposes, in Fiscal Year 2016-17 the City included \$68.4 million in the budget and \$57.8 million in the Unappropriated balance for liability claims, but paid out over \$201.3 million.

Of the provided \$89.09 million budgeted for liability payouts in Fiscal Year 2017-18, \$80.34 million was allocated to the Miscellaneous Liability Payouts account and \$8.75 million was allocated to the Department of Public Works, Bureau of Sanitation (BOS) account. The funds in the Miscellaneous Liability Payouts account are used to pay for liability payouts of all departments except the BOS.

The City Attorney reports that during Fiscal Year 2016-17 the City made liability payments in 108 legal cases involving the LAPD and that the total cost of these payments was \$47 million. The majority of these payments were the result of civil rights or excessive/unlawful arrest claims (\$30.3 million) and labor/employment claims (\$16 million). However, it should be noted that a number of these payments have resulted from actions by LAPD officers that occurred over five years before payment, and a number of the incidents that resulted in payments may not be reviewable by a BOR.

As a result of growing liability issues, the LAPD implemented a new Risk Management and Harm Reduction Strategy in February 2015. This strategy was implemented with the objective of reducing the recurring and measurable physical, organizational, and financial harms caused by certain police-related activities such as uses of force and employee involved traffic collisions.

In 2015, the City Attorney and CAO also began to take steps to address growing liability and risk management issues. In December 2015, a Motion (Krekorian – Cedillo, Council File No. 15-1432) was introduced requesting a report on the history of liability payouts for each department, and to identify the greatest sources of liability claims over the previous five years. Shortly after that Motion was introduced, the CAO released its report on the issue, and described the CAO Risk Management Division and City Attorney's efforts to reduce liability claims, which included tracking liability claims by department. However, liability claims remain a significant issue, and the CAO and City Attorney are continuing to work to address the problem.

Analysis of *Copley V. Superior Court* and Other Cases

The City Attorney states that in 2006, the California Supreme Court analyzed and decided the extent to which the California Public Records Act (CPRA) required disclosure of records of a county civil service commission ("CSC") regarding a peace officer's administrative appeal of a disciplinary matter (*Copley Press, Inc. v. Superior Court*). While the *Copley* decision was focused primarily on access to records pertaining to the administrative appeal, the rationale employed by the Court concerning the confidentiality of peace officer personnel records and information applies with equal force to the openness of such hearings to the public.

The City Attorney states that in *Copley*, the San Diego Civil Service Commission scheduled a closed hearing for a deputy sheriff appealing a termination notice, as this Commission conducts

administrative appeal hearings on behalf of the San Diego Sheriff's Department. Copley Press requested and was denied access to the hearing. Copley Press then served a CPRA request on the Commission, requesting "any documents filed with, submitted to, or created by the Commission concerning the appeal (including its finding and decision) and any tape recordings of the hearing." The Commission withheld most of the requested records, including the deputy's name, asserting exemptions to disclosure under the CPRA. Copley Press filed a Petition for Writ of Mandate in the Superior Court, which ultimately resulted in the California Court of Appeal hearing the matter and ordering nearly all requested records disclosed, including the deputy's name. The California Supreme Court then granted review of this decision, and reversed it.

One of the main issues addressed by the State Supreme Court was whether the San Diego Civil Service Commission was properly considered part of the deputy's "employing agency," as the peace officer personnel privilege limits confidentiality of such files to those maintained by the officer's employing agency. According to the appellate court, the confidentiality provided by state law did not apply to the testimony of percipient witnesses to an event, from documents not maintained in the officer's personnel file, or from material generated from the administrative appeal added to the officer's file. Therefore, the Court of Appeal concluded that the Commission's records were not exempt under the CPRA.

The California Supreme Court disagreed. First, the Supreme Court affirmed that the peace officer personnel privilege of Penal Code § 832.7 applied in civil, criminal and administrative proceedings. Importantly, the Court emphasized that the word "confidential" establishes a general condition (presumption) of confidentiality, with limited exceptions. The Court next addressed and rejected the Copley Press's argument that because the Commission does not employ peace officers, its files are not "maintained... by the officer's employing agency," as required under the definition of a personnel record. Specifically, the Court held that because the civil service commission had been designated to provide an appeal that the officer's employer is required by law to provide in connection with taking punitive action, it was reasonable to conclude that the Commission is functioning as part of the "employing agency," and that any file it maintains regarding an officer's disciplinary appeal constitutes a file maintained by the officer's employing agency.

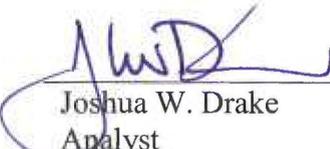
The City Attorney states that the law grants local agencies discretion to determine rules and procedures for administrative appeals. Discretion can be exercised to select a third party to hear the appeal or, as in the case of the LAPD, can select one or more individuals within the law enforcement agency to hear it. However, the City Attorney states that the Court cautioned that discretion must be exercised consistent with any constitutional or statutory limitations.

Respecting the release of the deputy's name, the Supreme Court concluded in its *Copley* decision that the identity of an involved officer is confidential when related to or part of a disciplinary process, and that the legislative history of the pertinent Penal Code sections confirms the Legislature's intent to prohibit release of any information identifying the individuals involved, in an effort to protect personal privacy rights of both, citizens and officers. Finally, in response to the Copley Press's argument that public policy compelled disclosure of the requested records, the Court found that the Legislature had already heard and considered such arguments prior to passing and then amending Penal Code Sections 832.5, 832.7 and 832.8, and reaffirmed that "...the desirability of confidentiality in police personnel matters does outweigh the public interest in

openness.” The Court concluded that the state legislature, not the court, is the appropriate venue for this type of policy consideration.

According to the City Attorney, the *Copley* Court declined to rule on whether a law enforcement department or agency should close peace officer administrative appeal hearings. While the San Diego Civil Service Commission’s practice was to close such hearings, the deputy’s disciplinary appeal in *Copley* was resolved prior to hearing. As such, neither the Court of Appeal nor the California Supreme Court ruled on this issue. However, as maintaining open Boards of Rights hearings conflicts with the rationale employed by the *Copley* Court in reaching its conclusion regarding the confidentiality of ‘records’ of these administrative appeals, the City Attorney states that the *Copley* decision strongly supported requiring that the administrative hearing itself, where the subject matter of the complaint or disciplinary investigation was discussed and adjudicated, would also be privileged and required closure. This interpretation of the breadth of *Copley* was later affirmed by the Court of Appeal in *Berkeley Police Association v. City of Berkeley*. In that case, the court determined public hearings, would necessarily violate Section 832.7 of the Penal Code by disclosing information obtained from an officer’s confidential personnel record. Like the Supreme Court in *Copley*, the *Berkeley* Court remarked that to the extent a closed process is less effective than an open one in accomplishing the objectives supporting civilian oversight, it was a matter that must be addressed by the Legislature.

While *Copley* and other case law makes clear that peace officer personnel records and information, including complaint investigations and the identity of an officer when connected to a complaint or disciplinary matter, are confidential and may not be disclosed in the absence of compliance with the procedures set forth in the Penal and Evidence Codes, the City Attorney states that the City is not without options to increase transparency and access to the LAPD’s BOR process and decisions. The City Attorney states that the City could require enhancement of existing LAPD reports containing statistical information on the number, type or disposition of complaints made against officers, so long as said information is in a form which does not identify the individuals involved. Finally, the LAPD could continue its current practice of releasing the names of officers involved in officer-involved shootings and other significant uses of force incidents at or near the time of the event.



Joshua W. Drake
Analyst

Attachment: Motion (Wesson – Koretz – Price – Bonin – et al.)

SMT:jwd

MOTION

RULES, ELECTIONS & INTERGOVERNMENTAL RELATIONS

In the wake of Rodney King in 1991, then-Mayor Tom Bradley formed an independent Commission on the Los Angeles Police Department (LAPD), informally known as the Christopher Commission. The Commission was created to conduct a full and fair examination of the structure and operation of the LAPD, including its recruitment and training practices, internal disciplinary system, and citizen complain system. With the publication of the report, the City Council placed Charter Amendment F on the June 2, 1992 State of California Primary Election ballot to reform the Los Angeles Police Department.

Charter Amendment F passed with nearly 67 percent of the vote in 1992. Warren Christopher, the architect of the amendment, called the disciplinary changes "a critical aspect" of the measure that received little attention during the campaign because they are complicated and difficult to explain to voters, according to the Los Angeles Times. It has been over 20 years since the disciplinary changes have been thoroughly reviewed and evaluated, including most importantly the adjudication process known as the Board of Rights and the roles of command officers and civilian Hearing Examiners.

The current civilian Hearing Examiners meet high standards in order to serve on a Board of Rights panel. However after 25 years of this policy, the City should evaluate and determine whether the pool of civilians should be increased to include greater diversity more focused on residents of the City, retired police officers, and former command staff. Over those two decades, there have been several complaints by officers and residents related to the Board of Rights process that can be summarized into three categories: fairness, liability, and transparency.

According to a report written in 2000 by the former Chair of the Elected Charter Reform Commission and current Dean of the UC Irvine School of Law Erwin Chemerinsky, after reviewing these issues in the aftermath of the LAPD Rampart Division scandal, the Board of Rights needed to be reconstituted. According to Chemerinsky, "The current disciplinary system is widely distrusted by officers. Many believe that it often is controlled ... and is used in an arbitrary fashion, sparing command staff from punishment and imposing sanctions on the rank and file. This perception causes friction between leadership and the rank and file, undermines morale, and reinforces the code of silence as officers are unwilling to make complaints in a process they distrust." One of three options recommended by the Commission according to Chemerinsky's report, "... likely the most promising, would be a civilian review board ...", or an all-civilian Board of Rights. Since 1992, no changes have been made to the composition of the Board of Rights.

Furthermore, as the City Council is well aware, there has been a recent spike in the number of liability claims and liability payouts, some of which includes LAPD matters. Repairing the disciplinary system can be a significant factor in increasing the trust between the public and the City. That increased trust can and should lead to a reduced number of jury awards and settlement payouts. Programs like the recently implemented embRACE LA, as well as a reconstituted and reformed Board of Rights, are two of many strategies that are needed to increase the trust between our communities and the LAPD.

Lastly, as noted by the Chief Legislative Analyst (CLA) in a report dated January 6, 2017, as a result of a State of California Supreme Court decision in 2006, *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." This has led to frustration by the public and media with respect to how Board of Rights hearings have been conducted over the last decade, as well as how decisions are made regarding suspension, demotion, or termination. Increasing transparency will build confidence and trust between the community and the City.

WE THEREFORE MOVE to INSTRUCT the CLA, with the assistance of the CAO, City Attorney, and LAPD, to report back within 90 days to the AdHoc Committee on the LAPD Board of Rights with respect to the following issues:

1. An implementation plan to conduct hearings throughout the City and in the community with respect to the Board of Rights and the issues as described above and below.
2. A thorough and comprehensive review of civilian Hearing Examiners, including the application process, the criteria for selection, options to increase the pool of civilians from residents of the City, and the role of the Police Commission
3. A comprehensive report of liability claims, liability payouts, and pending actions related to the LAPD. This report should also contain recommendations to reform risk management and budgetary practices with respect to LAPD-related liability claims and made available to be considered during the FY 2017-18 Budget process.
4. A complete legal analysis of *Copley v. Superior Court* and other relevant cases related to increasing transparency with respect to the Board of Rights. This report should contain options, whether via state legislation, Charter Amendment, or municipal ordinance, to provide further access to the public with respect to Board of Rights hearings and decisions.

PRESENTED BY:

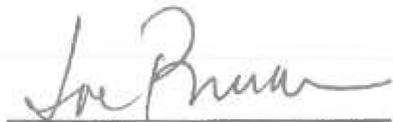

HERB J. WESSON, JR.
Councilmember, 10th District


PAUL KORETZ
Councilmember, 5th District

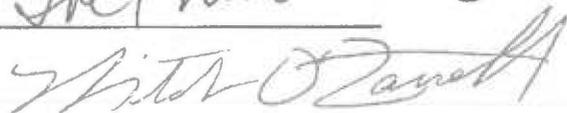

CURREN D. PRICE, JR.
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SECONDED BY:







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