

THE BALTIMORE POLICE UNION CONTRACT AND THE LAW ENFORCEMENT OFFICERS'S BILL OF RIGHTS:

IMPEDIMENTS TO ACCOUNTABILITY

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INTRODUCTION

The recent tragic death of Freddie Gray while in the custody of Baltimore police officers has raised serious questions about the circumstances of his death and the practices of Baltimore officers in dealing with members of the public. This tragedy has created an opportunity for reform.

If we want to understand the long history of police misconduct by Baltimore police officers, and begin to end that misconduct, a good place to start is the police union contract and the Maryland Law Enforcement Officers' Bill of Rights.

In Baltimore, and in other cities and counties across the country, police union contracts contain provisions that impede the effective investigation of reported misconduct and shield officers who are in fact guilty of misconduct from meaningful discipline.

The role of police union contracts in impeding police accountability has been largely ignored in all of the protests and discussions that have consumed the nation since the tragic events in Ferguson, Missouri, in August 2014.

Police officers are, of course, entitled to the full measure of due process with respect to disciplinary matters. They should not be subject to arbitrary and unreasonable investigations or

discipline. But they are not entitled to unreasonable protections against investigations of alleged misconduct.

ABOUT THIS REPORT

This report examines the provisions of the contract between the City of Baltimore and Baltimore City Lodge No 3, Fraternal Order of Police Unit 1, and also the Maryland Law Enforcement Officers' Bill of Rights, which impede the effective investigation of alleged officer misconduct and shield officers from discipline.²

The report identifies the offensive provisions and provides a commentary on how each one impedes accountability.

The report concludes with a discussion of the social and financial costs of continued police misconduct, along with a recommended action plan for removing the offending sections from the union contract and Maryland state law.

PROVISIONS THAT IMPEDE ACCOUNTABILITY

Delays in Investigating Officer Misconduct

Section 3-104 of the Maryland Law Enforcement Officers' Bill of Rights permits a 10 day delay in the interrogation of an officer in matters involving possible discipline. Subsection J (2) provides that an "interrogation shall be suspended for a period not exceeding 10 days until representation is obtained." The right to representation is provided in Section J (1) (i).

Commentary

It is completely unreasonable that the questioning of an officer who is involved in an incident requiring investigation by the department not be questioned for up to 10 days.

Additionally, it is unreasonable that a representative cannot be obtained very quickly after the incident under investigation. Indeed, in the folklore of contemporary policing there is a widespread joke that the police union representative arrives on the scene before an investigator from internal affairs does.

It is now a recognized “best practice” in policing that in the case of alleged misconduct – and particularly in officer-involved shootings and uses of force that involve injury to a member of the community- that it is essential for the officer to be questioned as soon as possible. (In cases where an officer is clearly distraught, as in an officer-involved shooting, it is appropriate to delay any questioning.)

The “best practice” on this issue is clearly defined in the Consent Decree between the U.S. Department of Justice and the Los Angeles Police Department. (Similar provisions are found in Justice Department settlements regarding the Seattle, New Orleans, Albuquerque, and Portland, Oregon, police departments.)

First, Section III of the Los Angeles Consent Decree requires that an officer from the Operations Homicide Bureau immediately “roll out” to all serious use of force incidents (defined in the decree as Categorical Use of Force incidents). The purpose is to have an independent department investigator on the scene as soon as possible.

Second, “all involved officers and witness officers shall be separated immediately.” (Section III, Paragraph 61) The purpose of this requirement is to end the long-standing and unacceptable practice of officers conspiring to create a story that exonerates any and all officers of misconduct.

Third, Section III, Paragraph 61 refers to involved and witness officers giving “statements” about the incident. In short, it is expected that officers will give immediate statements about the incident on the scene. Paragraph 61 further states that nothing in the Consent Decree “prevents the Department from compelling a statement.” (The *Garrity* requirements regarding compelled statements are not mentioned but are presumed to apply to such compelled statements.)

In short, the Los Angeles Consent Decree clearly gives a very high priority to a police department obtaining a statement from all officers (both involved and witness officers) as soon as possible and at the scene of an incident.

And as already mentioned, the Los Angeles Consent Decree requirement of separating officers at the scene of an incident highlights the long-standing problem of officers creating a false version of the incident. The 10 day delay only increased the opportunity for an officer to talk with other officers who have been involved in the incident under investigation or in similar incidents and to obtain their advice on how to explain and justify his or her conduct.

In short, it is an established “best practice” that police departments obtain immediate, on-the-scene statements about use of force incidents from involved and witness officers.

The 10 day delay provided by the Maryland Law Enforcement Officers’ Bill of Rights is unreasonable and unacceptable.

Who Can Investigate Police Misconduct?

The Maryland Law Enforcement Officers' Bill of Rights Section 3-104.b.1 provides that an officer can be interrogated only by another sworn officer (or the state Attorney General or his designee if so requested by the Governor).

Commentary

This provision precludes the creation of an independent citizen review board, such as exists in Washington, DC, San Francisco, and New York City, where the board has original jurisdiction over citizen complaints and complaints are investigated by investigators who are not sworn officers.

Insofar as local communities believe that an independent citizen review board will provide more thorough and fairer investigations, and will also help to build citizen confidence in the complaint process, that option is precluded by the Maryland LEOBR.

The Maryland law disallowing non-sworn investigators for alleged police officer misconduct is an impediment to citizen oversight of the police and an obstacle to building legitimacy and trust in the police as recommended by the President's Task Force on 21st Century Policing.³

Hearing Boards

Article 16, Section C.2 of the police union contract provides for a three-person Hearing Board in cases where the investigation of officer misconduct results in a finding that may result in "serious discipline." This contract provision implements the right to a Hearing Board established by the Maryland Police Officers Bill of Rights (Paragraph 3-107).

The contract provides that at least one member of each Hearing Board be a peer officer (that is, of the same rank) as the officer under investigation.

Commentary

There are two aspects of the Hearing Board provision that impede accountability.

First, it is unreasonable that such a hearing occur before the police chief has imposed discipline in the case. (The right to an appeal of discipline after it has been imposed is an established matter of due process.)

In practice, the Hearing Board provides an additional step in the disciplinary process that is an opportunity for mitigating the seriousness of the alleged misconduct. A proper disciplinary process involves the internal affairs (IA) or professional standards bureau (PSB) investigating allegations of misconduct, including citizen complaints, determining whether misconduct occurred, and forwarding that finding to the chief for disciplinary action.

Second, including a peer officer as a member of the Hearing Board serves to protect misconduct. This is a particularly serious matter in departments that have troubled histories of a pattern of misconduct. By giving the rank and file a direct voice in disciplinary investigations, the police union contract and Maryland law necessarily lowers the standards for police conduct. The peer officer member of a Hearing Board has a vested interest in shielding all officers from meaningful investigations and discipline.

In passing, it should be noted that the Maryland statute does not specify whether decisions of a Hearing Board require a unanimous vote or may be approved by a 2-1 vote. This is an ambiguity that creates uncertainty, possible disagreements, and possible appeals.

The police union contract and Maryland law provisions regarding Hearing Boards are an impediment to police accountability.

Expunging Performance Records

Article 16, Paragraph O of the Baltimore police union contract provides that after three years an officer can request that a finding that a formal complaint was found to be “not sustained, exonerated, unfounded,” or was “acquitted by a Hearing Board be expunged “any file” regarding his or her performance.

Similarly, Article 16, Paragraph Q provides that the police department “agrees to expunge any allegation” that was “not sustained, exonerated, unfounded,” or was dismissed or resulted in an acquittal by a Hearing Board.

Commentary

Expunging records relating to alleged misconduct from a police officer’s file violates the principles of the new “best practices” in law enforcement.

Early Intervention Systems (EIS) have emerged as a “best practice” in law enforcement over the past twenty years. EIS are included in all of the settlements (consent decrees, memoranda of agreement, negotiated settlement agreements) negotiated by the Special Litigation Section of the Civil Rights Division of the U.S. Department of Justice.⁴

An EIS is a computerized data base of officer performance. It includes anywhere from five to 25 performance indicators (e.g., uses of force, citizen complaints, resisting arrest charges, being named in a civil suit against the department).⁵

An EIS includes all citizen complaints and all reported uses of force regardless of the outcome of the department investigation of each incident. The basic principle is that an EIS should capture the most complete picture of an officer’s performance. Most citizen complaints are not sustained, but it is a revealing indicator of an officer’s performance if an officer receives complaints at a much higher rate than peer officers.

Meaningful police accountability requires as full a picture of an officer’s performance record, and any procedure for expunging records is an impediment to accountability.

“Do Not Call” List

Article 16, Paragraph P of the Baltimore police union contract provides that officers may not be disciplined or terminated “solely” because they have been “placed on the ‘witness do not call list’ by the office of the State’s Attorney for Baltimore City.

The Maryland Law Enforcement Officers’ Bill of Rights, Paragraph 3.106.1, requires each law enforcement agency in the state to maintain a list of officers “who have been found or alleged to have committed acts which bear on credibility, integrity, honesty, or other characteristics that would constitute exculpatory or impeachment evidence.” The law also prohibits demotion, dismissal, suspension without pay, or reduction in pay for an officer being included on the aforementioned list.

Commentary

A police officer who has been determined to have performance problems related to “credibility, integrity, or honesty” should not be retained by the department. Police officers possess the awesome power to deprive people of their liberty through arrest and to take human life. The highest standards of integrity and honesty must be expected of all officers. On

one specific point, an officer on the “do not call” is, according to the language of the police union contract, unable to serve as a witness in a criminal case. And if an officer cannot serve as a witness in a criminal case, he or she cannot make arrests.

It is unbelievable that a police department should have so many officers with “credibility, integrity, or honesty” problems that a “list” is necessary. The very idea of such a list undermines public trust in the department.

Section 3.106.1 of the Law Enforcement Officers’ Bill of Rights is, in fact, contradictory. It requires law enforcement agencies to maintain a list of officers who are apparently unfit to perform all of their duties for reasons of integrity, but then prevents them from disciplining them in any way.

Maintaining on a police force any officers who have been found to have “credibility, integrity, or honesty” problems is an impediment to police accountability and serves to undermine public trust and confidence in the police.

Lack of Transparency Regarding Disciplinary Actions

Article 16.K of the Baltimore contract states that notice of disciplinary actions may not be made public.

Commentary

Failure to inform the public of disciplinary actions inhibits transparency. The public has a right to know what discipline an officer receives, for example, for a sustained use of force incident. Making this information public would help both members of the public and public officials determine patterns of discipline, particularly whether the department is stern or lax in general and also whether certain types of misconduct are regularly excused.

In many, if not most or all states, the discipline of lawyers and medical professionals are public record. And it is worth remembering that most members of those professions are private and not public employees. Why should police officer, who are by definition public employees, enjoy this special shield from accountability?

BROADER IMPACTS

The impact of the union contract and Maryland Law Enforcement Officers’ Bill of Rights provisions discussed in this report extend far beyond the specific provisions themselves.

The Costs of Police Misconduct

Police misconduct has serious social and financial costs. A pattern of officer misconduct that goes unpunished and uncorrected erodes public trust in the police. The *Interim Report* of the President's Task Force on 21st Century Policing in March of this year highlighted the importance of trust and legitimacy in the police.⁶

The opening words of the Task Forces' *Interim Report* declared that:

*"Trust between law enforcement agencies and the people they protect and serve is essential in a democracy. It is key to the stability of our communities, the integrity of our criminal justice system, and the safe and effective delivery of policing services."*⁷

Trust and legitimacy lead to greater cooperation with the police by community residents. That cooperation takes the form of reporting crimes, reporting neighborhood problems, providing information about suspected criminal activity, and a greater willingness to serve as witnesses in criminal cases.

In short, more professional policing equals more effective crime control and public safety.

The costs of police misconduct are also financial. The City of Baltimore paid out \$5.7 million in 102 cases of police misconduct between 2011 and mid-2014.⁸ The taxpayers of the City of Baltimore should not be expected to bear such a heavy financial cost of police misconduct.

The Police Officer Culture of Impunity

As a group, the union contract and statutory provisions discussed in this report create a police culture of impunity, a collective sense among officers that they do not have to be held fully accountable for misconduct.

In important respects, this broader impact is more insidious than any specific provision. A police culture of impunity is contrary to the basic principle of professionalism, that members of the profession and the organization should be self-policing and take appropriate steps, both formal and informal, to eliminate misconduct.

Additional Comment on the Baltimore City Police Policy Manual

The Law Enforcement Officers' Bill of Rights and the police union contract are not the only sets of rules and regulations that affect the investigation of possible officer misconduct.

The official policy manual of the Baltimore City Police Department may contain additional provisions regarding the investigation of officers and the imposition of discipline.

The Baltimore Police Department policy manual is not a public document, however. As a result, the public is not informed about important policies related to the full range of police operations. In addition to matters of investigating alleged misconduct and discipline, the public has a right to know about policies related to the use of force, the handling of domestic violence incidents, high speed vehicle pursuits. The use of less-than-lethal weapons, and many others.

The secrecy surrounding the Baltimore Police Department policy manual violates the recognized "best practice" which calls for police departments to make their policy manuals public and even to place them on the department web site.

Many police departments, including Los Angeles, Minneapolis, and Seattle, make their policy manuals available on their department web sites.

In March 2015, the Interim Report of the President's Task Force on 21st Century Policing recommended that "To embrace a culture of transparency, law enforcement agencies should make all department policies available for public review . . ." (1.3.1 Action Item, p. 11).⁹

The Baltimore Police Department, in order to restore the trust of the community, should immediately make its policy manual public and do so by placing it on the department web site.

ACTION PLAN

Many people who are not experts in policing are likely to ask how provisions that impede accountability came to be included in the Baltimore police union contract and the state Law Enforcement Officers' Bill of Rights.

The answer is simple. Across the country, police unions have been very aggressive in securing protections for their members. City and county negotiators, who are understandably focused on the financial aspects of contracts, have been too willing to trade away accountability-related issues. The costs of inadequate accountability, as discussed above, are future and uncertain costs, compared with the immediate and certain financial terms of a

contract. In addition, police unions have historically been able to play the “crime card” and accuse mayors who do not yield to their demands as being “soft” on crime and “anti-police.” Finally, members of the public are not aware of the implications of the various accountability-related contract provisions.

To establish standards of professionalism in the Baltimore City Police Department, the above mentioned sections of both the police union contract and the Maryland Law Enforcement Officers’ Bill of Rights must be revised.

Revising the Maryland statute will require a state-wide lobbying effort. That effort needs to be accompanied by a well-organized public education effort that will explain the costs, both social and financial, of the impediments to accountability posed by the sections of the law identified in this report.

Removing the objectionable provisions from the Baltimore police union contract, will depend in part on the revision of the Maryland statute. But it also involves a concerted effort to educate the mayor of Baltimore about the relevant provisions of the contract and to obtain a commitment to seek removal of the objectionable provisions in the next round of contract negotiations.

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² See the report for the ACLU of Maryland, Samuel Walker, *The Maryland Law Enforcement Officers’ Bill of Rights: An Impediment to Accountability*, Revised edition (January 2015). See also the national survey of state police officers’ bill of rights: Samuel Walker and Kevin M. Keenan, “An Impediment of Police Accountability?: An Analysis of Statutory Law Enforcement Officers’ Bills of Rights,” *Boston University Public Interest Law Journal*, 14 (2005): 185-243.

³ President’s Task Force on 21st Century Policing, *Interim Report* (March 2015).

⁴ Settlements by the Civil Rights Divisions of the U. S. Justice Department are available at the web page of the Special Litigation Section, at Conduct of Law Enforcement Agencies, Cases and Matters: <http://www.justice.gov/crt/about/spl/findsettle.php#police>

⁵ Samuel Walker, *Early Intervention Systems for Law Enforcement Agencies: A Planning and Management Guide* (Washington, DC: Department of Justice, 2003). Available at: http://www.cops.usdoj.gov/html/cd_rom/inaction1/pubs/EarlyInterventionSystemsLawEnforcement.pdf

⁶ President's Task Force on 21st Century Policing, *Interim Report* (March 2015).

⁷ *Ibid.*, p. 1

⁸ "Brutality Lawsuits Continue," *Baltimore Sun*, April 28, 2015.

<http://www.baltimoresun.com/news/maryland/baltimore-city/bs-md-gray-police-lawsuits-20150422-story.html#page=1>

⁹ President's Task Force on 21st Century Policing, *Interim Report* (March 2015), p. 11.