



Police Review Commission

## ACTION MINUTES OF THE REGULAR MEETING OF THE POLICE REVIEW COMMISSION

North Berkeley Senior Center  
1901 Hearst Street  
Berkeley, California

Date: Wed. May 24, 2000  
Time: 7:30 p.m.

1. ROLL CALL: 7:40 PM  
  
Commissioners Present: Bennett, DeBose, Mar, Martynn, Ritchie (7:45 PM), Sanchez-Resnik, Taylor, White, Zellman  
  
Commissioners Absent: None  
  
PRC Staff: Barbara Attard  
  
BPD Personnel: Sgt. Gordon, Lt. Randle
2. PUBLIC COMMENT  
  
William Caldeira expressed dissatisfaction with the PRC and asserted that the Administrative Closure request was “fraudulent.”
3. MINUTES OF THE MAY 10, 2000 MEETING  
  
**Bennett/Taylor (Moved/Seconded) to approve the May 10, 2000 meeting minutes. Passed with DeBose and Ritchie abstaining.**
4. PRC OFFICER'S REPORT (For Discussion or Action)
  - a) New Filings- Three since last meeting
  - b) Boards of Inquiry



The following boards were discussed:

1806 Gibson/Off Bachman Case--Thursday 6/8/00—Zellman Sanchez-Resnik, DeBose

1811 Moore/Off's Hart, Rateaver, Files, Jamison +—Wed. 6/21/00 Ritchie, White, Martynn

1810 Iphie/Off Jamison—Unable to fill

c) Late Filing—PRC Case #1815—Filed by James Boyd

Commissioner Zellman expressed concern that Mr. Boyd stated that he had no knowledge of the PRC. Sgt. Gordon stated that all complainants are mailed a flier that has information about the PRC. **DeBose/Mar (Moved/Seconded) to accept case as late-filed. Passed unanimously.**

d) Administrative Closure—PRC Case #1818—Filed by William Caldeira

Barbara Attard stated that the Administrative Closure request was based on a City Attorney opinion that the PRC did not have jurisdiction over complaints filed regarding officers lying in PRC interviews because this could possibly lead to an endless cycle of complaints in which the complainant could continue to allege that the officer gave false testimony in the previous case.

Mr. Caldeira expressed his dissatisfaction with the PRC and his concerns that the Administrative Closure request was “fraudulent.”

**DeBose/Ritchie (Moved/Seconded) to administratively close case. Passed with Bennett abstaining.**

e) Commissioner Workshop Rescheduled for June 22, 2000

Chair White and Commissioner Bennett stated that they planned to go to the workshop.

f) NACOLE Meeting

Chair White and Commissioners DeBose and Mar expressed interest in attending the NACOLE meeting September 26-29 in Kauai.

3. BPD CHIEF'S REPORT—None.

Commissioner Sanchez-Resnik stated that if BPD forms a committee for recruitment, the PRC Commissioners who have volunteered to participate in the recruitment process would like to be notified of the meeting and would like to receive copies of documents for recruitment. (Commissioners Sanchez-Resnik, DeBose and Mar have volunteered to participate.)

6. COMMITTEE REPORTS (For Discussion or Action)

--Transgender Task Force—A meeting is scheduled for June 14, 2PM with Sgt. Gordon.

--Drug Task Force Update

Commissioner Ritchie reported that parts of the forum will be televised on BTv. (PRC has received a copy of the videotape.) The task force will be putting together a summary and report for the City Council.

7. OLD BUSINESS (For Discussion or Action)

a) City Manager Jim Keene to Discuss CALOCA Case With PRC (Item taken out of order)

James Keene appeared before the PRC with City Attorney Manuela Albuquerque and Deputy City Attorney Sarah Reynoso. Mr. Keene explained that the Berkeley Police Association (BPA) has asked the City to afford Berkeley police officers the appellate rights indicated in the Caloca case. Caloca (*Caloca v County of San Diego*, 72 Cal. App. 4<sup>th</sup>) is a case brought against the County of San Diego by the Deputy Sheriff's Association (DSA) regarding the right to due process appeals to sustained findings of misconduct issued by the CLERB (Citizens Law Enforcement Review Board). Mr. Keene had discussed the matter with staff and wanted to review staff recommendations with the PRC and get the Commission's perspective before making final decisions in responding to Caloca.

Ms. Albuquerque stated that the "Public Safety Officers Procedural Bill of Rights" as delineated in the California Government Code, requires that a public agency provide police officers with an appeal hearing whenever an officer is subject to punitive action. Because PRC findings have not historically been connected to the disciplinary process, the position of the City has been that officers are not entitled to appeal hearings.

Ms. Reynoso explained that the Caloca case has taken the right to appeal a step further—indicating that if the sustained misconduct findings by a civilian oversight agency may affect an officer's career *in any way*, (whether or not there is discipline) the officer is entitled to request an administrative appeal of that finding. When questioned by the City Attorney, Chief Butler stated that he may consider PRC findings in making promotional or special assignment decisions, or if an officer is applying to an outside agency the PRC findings may be released. Because Chief Butler's stated use of PRC findings parallel the response of the San Diego sheriff involved in the case, the City Attorney believes that the appeal rights triggered in Caloca under the Public Safety Officers Procedural Bill of Rights apply to Berkeley PRC findings, as well, if the Chief of Police may consider the findings in any personnel matters. What Caloca has left open is what kind of appeal must be provided to comply with the Public Safety Officers Procedural Bill of Rights. However the cases under the Public Safety Officers Procedural Bill of Rights seem to suggest that the officers must be given a right to confront witnesses, which implies a *de novo* hearing. San Diego has been involved in "Meet and Confer" with the DSA over this issue. San Diego has adopted procedures to implement an administrative appeal process before the County Civil Service Commission. San Diego implemented these procedures after reaching impasse during meet and confer with the DSA on this issue. The procedures adopted by San Diego provide for a full evidentiary hearing before the Civil Service Commission. The DSA has filed a new legal action against

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the County regarding these new procedures in which it argues that the procedures do not comply with the Public Safety Officers Procedural Bill of Rights because they do not provide sufficient due process. In addition, the DSA is challenging the meet and confer process.

Ms. Albuquerque stated that she has advised the City Manager that if the Chief of Police may consider the findings in promotions or assignments in any way that could adversely impact the officer, that the City will have to institute an administrative appeal procedure. Because the Internal Affairs (IA) disciplinary procedure happens on a faster time line, the PRC decisions cannot be folded into the appellate process established for IA cases.

Mr. Keene expressed concerns about establishing an appeal process for two reasons: 1) How would formally calling the PRC findings into question ultimately impact the PRC? 2) What would be the impact on City government of establishing a review process--as far as increased costs and demands?

An option that Mr. Keene has been favoring would be to establish a policy for the Chief to make clear that he will not consider the PRC findings with respect to individual officer's assignments or promotions. The PRC would continue to issue its decision and the City Manager would review the findings. In the instances in which the Chief's internal affairs investigation has come to a different conclusion than the PRC, if the City manager tends to agree with the PRC, he will institute further discussions with the Chief in this regard and if he continues to believe that the conduct needed to be corrected he will ask the Chief to undertake training or policy changes to avoid a repetition of the incident. However, before finalizing a decision on implementing Caloca, Mr. Keene wanted to get input, reactions and ideas from the PRC.

Commissioner Ritchie asked about disciplinary responsibilities of the City Manager in relation to the disciplinary responsibilities of the Police Chief. Ms. Albuquerque explained that the Police Chief has disciplinary authority up to a three-day suspension, whereas the City Manager has authority over stronger discipline. The discipline can be appealed to the City Manager's designee before it is imposed. Commissioner Ritchie asked how this would affect the City Manager's review of PRC cases. Mr. Keene stated that this process would have to be reviewed in light of Caloca.

There was a discussion regarding the type of appellate hearing that is required. Commissioner Ritchie stated that because there is already a record that includes witness testimony, the appeal could be a less formal one at the City Manager level. Ms. Albuquerque and Ms. Reynoso disagreed, stating that the cases under the Public Safety Officers Procedural Bill of Rights in other contexts had held that the appeal would have to include a right to confront adverse witnesses and thus seemed to require an evidentiary hearing.

Mr. Keene stated that it is important to understand that BPA may not be a passive player in this process. It is possible that they may push to have hearings on all cases and issues.

Commissioner Martynn supported Commissioner Ritchie's suggested hearing process. He also stated that the decision should be based upon more than a theoretical possibility that the Police Chief states that he "may," possibly use PRC findings. PRC General Order P-26 discusses an appeal process;

perhaps this process could be part of the PRC appeal.

Ms. Albuquerque stated that this reference is to the grievance process for discipline and leads to binding arbitration. She explained, however, that since PRC findings do not result in discipline, to subject all such findings to binding arbitration would create a very expensive and cumbersome appeal that was not legally required to comply with Caloca and not one that she would recommend. She stated that she agreed with Commissioner Martynn's comments that the mere fact that the Chief had said that he might consider PRC findings in promotional or personnel assignments did not mean that he had actually ever done so. She explained that it was for this reason that the City Manager was considering simply advising the Chief to cease his consideration of PRC findings as even a theoretical possibility.

Commissioner Martynn stated that civilian oversight is necessary and essential and, particularly during these times with police issues in the media, we should not be considering cutting back on this process. Civilian oversight in Berkeley should be preserved; cost should not be a factor.

Ms. Albuquerque stated that the PRC's current procedures that provide for civilian oversight are not being challenged in Caloca, it is merely the "possibility" of the use of the findings that triggers the appeal.

Commissioner Martynn stated that the suggested remedy would render the PRC a charade. In fact, he feels that because the Police Chief makes disciplinary findings without benefit of the PRC findings or the City Manager's findings, there is currently very little civilian oversight in Berkeley.

Osha Neumann, a former PRC commissioner for eight years, addressed the PRC. He was on the Commission during a period when there was a "meet and confer" process. His memory was that the 120-day disciplinary timeline was established because the PRC findings would be used for discipline. He feels that this is a crucial time in PRC history and that important decisions are being made at this time that would greatly impact the PRC process. Mr. Neumann stated that the administrative appeal proposed by the City Manager and the City Attorney is not necessarily the legal requirement. The proposal goes beyond what is required in Caloca. He read from cases that are cited in Caloca.

Mr. Neumann stated that although he did not do significant research into this matter, he has reached a differing legal opinion than that offered by the City Attorney. He feels that the PRC should ask for independent counsel at this juncture because of inherent conflicts in city government. City attorneys wear many hats--they represent police officers and defend lawsuits filed against police officers, and the City Manager must keep labor relations smooth.

Commissioner Sanchez-Resnik stated that she believes that it will cost money to resolve this matter. She additionally stated that she had written a letter to the City Manager approximately a year ago about an incident in a PRC Board of Inquiry in which officers refused to answer Commissioners' questions. She was unhappy that she did not get a response to the letter. Mr. Keene apologized for the oversight of not formally responding to Commissioner Sanchez-Resnik's letter.

Mr. Randy Files, BPA representative, stated that officers are employees with due process rights. They feel that their rights are being violated because the right of appeal indicated in Caloca are being denied officers at this time.

Commissioner Zellman stated that she feels that the City Attorney's suggestion for resolving the Caloca appellate rights issue would undermine the PRC process. Ms. Albuquerque stated that she is not advocating a change in the PRC process, just stating that the Police Chief could not consider the PRC findings for the purposes that he has stated that he may use them. Commissioner Zellman stated that she understood the City Attorney's position, however she feels that this would further undermine the PRC process.

Commissioner Taylor asked the City Manager if he would have a problem with the PRC retaining independent counsel. Ms. Albuquerque stated that she was concerned that this had quickly become an adversarial discussion. She believes that there are issues that different parties would agree upon. For example, she believes that Mr. Neumann would agree that the development of an appeal process under Caloca is subject to meeting and conferring with the BPA and the meet and conferring with the union would be between the City Manager and the BPA, the PRC would not be a party. Thus, any outside counsel would not be advising the PRC, but the City Manager. She explained that in the past, the PRC was involved in the meet and confer process because the subject of the meeting and conferring process concerned what regulations the PRC would adopt for its own hearings and findings. She stated that she believed it would also be agreed to by all concerned, including Mr. Neumann, that the PRC was not required to adopt the evidentiary procedures which it ended up adopting after the prior meet and confer process yet it did so. Ms. Albuquerque stated that the point that they were trying to make was that the Public Safety Officers Procedural Bill of Rights requires "the right to confront" in the procedure. They were not trying to say that it mandated a particular procedure; it does require the right to confront.

**DeBose/Zellman (Moved/Seconded) to request that the City Manager hire independent counsel to review the Caloca case on behalf of the PRC in order to determine options for an appeal process (if necessary, the request should be presented to the City Council). Passed unanimously.**

Discussion of Motion before vote:

Commissioner DeBose believes that the appeal process does not have to be so complicated as the process that was proposed. Commissioner Ritchie asked whether the City Manager or the City Council would be the group that would make the decision about hiring independent counsel. Commissioners Martynn and Sanchez-Resnik stated that the PRC should have some input on hiring independent counsel. Commissioner Bennett stated that the Commission devotes a lot of time to hearings on cases and if the findings were to have no impact it would be a waste of time. Commissioner Sanchez-Resnik referred to a letter from Jim Chanin of the BARK ACLU commenting on the appellate process.

Osha Neumann suggested possibly amending the motion to leave the option open that the City Council could authorize hiring of the independent counsel for the PRC. Commissioner DeBose agreed that her

motion could be amended to reflect this change.

Mr. Keene stated that the reason that he had come before the PRC was to get the Commission's perspective on this issue. He cautioned against over-simplification of the process, because he often sees over-simplification in City government. He warned against setting up a process that would fail because the City cannot support it.

Discussion of Motion after vote:

Mr. Keene stated that he would like the PRC to formalize where the PRC would like to go with an appeal process so that the City could begin to formulate procedures for appeals.

Commissioner Mar stated that the PRC is asking for assistance in determining an appeal process. The PRC cannot support further erosion of the efficacy of the PRC.

Mr. Keene stated that he (and the City Attorney) very much support civilian oversight. His concern is determining the mechanics for implementing the Caloca decision.

Barbara Attard asked if it would be possible to combine the appeal rights for IA with the appeal rights for PRC if the two processes could be investigated within the same time frame.

Commissioner Ritchie stated that there are two other issues that the PRC would like addressed: 1) bringing the City of Berkeley within the state mandated time line of one year for police discipline (and eliminating the 120 day timeline) and 2) establishing a process for referral of names of IA complainants to the PRC, perhaps with use of information cards. These issues will be discussed further with the City Manager at a later date.

Mr. Files stated that BPA is will be pushing the City Manager to make a decision regarding Caloca. There are officers who are interested in appealing PRC findings who cannot do so because there is no process in place. They feel that their rights are being denied.

b) PRC/Internal Affairs Procedures and Statistics

There was a discussion regarding BPD's notification to complainants regarding the disposition of citizen complaint investigations. Commissioner Martynn pointed out that CA Penal Code 832.7, "Peace Officer Personnel Records," requires ". . .(e) The department or agency shall provide written notification to the complaining party of the disposition of the complaint within 30 days." Chief Butler had informed the PRC that IA only notifies complainants (of the disposition) in cases in which the complainants file directly with internal affairs. In cases referred to IA by PRC no notification is sent. Commissioner Martynn stated that CA P.C. 832.7 does not make this distinction and believes that all complainants should be notified.

**Martynn/Taylor (Moved/Seconded) to ask the City Manager and/or City Attorney to direct BPD to comply with CA P.C. 832.7 by notifying all complainants of the findings of the**

**investigation of their complaints. Motion amended to: Ask the City Attorney to review the issue of notification of findings in PRC initiated cases and if BPD is not in compliance with CA P.C. 832.7 to direct BPD to comply by notifying all complainants of the findings of the investigation. Passed unanimously.**

- c) Ballot Measure to Increase PRC Commissioner Stipend—Follow up from 5/23/00 Council Meeting

Chair White reported that this item did not pass at the Council Meeting, but may be revisited at a later date. One possibility being discussed is to place an item on the ballot giving the City Council authority to change the amount of the stipend without asking for an increase at the same time.

The action taken at the 5/23/2000 City Council Meeting:

Moved, seconded, failed (Spring/Breland; Abstain—Maio, Olds, Woolley, Dean; Absent-Armstrong) to adopt the PRC recommendation.

- d) April 12, 2000 Officer Involved Shooting

A report was received from BPD on the shooting. The item was carried over to the 6/14/00 Meeting.

8. NEW BUSINESS (For Discussion or Action)

- a) Policy Complaint—Crowd Control Issues—Complaint Filed by Carol Denney

Complainant Denney presented her policy issues. Her specific concerns include:

1. A crowd of onlookers, was forcibly shoved backwards by a police line without being given egress, causing some people to fall to the ground. (Handled through PRC complaint #1771-Complainant Rochelle—Not Sustained)
2. Non-violent, non-resisting, voluntary arrestees committing civil disobedience were given pain compliance holds by officers making arrests.
3. A Berkeley police officer tore a “Save KPFA” protest sign out of the hands of a KPFA supporter.
4. Onlookers were forced back too far to be able to witness the treatment of arrestees in violation of their right to observe.
5. UCPD Officer Roby, as part of a wedge, used his baton pointed end forward instead of horizontally. (Not within PRC Jurisdiction)

Item #1 was not discussed because it was handled in a complaint investigation.

Item #2—Ms. Denney stated that when this issue came before the City Council there was no distinction drawn between pain compliance and control holds. She would like a policy instituted that



no distinction should be made between these two types of holds/maneuvers for purposes of dealing with nonviolent demonstrators.

Item #3—Ms. Denney would like to see a policy instituted that requires officers to issue property receipts in cases in which fliers, banners, and signs are confiscated.

Item #4—Ms. Denney stated that the action taken during the KPFA demonstration caused protestors to be moved to a position from which they could not observe action taken. She would like to see guidelines established for perimeters for demonstrations that would justify for exceeding.

Item #5—Questions came up regarding the jurisdictional issue raised here because officers from other jurisdictions who are responding to a mutual aid request are required to follow BPD policies. Questions came up regarding joint training of officers throughout Alameda County who may be involved in mutual aid requests. This joint training was urged by the City Council in April, 1992.

Commissioner Zellman stated that neither pain compliance nor control holds should be utilized in Category 1 arrests (Cooperative arrestees).

When questioned regarding policies for confiscation of political signs, etc., Lt. Randle stated that he would discourage establishing a policy for issuing receipts for these items because he feared that this would give officers the impression that these items could be confiscated, a possible 1<sup>st</sup> Amendment violation.

Commissioner Taylor stated that it may be important to devote a period of time at a future meeting to this issue, possibly in July.

**DeBose/Sanchez-Resnik (Moved/Seconded) to establish a subcommittee to include PRC members, BPD, and members of the public who may want to participate, to review these issues and make recommendations for the meeting in July. Passed unanimously.**

Commissioner Taylor stated that he would participate in the subcommittee.

## 9. COMMUNICATIONS

- Letter from James Chanin-BARK ACLU—to be placed on the agenda for the 6/14/00 PRC meeting.
- BPD Vehicle Stop Demographics Study-- to be placed on the agenda for a later PRC meeting.
- BHS Operation Stay in School Truancy Program—Report Received from BPD  
Commissioner Bennett spoke with BHS Principal Saunders about the report. Ms. Saunders verified that the report was accurate. To be placed on the agenda for the next meeting.
- Police Commendations
- Commissioner Martynn asked that the UCPRB recommendations be placed on the agenda for the next meeting.
- Commissioner Martynn stated that he and Commissioner Mar will be reviewing the

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Accreditation Standards and would like to discuss BPD accreditation at the next meeting.

- Commissioner Zellman announced upcoming budget meetings before the City Council—June 6 and 20

10. ADJOURNMENT

**Bennett/Zellman (Moved/Seconded) to adjourn at approximately 10:55 PM. Passed unanimously.**