

Re: My response and concerns regarding the current Charter Amendment measure to establish a new Police Board

From: Commissioner Calavita

Date: April 8, 2020

The current proposal will significantly strengthen the PRC in some important respects. However, in other respects it is a weakening of the original PRC proposal as well as the Arreguin/Harrison proposal. In the interest of time, I wanted to enumerate the concerns I will raise at our meeting this evening. They are of two sorts: more minor language changes and substantive changes.

LANGUAGE ISSUES:

1. Most minor, on p. 24, Section 19 (e), the document states, "In cases where the finding is not sustained, unfounded, or exonerated....". I had to read this several times before I realized what it means is "where the finding is 'not sustained', 'unfounded', or 'exonerated'". In other words, quotes are needed around each type of finding.
2. On p. 21, Section 18 (b), there is no mention of the complainant appearing at the hearing, but on p. 22, Section 18 (i), both the sworn employee...and the complainant" appear. The complainant needs to be included in the prior section.
3. On pp. 5 and 13, the document states that in cases of complaints, the Director of Police Accountability (DPA) shall make findings and recommendations to the Board, with no mention of the Board doing an independent hearing of the complaint (Instead, it is to "receive and consider the findings and recommendations of the Director...." [Section 3 (3)]). However, on p. 21 Section 18 (b), it states that the Board "shall hear and decide findings on allegations of misconduct..." The role of the Board in hearings needs to be emphasized on pp. 5 and 13.
4. On p. 20, Section 16 (b) (5), race and ethnicity need to be specifically included as per previous versions. "Statistical data shall include the demographics—including race and ethnicity—reason for the stop...in compliance with policies, practices, and procedures of the City, Police Department, and the Police Department General Order on Fair and Impartial Policing, B-4.
5. The title—"Police Board"—includes no acknowledgement of its primary function as a citizen oversight panel. Since the Director is the "Director of Police Accountability," I propose the Board be called the "Police Accountability Board."

SUBSTANTIVE ISSUES:

1. The Boards of Inquiry have been done away with (Section 18 (b)). In combination with what seems like an increased role of the DPA for hearing complaints, this elimination of the BOI appears to dilute the input of the Board with regard to complaints and reduce it to a rubber stamper of DPA recommendations. Related, scheduling timely and full hearings for the entire

Board of 9 commissioners will be a serious challenge, and I suspect they will often be reduced to quorums.

2. Section 17 (a) on p. 21 proposes that the Chief of Police submit new policies for review by the Board within 30 days **after** they have been implemented. This after-the-fact review is a serious step backwards from the current practice of reviewing new policies before they take effect.
3. Section 14 (a) on p. 18 stipulates that the City Manager shall—"to the extent possible"--send the the names of three candidates for the Director of Police Accountability selected by the City Manager to the City Council which will then select the finalist. In this scenario, the Board will have no role in selecting its Director. I propose including language such as "The Police Accountability Board will have the opportunity to review and submit their evaluations of these nominees to be considered by the Council and to make their recommendation for appointment."
4. Section 19 (d) on p. 24 states that for external complaints to the BPD, the Chief shall submit the disposition to the DPA. However, there is no mention of access beyond the disposition. The DPA and the Board need access to at least a summary of these complaints, beyond the disposition.
5. Related, there is no mention of whistle blower complaints from within the department, such as was mentioned in all previous versions. It is important that this police oversight body have access to whistle blower complaints.
6. Section 15 (b) on p. 19 states that independent legal counsel be provided to the Board only when the City Attorney has determined that there exists a conflict of interest with his/her office. I believe this possibility of a conflict should also be determined independently by the City Counsel. The section would then read: "Pursuant to Section 14, **when either the City Attorney or the City Counsel has determined that a conflict of interest exists....**"

Again, I believe this charter amendment proposal overall represents a significant step forward in establishing a more effective police review body. The points above delineate my concerns with it. I expect that some of you may have other issues. It is my hope that we can have a meaningful role in remedying whatever weaknesses we collectively agree on.

Community Concerns Regarding Police Board Proposal
April 7, 2020

To: Mayor Jesse Arreguin and members, Berkeley City Council
Subject: Charter Amendment for a New Berkeley Police Board

We the undersigned advocates for police accountability in Berkeley express our appreciation for the devoted work the Council has done to produce the version of the charter amendment to go on the November 2020 ballot. We are pleased to find that this draft generally meets the bottom-line community requirements we communicated to you in July 2019. This initiative has the potential to drive greater transparency and accountability in public safety, thereby improving police-community relations and reducing crime.

Having said that, we take the process and the details seriously, since enacting a charter amendment is a consequential step that is not easily modified after passage.

In this letter we recommend four crucial changes that would substantially improve the effectiveness of the charter amendment. None of these recommendations impact wages, hours, or other terms and conditions of employment for City staff, so they should not require reopening meet-and-confer.

Please reach out to any of us or write to us at racialandcriminaljustice@gmail.com to discuss these important concerns. In a fuller conversation, we can also present other, relatively minor improvements that should not be controversial.

1. Police chief to share and discuss policy changes prior to adopting them.
2. BPD to provide the Director of Police Accountability (DPA) with copies of all complaints newly filed with the Department, both those filed from outside the department and within the department.
3. Empower the Board and DPA to seek outside counsel.
4. The Police Board to nominate the DPA subject to confirmation by the City Council.

Background and recommendations:

1. [Section 17] Submission of newly adopted policies to the Board within 30 days of implementation. Currently BPD engages the PRC in the policy development process. This language is a step back from the current process. It should at a minimum encourage current consultative practice to continue, or better, return to the 2018 Arreguin-Harrison version, which stated:
 - i. "Before taking effect, the Chief shall submit all new Departmental policies and revisions to existing policies to the Commission for review and recommendation. If the Police Department and the Commission are

unable to reconcile their differences about a policy, the policy shall be sent to the City Council for a final decision.”

2. There are two aspects to the issue of BPD sharing complaint information with the DPA.

a. [Section 3 (3)] Non-civilian complaints: The proposed text of the Charter Amendment has no provision for Police Board (“the Board”) review of complaints generated from other than community members, for example from whistleblowers inside the police department. Peer reporting is a prime way to surface issues within a police department. There might otherwise be no way for the Board and DPA to find out about problems such as the 2006 evidence room thefts. All previous amendment versions over the last two years included civilian review of departmental complaints.

Here is the provision from the 2018 Arreguin-Harrison version of the Amendment that has been removed from the current version:

i. “The Police Department shall provide the Independent Police Auditor with copies of all complaints newly *filed with the Department, both those filed from outside the department and within the department.* The Independent Police Auditor shall present each case to the Commission to decide which complaints staff shall conduct parallel investigations of, after receiving recommendations from its staff. If the Commission elects to conduct an investigation, the Department shall share all written and unwritten information, documents, materials and evidence the Department collects during its investigation.”

b. [Section 19 (h)] Complaints filed by members of the public with the BPD. The Amendment states that in these cases, “Upon completion of the Chief of Police’s investigation, the Chief shall issue a letter of disposition to the officer....If a complainant contests the Chief of Police’s determination, the Director of Police Accountability, if appropriate, may request to review all files, transcripts and records related to the complaint.”

We do not agree that DPA/Board review of complaints filed by the public with the BPD should be limited to those where the complainant contests the Chief’s determination.

This process puts too much responsibility on the complainant who, for a variety of reasons, may not choose to go further with appeals after undergoing the initial experience and then failing to prevail in the internal investigation.

This limitation is at odds with the overall thrust of the charter amendment, which is that City staff shall “produce all records and documentation, materials and evidence the Board or its staff requests for the purpose of carrying out its duties and functions.”

As with complaints filed directly with the Board and its staff, the DPA should have the option to review and act on civilian complaints filed with the Department.

3. [Section 15] Outside counsel. Under the proposed Amendment, the Board and DPA must use the City Attorney for legal advice. If the City Attorney determines that she or he has a conflict of interest with regard to a specified matter, the City Attorney shall provide the DPA with separate legal counsel.

This is too narrow a path to allow for independent legal advice, and the decision should not rest with the party that has the potential conflict. There is an inherent conflict of interest in city management having responsibility for the police department and having control of the civilian oversight of the same department. Independence of the civilian review process is a prime reason the charter amendment is needed. We recommend you modify this section to empower the Board and DPA to seek outside counsel.

4. [Section 14] Nomination of the Director of Police Accountability. This version of the Amendment removes the Board's role in recommending candidates for the DPA position, and assigns this role to the City Manager, removing the following role envisioned in the 2018 Arreguin-Harrison version:
 - a. "The Police Commission shall nominate an Independent Police Auditor subject to confirmation by the City Council."

This change is a significant step back from independence for the Board from city management. We ask Council to restore the Board's role in selecting the Director of Police Accountability.

Sincerely yours,

Elliot Halpern
Mansour Id-Deen
Rivka Polatnick
George Lippman
Edward Opton
Carol Crooks
Meghan Schwartz

(Updated p. 3 w/ additional signers)

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Elliot Halpern
Mansour Id-Deen
Rivka Polatnick
George Lippman
Edward Opton
Carol Crooks
Meghan Schwartz
Marc Staton
Karl Knobler
Judith White
(partial list)

April 6th, 2020

To: Mayor Jesse Arreguin and Berkeley City Council
CC: Dee Williams-Ridley, Berkeley City Manager, Mark Numainville, Berkeley City Clerk
Subject: Charter Amendment creating a New Berkeley Police Board

Dear Mayor Arreguin and Council,

First and foremost, allow me to express my appreciation for the work and time members of the Council, City Attorney, City Manager staff, Berkeley Police Department and the Berkeley Police union have committed in creating the current proposal for review. The meet and confer process can be challenging. A year long process that has culminated in this charter amendment proposal must be commended.

As the former Chair of the subcommittee charged within the Police Review Commission to review the current enabling ordinance model and make recommendations to City Council on a charter amendment, it is reassuring to find that the submitted proposal generally meets and addresses some, if not most, of the community concerns and requirements as well as national police oversight developments and standards.

Having been immersed in police oversight for the last 20 years and having played a part as a panel speaker during the process of implementing new oversight boards (Napa OLEO Board, Measure LL in Oakland) or as part of the review team on established ones (BART BPCRB and Berkeley PRC) I recognize the critical need for tangible changes and the relevance of the details when evaluating the current Berkeley 1973 model or any model. Enacting a charter amendment is a consequential and monumental step that is not easily modified after passage.

Oversight has always been about prevention and taking a pro-active approach. "After the fact" changes based on a possible incremental curve or missed stipulations will dilute the efficiency of an agency and prove contrary to its purpose. The "two year" from implementation review will be helpful but it does not invalidate the need for initial exactitude in both language and scope. This is fundamental.

Therefore, please find enclosed a set of questions and concerns as well as possible language recommendations for your consideration as you discuss the final ballot proposal. I have attempted to stay away, hopefully, from any changes that would trigger the meet and confer process and focused on those that can be enacted administratively by discussion and possible majority of Council via consent.

- I. The current version of the Charter Amendment has no provision for the new Police Board to review complaints generated from other than community members unless they are an aggrieved person, or from whistleblowers inside the police department (in line with the Early Warning System policy intent). The 2006 evidence room thefts and subsequent investigation, resignations and community generated policy changes are a clear example of why expanded provisions are needed. Policy complaints and recommendations alone will not offer resolution. The Police Review Commission was currently working on a process for possible changes to how it hears and investigates such cases.

- II. "Complaints filed by members of the public with the BPD." The Amendment states that in these cases, "Upon completion of the Chief of Police's investigation, the Chief shall issue a letter of disposition to the officer.... If a complainant contests the Chief of Police's determination, the Director of Police Accountability (DPA), if appropriate, may request to review all files, transcripts and records related to the complaint."
 - a. This review begins a process in which the DPA and Board may opt to agree with or to contest the Chief's decision. In case of a dispute the final decision will be made by the City Manager or designee. DPA/Board review of complaints filed by the public with the BPD should not be limited to those where the complainant contests the Chief's determination.
 - b. This limitation is at odds with the overall thrust of the charter amendment, which is that City staff shall "produce all records and documentation, materials and evidence the Board or its staff requests for the purpose of carrying out its duties and functions."
 - c. "City Manager or designee" nullifies the accountability process inherent in obligating the City Manager to render an "on the record decision". This is integral to transparency and accountability. There is no process for review if the "designee" and the City Manager disagree or the designee fails to make the correct summation based on the evidence. It dilutes the process and effectively bypasses true accountability. It should remain City Manager **ONLY**. If the concern is based on availability of the City Manager, then all parties must submit in a timely manner and the City Manager must render a decision accordingly.

- III. "The Board and DPA must use the City Attorney for legal advice. If the City Attorney determines that she or he has a conflict of interest with regard to a specified matter...the City Attorney shall provide the DPA with separate legal counsel." This is problematic. There could be an inherent conflict of interest in city attorney having responsibility for the legal counsel of the police department and the civilian oversight of the same department. Even if two separate attorneys within the department have separate responsibilities. This, in fact, has never been the case. Independence of the civilian review process

is a prime reason the charter amendment is needed. This provision is both a step forward and step backwards. I recommend you modify this section to empower the Board and DPA to seek outside counsel. At a minimum, add language of an appeal process to City Council. **“In instances in which the Police Commission and the Director of Police Accountability still have a dissenting opinion from the City Attorney, the Director of Police Accountability may appeal to City Council for a final determination”**. This will ensure a process in which directly or indirectly all options are available. [Section 15]

- IV. Disciplinary timeline: The Police Review Commission, community (ACLU, NAACP) and overall statewide practice submitted to meet and confer was for the maximum of 365 days as per California Law. Although this represents a doubling of the current limit of 120 days to 240 it does not address several concerns related to tolling. The reference to Government code 3304 based on *Bacilio v. City of L.A.*, 2018 would only be applicable when there is an administrative investigation in conflict with a criminal investigation. This enforces an automatic toll until a district attorney makes a determination whether or not to file a charge against the officer under investigation. There have been several cases in which vacation, sick time, disability or a family emergency have stalled investigations and precluded the completion and possible adjudication of a complaint from being finished within the timeline (interviews, boards of inquiry, submission of findings). Even under the new model, this remains a concern. Council should add language requiring the tolling under such circumstance to be (but not to exceed) 365 days from filing per California law. In addition, the time for the DPA/Police Board process is only 195 days, just over half the statewide maximum; and only two and a half months more than the current Berkeley cap. Exceptions as above must be noted here as well. Possible language could be: **“In instances in which a complainant has filed a complaint against an officer on an approved leave, an automatic tolling or stopping of the 240 days clock will be in effect”**
- V. Submission of newly adopted policies to the Board within 30 days of implementation. [Section 17]. Currently BPD engages the PRC in the policy development process. This language is a step back from the current process and a critical blow to the oversight process. There is no effective oversight when you have to review any operational process after the fact. It, in fact, silences the voices of the community, subject matters experts and makes the city liable to possible end results. If this process would have been in place in the last ten years, there would not be a robust, community, Police Review Commission and Council approved set of policies dealing with Crowd Control and Management, Impartial Policing, Use of Force, Body Worn Cameras, Surveillance, Hate Crimes, Transgender Treatment, Homeless, Police Involved Shootings, Early warning Systems etc. etc. . **The language should be changed to be “30 days prior to implementation”**. If the concern

expressed by the department is turn around then introduce a timeline for review completion. **"The Police Commission shall review and forward any concerns within the 30 days". In instances in which any and all changes require immediacy, the 30 days to implementation is waved"**

- VI.** Board Member Training: Section 12(6). Although in agreement with the training as an integral part of an effective, professional board (as this is the process with BART and the BPCRB), there is a disparity here and an imbalance within all the parties involved. Particularly the shall(s) referring to both input and attendance of the Chief of Police and a representative of the BPA. There does not exist the same requirement for members of the Commission to attend Police Department training to evaluate process, implementation and efficiency. It then becomes a much more visceral and critical disparity as a comparison to the input timeline on new policies as described on bullet point V. Moreover, by indirect inference, **it denotes that the members of the Commission require bigger oversight than the entities it has oversight over. The shall(s) should be changed to "may".**

I hope that the Mayor and Council review the above-mentioned concerns and possible language in the spirit in which they are submitted. One of gratefulness for the opportunity to submit my concerns but with the inherent necessary gravity for their consideration. Police oversight has been a benchmark of my community participation in Berkeley for over a decade and it has been my privilege to see the Berkeley Police Department and the Police Review Commission evolve into collaborative working partners and trusted institutions within our community. This Charter Amendment will go a long way at continuing to build that trust and move Berkeley forward.

Respectfully Submitted,

George D. Perezvelez

Senior Member, Past Chair, Berkeley Police Review Commission
Founding Member, Past Chair, BART Police Citizen Review Board
Institutional and Individual Member, Panelist, NACOLE
Member Alameda County Fire Advisory Commission

(titles are for identification purposes only and not to denote any official capacity related to this matter)