



**TESTIMONY OF
CITIZENS UNION OF THE CITY OF NEW YORK
on the 2007 Annual Report of the Civilian Complaint Review Board
Before the New York City Council Committee on Public Safety
January 29, 2009**

Good morning Chair Vallone and other members of the Committee on Public Safety. My name is Dick Dadey, and I am the executive director of Citizens Union of the City of New York, an independent, non-partisan, civic organization of New Yorkers who promote good government and advance political reform in our city and state. For more than a century, Citizens Union has served as a watchdog for the public interest and an advocate for the common good. I thank you for holding this hearing and giving me the opportunity to present Citizens Union's views on this important topic.

Citizens Union has reviewed the Civilian Complaint Review Board's (CCRB) 2007 Annual Report, and believe that its findings underscore the need to implement the recommendations we put forward last year in our Report and Recommendations on Public Oversight of Police Misconduct (Report) which was released in April 2008. Our Report was the product of an eighteen-month study of the issue, which included meetings with over two dozen individual stakeholders, including City Council members and staff, and intensive research into legal issues and recommendations of several government commissions that have studied the NYPD disciplinary system. Our testimony today represents Citizens Union's first presentation of these recommendations to the Council.

Though today's hearing is focused on the 2007 report, enough time has passed that information is now available about 2008. Given that, I will present some information that now covers almost two years of data.

How the NYPD handles police misconduct is critical to the effectiveness of the operations of the Department and the public's confidence in it. Both the officers and the public are entitled to have a clear, definitive and open system of rules and disciplinary consequences that is fair, measured and consistent with any violation that is judged to have occurred. The Department is entitled to an oversight system that can, when appropriate, validate the policies and programs it has implemented. Moreover, the public is also entitled to a transparent and effective civilian oversight system that reports on important issues in a meaningful and timely manner.

Citizens Union believes that a healthy democratic society must have a citizenry that has confidence in, and actively supports, its police department if that entity is to be fully effective in providing public safety.

Citizens Union also believes that the vast majority of police officers are honest, hard-working individuals who perform the vital and dangerous function of protecting our city. The city is safer from crime and terrorism because of how the force has been led as well as the tens of thousands of New York City police officers have carried out their work courageously. And while the value and importance of its work and contributions are generally recognized and supported, the Department has yet to achieve in the many diverse communities throughout the city, the full confidence and

cooperation it needs to maximize its effectiveness and optimize safety for the public. Citizens Union believes this is due in significant measure to the NYPD and City's handling of police misconduct allegations.

Citizens Union believes that the NYPD would garner additional public confidence and support if more transparent and different procedures were in place to investigate public complaints of misconduct swiftly and fairly.

Citizens Union believes that even though the NYPD maintains it has improved its internal handling of allegations of police misconduct under its current leadership, a more independent system of oversight, prosecution and adjudication is required to maximize public confidence and ensure independent integrity in the process.

Most organizations prefer to be self-regulating. The NYPD is no different. There is a culture within the Department of wanting to deal with alleged misconduct "in-house" rather than in view of the public. We believe that this approach has hindered the Department's ability to effectively perform its broader mission of providing a sense of safety and well-being for all citizens. It has also engendered, in some communities, an unnecessary atmosphere of mistrust as well as added to the perception that there exists "a blue wall of secrecy."

As a result, when incidents involving alleged misconduct by the police occur, they are not channeled through a system of justice in which the public has confidence, and instead disappear into a process where the disciplinary handling and outcome take place out of the public realm. This process, hidden from public view and scrutiny, results in little, if any, long-term structural reform to reduce future acts of misconduct and further alienates the NYPD from the public.

The continued high number of complaints to the CCRB in 2007 and 2008 shows that police misconduct remains a problem in need of greater public action. The data also makes the case that there needs to be changes to the oversight process of how cases of police misconduct are handled by the City. The outrage in the City resulting from the aftermath of the *Bell* verdict, as well as the recent incidents of a police officer knocking a cyclist off his bike in Times Square and the death of a mentally ill man who was shot by a police officer with a taser, cries out for immediate action of a more substantive nature. We simply cannot afford to wait any longer until another incident occurs to respond as a City. Inaction continues to undermine the public's confidence in government's ability to appropriately handle police misconduct.

In response to this ever present public need, Citizens Union today presents a five point plan for legislation and regulations to reform the civilian oversight system, as first provided in our Report. Citizens Union believes that in looking at the functioning of the CCRB today, it is important that the committee look at ways in which to reform the system of civilian oversight. We believe that enactment of these five measures will improve the accountability and effectiveness of our civilian oversight system.

These five core recommendations are as follows:

1. Transfer prosecutorial power to CCRB attorneys to enable the CCRB to try the cases it substantiates;
2. Expand the range of penalties available to the Police Commissioner;
3. Reinstate the Zero Tolerance penalty for False Statements;
4. Provide the CCRB with the authority to prosecute officers found guilty of lying during CCRB investigations; and
5. Create of a permanent and stronger Commission to Combat Police Corruption.

1. Transfer prosecutorial power to CCRB attorneys to enable the CCRB to try the cases it substantiates

A strengthened CCRB is in the best interests of citizens, as they are most protected by a transparent system that facilitates accountability. CU also believes that transferring prosecutorial power to the CCRB would create more balance in the Department's disciplinary system. By eliminating the ability of the NYPD to function as an institutionally hostile gatekeeper through its triple role of serving as the prosecutor, judge and jury, it will remove the NYPD from unnecessarily second-guessing the work of the CCRB, while protecting the legitimate interests of the Department. By allowing the Department to retain the ultimate tribunal role, as well as the Commissioner's authority over disciplinary action, the interests of the Department and Commissioner would be preserved and protected, while allowing for greater accountability, transparency, and independence.

There is no doubt that the current oversight system is overburdened, and the number of complaints filed with the CCRB remains sizeable. Board and staff members of the CCRB have a great deal of responsibility, with board panels reviewing 175 cases in a single monthly meeting. The CCRB in 2007 substantiated 507 allegations of misconduct, some of which will be reviewed by the NYPD in 2008. According to the CCRB's 2007 Annual Report¹, 7,559 complaints were filed in 2007, representing a decrease of only one hundred since 2006, and an increase of 84% since 2000. A total of 7,421 complaints were received from January - December 2008, according to the most recent data available from the CCRB.² While complaints have decreased slightly, more allegations are being pled per complaint (a single complaint may contain several allegations). The CCRB has stated that this reflects a new policy favoring greater detail in pleading by investigators.

Allegations of misconduct fall in four areas of CCRB jurisdiction: force, abuse of authority, discourtesy, and offensive language (referred to together as "FADO"). The table below lists the number of complaints filed over the last three years, as well as allegations by type. This table also shows that each reported complaint can involve more than just one allegation against more than one police officer.

1 Data was obtained from the New York City Civilian Complaint Review Board's 2007 Annual Report, available at: http://nyc.gov/html/ccrb/pdf/ccrbann2007_A.pdf

2 Please see the January 2009 Executive Director's report, available on the CCRB's website at <http://www.nyc.gov/html/ccrb/html/reports.html>

* The most recent data from the CCRB on 2008 is contained in the January 2009 Executive Director's report. The data for 2005 - 2007 was obtained from the CCRB's 2007 Annual Report.

Table 1
COMPLAINTS RECEIVED BY THE CCRB & TYPE OF ALLEGATIONS: 2005 – 2008*

<u>Year</u>	<u>Total Number of Complaints</u>	<u>Allegations of Force</u>	<u>Allegations of Abuse of Authority</u>	<u>Allegations of Discourtesy</u>	<u>Allegations of Offensive Language</u>
2005	6,786	6,063	10,409	3,494	543
2006	7,662	7,442	12,182	3,733	632
2007	7,559	8,288	14,652	4,024	723
January-December 2008*	7,421	7,953	13,441	4,000	694

While the number of complaints and allegations remain high, discipline appears to be decreasing. Of the 296 cases that were substantiated by the CCRB either in 2007 or prior year and then reviewed by the Police Department in 2007:

- Discipline by the NYPD was only sought in 181 cases.
- No discipline was sought in 102 cases – nearly 35% of the substantiated CCRB cases handled by the department in 2007.
- For the remaining 13 cases, the officer was fired or resigned before action was taken on the case.

The lack of discipline for 102 cases in 2007 marked a *tenfold* increase from 2006 in the number of CCRB substantiated cases in which the department pursued no discipline for officers. The most recent data for 2008 demonstrates that 2007 was not an anomaly – of the 269 cases handled by the department in 2008, no discipline was sought in 114 cases or 42% of the CCRB substantiations. While the data is still being finalized for 2008, this trend of decreasing discipline is of increasing concern.

Of the 181 cases in 2007 in which discipline was sought, penalties were provided in 172 cases, but this is misleading given the nature of penalties meted out. For the other 9, charges were dismissed in 4 cases, and in 5 cases, the officer was found not guilty after a trial. “Instructions” are the most common punishment, amounting to little more than a slap on the wrist, and in 2007 represented 53% of all penalties levied by the Police Department on CCRB substantiated cases. Instructions also amounted to 48% of all penalties in 2008.³ They are the most minor form of sanctions in which the officer is merely cautioned not to repeat the misconduct. Command discipline is the second most common penalty. Citizens Union noted in its report that it is the second most minor penalty, and serves essentially to bypass more formal discipline. Command discipline represented 44.5% of all penalties in 2008. For Command Discipline A and B, the Department Advocate's Office refers a case to a commanding officer for the imposition of a command discipline. The range of penalty is normally suspension or loss of vacation days between 1 and 10 days: up to 5 days for Schedule A violations and up to 10 days for Schedule B violations. The NYPD considers the case closed after it is referred to the commanding officer, and then reports that closure to the CCRB. Subsequent to this closure date, the commanding officer decides upon a penalty consistent with the level of command discipline proscribed by the Department Advocate's Office. The first table below

³ The information for 2008 was obtained from the CCRB, and is in the process of being finalized.

* The most recent data on received allegations from the CCRB on 2008 is contained in the January 2009 Executive Director's report. The data for 2005 – 2007 was obtained from the CCRB's 2007 Annual Report.

illustrates the rates of discipline over the last four years, and the second table lists the penalties used by the department during that time period.

Table 2
POLICE DEPARTMENT DISPOSITIONS⁴
ON CCRB SUBSTANTIATED CASES: 2005 – 2008* (by year of NYPD closure)

<u>Year</u>	<u>Total Substantiated CCRB Cases Disposed by PD</u>	<u>Officer Resigns or is Fired before PD Action</u>	<u>PD Pursues no Discipline</u>	<u>PD Pursues Discipline</u>
2005	465	17	11	437
2006	356	17	12	327
2007	296	13	102	181
2008*	269	7	114	148

Table 3
TYPE OF DISCIPLINE SOUGHT
BY THE POLICE DEPARTMENT: 2005 – 2008* (by year of NYPD closure)

<u>Penalty</u>	<u>2005</u>	<u>2006</u>	<u>2007</u>	<u>2008*</u>
Termination	0	0	0	0
Suspension for or loss of vacation time of 31 or more days and/or 1-year of probation	2	3	2	0
Suspension for or loss vacation time of 21 to 30 days and/or 1-year of probation	2	1	1	3
Suspension for or loss of vacation time of 11 to 20 days	6	6	2	0
Suspension for or loss of vacation time of 1 to 10 days	21	7	3	8
Command discipline A	96	42	57	22
Command discipline B	10	11	12	44
Instructions	196	197	94	71
Warned and Admonished	3	0	0	0
Total:	336	267	172	148

Additionally, fewer cases were brought to trial by the Police Department in 2007 than in 2006; only 8 cases were brought to trial in 2007, while 44 were brought in 2006. Of the 8 cases brought to trial in 2007, in only 3 of them were the officers found guilty. The most recent data for 2008 shows that 4 officers were found guilty after trial, and 14 officers were found not guilty after trial. In commenting on the significant drop in cases going to trial, the CCRB points out that bringing fewer cases to trial has not resulted in greater success in the trial room, as would be expected if the practice was that the weaker cases were discarded. Citizens Union is troubled by both the low number of cases brought to trial and the large number of cases in which no discipline was sought.

⁴ Dispositions refer to NYPD determinations on substantiated cases such as pursuing discipline, dismissing the case, etc.

* The most recent data for 2008 was obtained from the CCRB and is in the process of being finalized.

While Citizens Union was encouraged to learn last September that the CCRB and the NYPD are entering into a pilot program that will allow CCRB prosecutors to act as second counsel or “second seat” to the assigned Police Department prosecutor, we believe that this program must not be seen as justification to preempt effectuating the transfer of prosecutorial power to the CCRB. The pilot program will bring the CCRB and the Police Department together to work for the successful prosecution of cases, which is a good step, but the ultimate authority over the means of prosecution will remain with the department and the program will thus not be the needed answer that will create better balance in the oversight system.

In response to questions and concerns over the lack of discipline of officers, the Police Department posits that the CCRB substantiates far more cases than which meet a necessary threshold for prosecution and often warrant additional investigation by the Department. However, Citizens Union’s Report notes that there has been continual finger pointing between the CCRB and the NYPD over the failure of prosecuting CCRB substantiations, as was noted by the Commission to Combat Police Corruption as far back as 2000. The CCRB has also noted in its 2007 Annual Report that while it has taken greater care substantiating cases of misconduct, officers have been subjected to discipline less frequently; however, the NYPD responded that this is merely a “self-serving statement” that “ignores the more obvious fact that uniformed officers are committing fewer acts of misconduct.”⁵ In further conversations with the CCRB, CU has learned that it has hired four former prosecutors to teach its investigators the best practices of how to assess credibility, marshal facts and apply the law, and that every case with substantiated allegations is reviewed by at least one attorney before it is submitted to the board.

Whatever the circumstances may be with regard to the failure in the prosecution of CCRB cases, Citizens Union believes that the citizens’ interests are best protected by a transparent system that facilitates accountability. This important goal is advanced by limiting the NYPD to a single gate keeping position by transferring prosecutorial power to the CCRB, rather than the double one that it currently maintains. Were the CCRB given full control of the presentation of a case, from investigation to prosecution, the failure of its cases could not be attributed to NYPD prosecutors, and citizens would have a better sense of the CCRB ability and success rate. As part of its mandate, the CCRB reports on the disciplinary results of its cases. If it were granted prosecutorial power over its cases, it would report the results of its prosecutions to the public, creating greater transparency.

The decrease in discipline of officers found guilty of misconduct by the CCRB also raises concerns over the public confidence in the hope for a fair process in which justice is served. While continuing to handle a large number of cases, the CCRB’s budget was decreased in the FY 2008 modified budget, and has proposed cuts for 2009 well below the initial budget adopted in FY 2008. Citizens Union believes that the CCRB must be afforded additional resources to carry out its currently mandated functions as effectively and efficiently as possible. The large caseload of the CCRB over the last several years illustrates continued demand from citizens to seek redress from allegations of police misconduct. It is important that this crucial service be provided effectively. Moreover, Citizens Union believes that granting the CCRB prosecutorial power will create better balance in the civilian oversight system, put greater onus on the CCRB to develop its cases more strongly, and put an end to the finger pointing over cases of police misconduct.

5 NYPD Response to the CCRB Report for 2007. http://www.nyc.gov/html/nypd/html/pr/ccrb_response.shtm

CU's report notes that the transfer of prosecutorial power could be effectuated in one of three ways.

1. The Mayor could simply order the implementation of the same MOU Mayor Giuliani authorized in 2001, or by issue of a new executive order pursuant to City Charter § 11 (a), and CU has asked the Mayor to do so. However, CU has been advised by the current police commissioner, Ray Kelly, that he opposes the transfer agreed to by Mayor Giuliani. Mayor Bloomberg has not yet responded to CU's request to implement the MOU.
2. The citizens of New York could pass an amendment to the City Charter as well. Mayor Bloomberg had previously stated that he would appoint a charter revision commission to examine city governmental issues broadly and place a referendum on the ballot, which may provide another avenue for this issue to be addressed, but that is not assured given the delay in forming such a commission.
3. The City Council could transfer the prosecutorial function to the CCRB as a legislatively-enacted Charter amendment.

The lack of action by the current Mayor or waiting until the possible but unsure consideration of this issue by the Charter Revision Commission should not in any way preclude the City Council from passing legislation now that enacts such a change. Therefore, Citizens Union calls upon the City Council to seize this moment of public concern over the way in which the city handles police misconduct, demonstrate needed leadership in effectuating stronger public oversight over the NYPD, and enact legislation granting the CCRB the power to prosecute the cases it substantiates.

Citizens Union has examined the legal basis for Council action in this regard, and we believe there is no doubt that the Council can by local law give the CCRB prosecutorial authority, as the Council is "vested with the legislative power of the City" (NYC Charter, § 21). Section 38(5) of the charter conditions the effectiveness of any local law that "abolishes, transfers or curtails any power of an elective officer" on voter approval in a mandatory referendum. Section 23(2)(f) of the state Municipal Home Rule Law provides in identical language that any local law that "abolishes, transfers, or curtails any power of an elective officer" must receive the approval of the voters in order to become effective. The question therefore is whether giving the CCRB prosecutorial authority "abolishes, transfers or curtails" the power of the Mayor, an elective officer. Citizens Union believes that giving the CCRB such authority does not abolish, transfer or curtail the power of the Mayor.

Our finding is supported by a number of legal cases including *Lynch v. Giuliani*, 301 A.D.2d 351 (1st Dept. 2003), which addressed the scope of power of the CCRB; *Mayor v. Council*, 280 A.D.2d 380 (1st Dept 2001), *Creation of the IPIAB*, and *Mayor v. Council*, 9 N.Y.3d 23 (2007), the Uniform Status to Fire Alarm and EMT Employees

We believe that the unprecedented amount of cases in which no discipline is sought demands immediate action by the City, and if necessary, the Council, to transfer prosecutorial power to the CCRB. While transferring this power to the CCRB would place greater onus on the CCRB in the development of its cases, this would create much needed balance and more effective prosecutions of substantiated cases. This change, more importantly, would not alter the Commissioner's charter mandated authority over discipline. This would increase the integrity of and public's confidence in the civilian oversight system, which has been undermined by the lack of action and pushback on CCRB substantiations from the Police Department.

2. Expand the range of penalties available to the Police Commissioner

The current penalty structure if an officer is found guilty in department disciplinary proceedings provides for nothing between (i) a maximum of thirty days suspension without pay and one year termination probation, and (ii) discharge from the service. More severe penalties involving suspension, loss of vacation time or a one-year probation are levied much less frequently, and officers are rarely terminated. No officers were terminated as a result of disciplinary proceedings in 2008 from substantiated CCRB cases.

Even worse, according to CCRB data, the most common forms of punishment are command discipline and instructions, which amount to little more than a slap on the wrist. Suspension or loss of vacation time is being used infrequently – in 2005 this penalty represented approximately 9% of all discipline, and in 2008 represented 7.4%. Instructions in 2007 represented 53% of all penalties levied by the Police Department on CCRB substantiated cases they handled in 2007. Command discipline represented 41% of all penalties in such cases. The most recent data from 2008 shows that the high levels of command discipline and instructions remain – instructions amounted to 48% of all penalties and command discipline 44.5% according to data from the CCRB.⁶ Citizens Union believes that a stronger message must be sent by the Commissioner regarding misconduct, and that the current lack of discipline does not demonstrate to the public that misconduct is being handled appropriately.

Several commissions over the last thirty-seven years have called for a greater range of discipline options to promote a more effective disciplinary system and a stronger message regarding misconduct. Citizens Union supports enactment of this recommendation. Mayor Giuliani introduced an administration program bill to make this change, and his Commission to Combat Police Corruption also supported the proposal. Even though these recommendations have been endorsed by the current and past Police Commissioners, they have never been actively treated as priorities.

Pursuant to the City Charter, the Police Commissioner retains the final authority over discipline within the NYPD ranks. In order to exercise effectively this control, while fostering greater public confidence in the disciplinary system of the NYPD, Citizens Union urges the Council to amend Section 14-115 the New York Administrative Code to allow the Police Commissioner to impose the following penalties in addition to those in current law:

- i. suspension without pay for up to one year for officers who have been found guilty of or pleading guilty to charges and specifications;
- ii. a monetary fine of up to \$25,000 with no option to substitute vacation or compensatory days of equivalent work;
- iii. a demotion in grade, title or rank with a commensurate reduction in salary.

After analyzing the lack of and severity of discipline of substantiated allegations of misconduct, as provided in the CCRB's reports, Citizens Union believes that the current penalty structure must be changed, for example, as provided in the manner above. Such a change will bolster the Commissioner's ability to impose more effective and adequate penalties for the charged offenses that are more equivalent to the transgression without altering his final disciplinary authority.

⁶ Information for 2008 was obtained from the CCRB and is in the process of being finalized.

Citizens Union also notes that the lack of transparency regarding police discipline must also be corrected. If the Police Commission deviates from the Trial Judge's recommendations in levying penalties, he is currently is not required to provide formal written decisions that state plainly and in a timely manner his reasons for doing so. The CCRB and the public also receive no information as to the ultimate penalty imposed by the commanding officer under command discipline. The lack of transparency with regard to deviations from trial judge recommendations and penalties provided through commanding officers undermines the credibility of the civilian oversight system. Citizens Union recommends that in addition to creating additional penalties, legislation be passed requiring full explanation of the Commissioner's deviations from the trial judge's recommendations to provide increased transparency.

3. Reinstate of the Zero Tolerance penalty for False Statements

Citizens Union believes that all allegations of misconduct must be handled with integrity if the public is to put its trust in the City's civilian oversight system. In analyzing the CCRB's 2007 report, Citizens Union found that from 2003 through 2006, 31 officers made a total of 32 false official statements in their CCRB interviews, and that 25 of these officers were still on the police force as of January 1, 2008. For these officers to not receive any penalties for lying under oath is particularly troubling, as the police are responsible for upholding the law, and must not be allowed skirt it by lying under oath during investigations and disciplinary proceedings.

Citizens Union recommends that the Commissioner reinstate the zero tolerance policy as enacted by Commissioner Safir in 1996, which required dismissal absent exceptional circumstances. The policy covered all false statements, without exception, and explicitly included "lying under oath during a civil, administrative or criminal proceeding," including CCRB investigative interviews. However, it was not enforced effectively and was weakened in 2005. The revised § 2-308 of the Patrol Guide now specifies that the policy does not apply where the officer "merely ... denies a civil claim or an administrative charge of misconduct." This exception is subject to misinterpretation, potentially allowing officers to deny with impunity misconduct in CCRB interviews. It should be narrowed to apply solely to pleas of not guilty in administrative proceedings or Answers in civil cases denying paragraphs of Complaints.

4. Provide the CCRB with the Authority to Prosecute Officers Found Guilty of Lying During CCRB investigations

Following from our previous recommendation, though misconduct such as false official statements are not within the CCRB's jurisdiction, the CCRB reports its findings of this type of misconduct to the police department. The police department does not regularly report on the outcome of recommendations that the CCRB makes with regard to false official statement, as it does with ordinary substantiated cases for force, abuse, discourtesy, and offensive language cases. Citizens Union believes that the CCRB should be able to prosecute officers guilty of lying during its investigations, in addition to misconduct currently under its jurisdiction.

5. Create of a Permanent, Stronger Commission to Combat Police Corruption

The City should enact legislation recreating the Commission to Combat Police Corruption (it is currently conceived only through Executive Order) and expanding its mandate to serve as a permanent monitoring commission. The "reconstituted" CCPC should be granted the clear authority to monitor all aspects of the Police Department's disciplinary system, including not only

the NYPD Internal Affairs Bureau, but also all the policies and procedures which influence the culture of the Department as it affects corruption and other forms of misconduct. While it is important that the Commissioner maintain the final say on matters pertaining to internal discipline, how that authority is exercised should be subject to review and monitoring by an independent entity, such as the recreated CCPC. To best accomplish the goals of an expanded mandate, the CCPC should be afforded greater resources and the power to issue subpoenas when appropriate.

We thank you for the opportunity to testify today at this important hearing and look forward to working with you to accomplishing meaningful reform. Citizens Union plans to work to advance legislation transferring prosecutorial power over substantiated cases to the CCRB, and urges the council to enact the changes presented in our testimony to create a system in which the public can trust that allegations of police misconduct are being handled properly, and restore needed balance and accountability in the civilian oversight system.