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October 15, 2020

Good morning Members of the Committee, thank you for this opportunity to testify. As the Chairman of the D.C. Police Union, I speak on behalf of more than 3,600 sworn police officers, detectives and sergeants who serve this community as members of the MPD. 66% of our members are minorities, making us a minority-majority Union. I have been a DC resident and a DC police officer for fifteen years and I take great pride in serving this city.

In regards to the Police Reform Bill, the Union has a number of significant objections to the technical and legal aspects of much of the Bill, some of which are being challenged in the Court system. Because of the limited time I have in this hearing, those objections have been highlighted in great detail in our written testimony, which has been provided to the Council and made available to the public on our website, DCPoliceUnion.com.

I will focus my time today on more general aspects of the Bill that our members believe will have a considerable impact on the hiring, retention, and attrition of the MPD, as well as an impact on our ability to provide quality and efficient service to citizens.

Let me first say that the Union remains steadfastly committed to important discussions on police reform and is always willing to be on the cutting edge of professional policing, we have only asked that the voices of the men and women who perform this work every day be included in these deliberations.

That being said, the Council has approached the idea of "Police Reform" in an extremely myopic manner. Legislation should be based on rigorously established empirical data and research, not anecdotal complaints or unrelated incidents that occur halfway across the country.

The Police Union made a public statement on June 8 which stated, *"[T]he outcome of the current language in the Bill will undoubtedly result in an exponential increase in crime and a mass exodus in personnel."* While many Councilmembers scoffed at this assertion, it seems that in just four months, both of these predictions have come to pass.

Crime data on the department's website from June 1st to this week confirms our suspicions about the devastating impacts of this law. Take areas like Ward 7 and Ward 8 where, just since June 1, shootings are up 25% and 30% respectively. Or take burglaries in Ward 3, which are up *122%* since June 1. Since the announcement and passage of this temporary bill, citywide homicides have increased 27%.

Just this past weekend we had 6 homicides in a 20 hour period, bringing our Y-T-D homicides to 155, putting us on pace for murders in the District to reach numbers not seen in over 12 years.

All of this can be attributed to the implementation of the police reform bill and its chilling effect on professional and responsible policing.

While the impact on crime is harrowing enough, the effect it has had on attrition is also startling. Between January and July, MPD lost an average of 20 members per month. Since August 1st, the department has lost 80 members, nearly doubling the average. Over half of those that left were resignations.

What the Union is asking from the Council is simple. Please be guided by the data and not rhetoric, not demagoguery, and certainly not abhorrent videos of police officers in other jurisdictions. The Council has instituted a commission to provide review, and the DC Auditor has launched a probe of similar concerns as well.

We encourage the Council to refrain from instituting any permanent policy until these reports are completed. The members of the DC Police Union thank you for your time today.

Gregg Pemberton
Chairman
DC Police Union

Encl: Full written testimony and comments on the Comprehensive Policing Reform and Justice Act of 2020

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DC POLICE UNION

October 15, 2020

VIA FIRST CLASS MAIL AND ELECTRONIC MAIL

Council of the District of Columbia
Committee on the Judiciary & Public Safety
1350 Pennsylvania Avenue, NW
Washington, DC 20004

Re: Comprehensive Policing and Justice Reform Amendment Act of 2020

Dear Councilmembers:

I am writing as Chairman of the Fraternal Order of Police, Metropolitan Police Department Labor Committee, D.C. Police Union ("D.C. Police Union") and on behalf of the nearly 3,600 members of the D.C. Police Union regarding the proposed legislation entitled the Comprehensive Policing and Justice Reform Amendment Act of 2020 (the "Act"). The Act proposes sweeping changes to many of the laws, rules, and regulations that govern D.C. Police Union members. Notably, several of the provisions contained in the Act are subject to pending lawsuits in the U.S. District Court for the District of Columbia and the Superior Court of the District of Columbia, challenging the constitutionality of identical provisions contained in the predecessor Emergency Act. Therefore, it would be premature for the Council to enact permanent legislation prior to these Courts determining the legality of the Act. While I have concerns about many of the proposed amendments contained in the Act, I have focused my comments on five specific proposals that are most troubling.

1. Eliminating Collective Bargaining Rights of Police Officers

Subtitle L of the Act proposes to amend D.C. Code § 1-617.08 to state: "All matters pertaining to discipline of sworn law enforcement personnel shall be retained by management and not be negotiable." Act at 20. This proposal would strip the D.C. Police Union of its collective bargaining rights over the disciplinary process, which help to ensure that the disciplinary process provides members with their due process rights and complies with the CMPA's requirement that "disciplinary actions may only be taken for cause." *See* D.C. Code § 1-616.51(1). Singling out police officers and stripping them of their most important right that arises in collective bargaining is unprecedented and legally invalid. Significantly, this amendment is currently being challenged in the U.S. District Court for the District of Columbia on the grounds that it violates the United States Constitution's equal protection and substantive due process requirements, is an unconstitutional bill of attainder, violates the Contracts Clause of the Constitution, and violates the District of Columbia Home Rule Act. The Constitutional challenge to this amendment is fully-briefed and awaiting a ruling from the Honorable James E. Boasberg. *See FOP v. District of Columbia, et al.*, Case No. 1:20-CV-02130. Therefore, the Council should refrain from enacting permanent legislation until the U.S. District Court rules on the constitutionality of Subtitle L.

In the District, the CMPA guarantees all employees the right to "organize a labor organization free from interference, restraint, or coercion" and "[t]o bargain collectively through representatives of their own choosing." Designating discipline as non-negotiable for only one union in the District contradicts these guaranteed rights of all employees. In attempting to defend this amendment, the District has argued that it is necessary to prevent police officers from being shielded from accountability. However, stripping D.C. Police Union members of their bargaining rights does nothing to increase accountability. Instead, the collectively bargained disciplinary process in place between the D.C. Police Union and the MPD helps to ensure that D.C. Police Union members receive the due process rights they are guaranteed under D.C. law. For example, D.C. Code § 1-616.51 requires that the disciplinary system include:

> (1) A provision that disciplinary actions may only be taken for cause;
> (2) A definition of the causes for which a disciplinary action may be taken;
> (3) Prior written notice of the grounds on which the action is proposed to be taken;
> (4) Except as provided in paragraph (5) of this section, a written opportunity to be heard before the action becomes effective, unless the agency head finds that taking action prior to the exercise of such opportunity is necessary to protect the integrity of government operations, in which case an opportunity to be heard shall be afforded within a reasonable time after the action becomes effective; and
> (5) An opportunity to be heard within a reasonable time after the action becomes effective when the agency head finds that taking action is necessary because the employee's conduct threatens the integrity of government operations; constitutes an immediate hazard to the agency, to other District employees, or to the employee; or is detrimental to the public health, safety or welfare.

D.C. Code § 1-616.51. Moreover, D.C. Code §1-616.52 provides that "[a]n official reprimand or a suspension of less than 10 days may be contested as a grievance" and "[a]n appeal from removal, a reduction in grade, or suspension of 10 days or more may be made to the Office of Employee Appeals." The Office of Employee Appeals permits parties to request "an evidentiary hearing to adduce testimony to support or refute any fact alleged in a pleading." 6-B DCMR § 624.1. These required, statutory due process rights have provided the framework for the D.C. Police Union and the MPD to negotiate a disciplinary system that adheres to these requirements and ensures that D.C. Police Union members receive the due process rights they are guaranteed.

Thus, many of the provisions contained in the disciplinary article of the Collective Bargaining Agreement ("CBA") between the D.C. Police Union and the District help to ensure that discipline is administered in a manner that comports with due process, thereby decreasing the likelihood that discipline will be overturned based on an error or a due process violation committed by the MPD. This process does not remove the final decision on discipline from the Chief of Police and does not preclude the Chief from imposing discipline in a swift manner. Indeed, even the right to appeal certain suspensions and terminations only accrues *after* the Chief has imposed final agency action and the member has been suspended or terminated. By taking away the D.C. Police Union's right to bargain over discipline, it appears that the Council wants the Chief of Police to have the ability to summarily discipline or terminate D.C. Police Union members without first providing them with basic due process rights aimed at ensuring that discipline is properly imposed in a fair manner. In doing so, the D.C. Council is actually attempting to shield MPD management from any

accountability on how it imposes discipline and is opening up all future discipline to due process challenges.

In addition, the D.C. Police Union is similarly situated to other public employees and unions that engage in the same police-related activity, but are nonetheless left untouched by the Act. As with the D.C. Police Union, the Fraternal Order of Police maintains labor committees (*i.e.*, unions) for public employees in four other departments and agencies within the District: (1) the District of Columbia Department of Corrections; (2) the District of Columbia Housing Authority; (3) the District of Columbia Department of General Services' Protective Services Division; and (4) the District of Columbia Department of Youth Rehabilitation Services. The public employees under these FOP unions all share substantial similarities to D.C. Police Union members, including the ability to make arrests, the ability to carry non-lethal and lethal weapons, and the ability to legally use physical force on the District's citizens. *See* D.C. Code § 6-223 (conferring on the Housing Authority Police Department "the same powers, including the power of arrest . . . as a member of the Metropolitan Police Department" and authorizing the carrying of handguns). Notably, each of these unions operates under their own collective bargaining agreements that contain express disciplinary procedures distinct from the procedures afforded under the CMPA. Thus, through Subtitle L, the District has separated the D.C. Police Union and its members into a new, distinct class, distinguishing them from all other similarly situated District employees and has discriminated against that class by stripping them of their right to bargain with management concerning discipline. As such, Subtitle L violates the equal protection requirements contained in the United States Constitution through the disparate treatment of similarly situated employees, and the Council should strike it from the Act.

2. <u>Requiring Immediate Release of Body Worn Camera Footage and Names of Officers</u>

Subtitle B of the Act requires the Mayor to "[w]ithin 5 business days after an officer-involved death or the serious use of force, publicly release the names and body-worn camera recordings of all officers who committed the officer-involved death or serious use of force." Act at p. 5. This amendment removes any discretion previously held by the Mayor in the release of body-worn camera recordings and unquestionably puts the lives of D.C. Police Union members, their families, and members of the public in jeopardy. The great danger caused by Subtitle B was immediately evident through the recent release of the body-worn camera footage and name of the officer involved in the September 2, 2020 shooting incident. Despite the fact that the shooting was justified, immediately upon release of the officer's name and the body-worn camera footage numerous death threats were made against the officer and D.C. Police Union members generally. For example, one threat stated: "we need the police officer's picture so we can see who he is…it's not going to be safe for him no more…street justice is the best for this cop…we need to know who he is an address and everything." Through the release of the officer's name and body-worn camera recordings, criminals seeking "street justice" will be able to identify the officer and attempt to carry out a death threat against the officer and the officer's family.

In addition, Dr. Beverly Anderson, the Clinical Director of the Metropolitan Police Employee Assistance Program ("MPEAP"), stated that public release of body-worn camera footage depicting a death in which an officer is involved can inflict serious psychological trauma on the officer and their families. Dr. Anderson further noted that in the early days following a serious use of force incident

or incident concerning an officer involved death, officers are particularly vulnerable to psychological harm, which would be exacerbated by the public release of the body-worn camera footage of the incident.

In addition to the significant risk of harm caused by Subtitle B, Subtitle B also impermissibly intrudes on the Mayor's exclusive power and duty to "preserve the public peace," and "prevent crimes and arrest offenders" by requiring her to release body-worn camera footage and names of officers, even if it will jeopardize the arrest of criminals, the prosecution of crimes, and place citizens of the District and police officers at immediate risk of significant bodily harm. Subtitle B of the Act has removed the necessary discretion the Mayor previously had in executing her specifically-delegated executive duties. This necessary discretion was described by Michael R. Sherwin, Acting United States Attorney for the District of Columbia, who expressed serious concerns that the immediate release of body-worn camera recordings "could create a narrative that makes it difficult to conduct an investigation, as it may lead witnesses to a conclusion that affects their testimony." Acting U.S. Attorney Sherwin also raised concern that the early release "could inadvertently publicize the identities of witnesses" and could result in "unjust reputational harm" that would "unjustly malign an officer" who is involved in justified use of force. These legitimate concerns became a reality and were crystallized through the death threats and unjust maligning of the reputation of the officer involved in the September 2, 2020 shooting incident.

The predecessor to Subtitle B contained in the Emergency Act is currently being challenged in the Superior Court of the District of Columbia. *See FOP v. District of Columbia, et al.* Case No. 2020 Ca 003492 B. Notably, during the August 13, 2020, temporary restraining order hearing held before the Honorable Hiram Puig-Lugo, Judge Puig-Lugo expressed significant concerns regarding the cavalier nature in which Subtitle B disregarded officers' safety and privacy rights through the immediate release of body-worn camera footage and officer names. As such, the Council should refrain from enacting permanent legislation until the Superior Court rules on the legality of Subtitle B.

3. Prohibiting the Review of BWC Recordings by Investigating Officers

The Act further proposes the amendment of 24 DCMR § 3900.9, to state: "Members may **not** review their BWC recordings or BWC recordings that have been shared with them to assist in initial report writing." Act at p. 7 (emphasis added). A sworn members' ability to review BWC recordings when drafting initial reports is critical to ensure that crimes committed against District residents are properly investigated and solved; suspects are properly identified, arrested and ultimately convicted; citizens are protected in instances of ongoing crimes; and future crimes are prevented. By preventing arresting officers from having access to critical evidence when drafting their initial reports, the Act jeopardizes these vital components necessary to allow the MPD to accomplish its mission. The MPD's General Order concerning the Field Reporting System states:

> A field reporting system that provides accurate information to members within the Department and to the citizens we serve is an essential part of delivering effective law enforcement services.
>
> . . . .
>
> The need to document and preserve information gathered from reported offenses and incidents provides a record for action taken by law enforcement members, whether

> self-initiated or in response to a request for police services, **helps ensure that appropriate enforcement action is taken when conducting investigations and provides information that can be used to identify crime trends and solve crimes**.

General Order 401.01 at p. 1-2 (emphasis added). Notably, sworn members "shall not be relieved from their shift until all reports are completed accurately and have been submitted and approved." *Id*. at p. 9. The MPD's Body-Worn Camera Sworn Program explicitly permits members to "use BWCs to record initial interviews of victims, complainants and witnesses." General Order 302.13 at p. 9. Thus, by preventing sworn members from reviewing BWC recordings when drafting initial reports, the Act impedes ongoing investigations and the arrests of suspects by interfering with police officers' access to evidence in connection with reporting critical information they receive from victims, complainants, and witnesses that was captured on BWC. This will undoubtedly result in an increase in crime and a decrease in crime prevention.

If a victim provides critical information identifying a violent suspect during an interview conducted on BWC, and the sworn officer cannot review that interview when drafting the initial report, critical identifying information may be left out of the report, thereby decreasing the chances of an arrest and increasing the probability that the violent suspect will commit a crime against another victim. For example, if a child has been kidnapped and an officer is prevented from reviewing necessary information obtained during an interview on BWC, the missing details in the initial report could prevent the child from being located and a suspect from being apprehended before a tragedy occurs. Conversely, if an initial report is conducted without the aid of BWC recordings, the wrong suspect could be identified in the report resulting in unnecessary arrests and encounters between police and innocent citizens.

Precluding sworn members from reviewing BWC recordings when drafting initial reports unnecessarily threatens the District's ability to obtain convictions in nearly all crimes committed in the District. Indeed, if an officer drafts an initial report without the aid of BWC recordings and simply forgets a fact that occurred during the incident, but one that can be easily observed on the BWC recording, this unintentional omission will be used by defense attorneys to attempt to create reasonable doubt at trial and avoid a conviction. Just as the Council would not prevent a detective from reviewing crime scene photographs when attempting to solve a crime, the Council should not preclude sworn members from reviewing BWC recordings when creating initial reports that are critical to criminal investigations and solving crimes. Through the Act, the District would unnecessarily restrict its own access to critical evidence when drafting reports and taking positions related to criminal prosecutions. This artificial restriction on its own access to evidence will jeopardize the District's ability secure convictions.

The Act's proposed amendment would further contradict the stated policy of the BWC program, which is as follows:

> It is the policy of the MPD to use BWCs to further the mission of the Department, promote public trust, and enhance service to the community **by accurately documenting events, actions, conditions, and statements made during citizen encounters, traffic stops, arrests, and other incidents, and to help ensure officer and public safety**.

General Order 302.13 at p. 1-2 (emphasis added). The BWC's ability to document events, conditions, and statements is rendered meaningless if those events, conditions, and statements cannot then be included in initial reports and used for law enforcement purposes.

Moreover, the review of BWC recordings currently in place requires sworn members to notify Department officials if they observe any violation of Department policies, laws, rules, regulations or directives. Specifically, 24 DCMR § 3900.8 requires: "When reviewing BWC recordings, members shall immediately notify Department officials upon observing, or becoming aware of, an alleged violation of Department policies, laws, rules, regulations, or directives." Thus, continuing to allow sworn members to review BWC recordings to assist in initial report writing will preserve the requirement that any violation of Department policies, laws, rules, regulations, or directives observed on the BWC recording will be immediately brought to the attention of Department officials.

4. <u>Removing All Police Officers from the Office of Police Complaints Board</u>

Subtitle C of the Act further proposes to remove the MPD representative from the Police Complaints Board. *See* Act at p. 10. This proposal undermines the purpose of the Police Complaints Board and the Office of Police Complaints as a whole. D.C. Code § 5-1102 sets forth the purpose of the Police Complaints Board and the Office of Police Complaints, as follows:

> The purpose of this subchapter is to establish an effective, efficient, and fair system of independent review of citizen complaints against police officers in the District of Columbia, which will:
> (1) Be visible to and easily accessible to the public;
> (2) Investigate promptly and thoroughly claims of police misconduct;
> (3) Encourage the mutually agreeable resolution of complaints through conciliation and mediation where appropriate;
> (4) Provide adequate due process protection to officers accused of misconduct;
> (5) Provide fair and speedy determination of cases that cannot be resolved through conciliation or mediation;
> (6) Render just determinations;
> (7) Foster increased communication and understanding and reduce tension between the police and the public; and
> (8) Improve the public safety and welfare of all persons in the District of Columbia.

D.C. Code § 5-1102. To help achieve this purpose, the Police Complaints Board is empowered, in part, as follows:

> The Board shall conduct periodic reviews of the citizen complaint review process, and shall make recommendations, where appropriate, to the Mayor, the Council, the Chief of the Metropolitan Police Department ("Police Chief"), and the Director of the District of Columbia Housing Authority ("DCHA Director") concerning the status and the improvement of the citizen complaint process. The Board shall, where appropriate, make recommendations to the above-named entities concerning those elements of management of the MPD affecting the incidence of police misconduct, such as the recruitment, training, evaluation, discipline, and supervision of police officers.

> . . . .
> The Board shall review, with respect to the MPD:
> (A) The number, type, and disposition of citizen complaints received, investigated, sustained, or otherwise resolved;
> (B) The race, national origin, gender, and age of the complainant and the subject officer or officers;
> (C) The proposed discipline and the actual discipline imposed on a police officer as a result of any sustained citizen complaint;
> (D) All use of force incidents, serious use of force incidents, and serious physical injury incidents as defined in MPD General Order 907.07; and
> (E) Any in-custody death.

D.C. Code § 5-1104. The unprecedented proposal to remove the MPD representative from the Board would eliminate necessary background, context and a perspective on citizen complaint matters that can only be provide by an MPD representative. A board designed to review complaints against other professionals, such as doctors or engineers, would not be comprised solely of members outside of the profession. Such boards would necessarily include members of the profession they are reviewing to provide necessary context, governing protocols, and perspective. The Act's proposal would also greatly diminish the Board's ability to accomplish its purpose of increasing communication and understanding and reducing tension between the police and the public because an MPD representative would no longer serve on the Board to consider, more fully understand, and convey to MPD management the complaints raised by citizens. The removal of the MPD representative from the Board would further threaten the Board's purpose and ability to render just determinations and provide adequate due process protection to officers accused of misconduct.

The Act further proposes to empower the Executive Director of the Office of Police Complaints with the ability to initiate the Executive Director's own complaint against a police officer for "abuse or misuse of police powers that was not alleged by the complainant in the complaint." *See* Act at p. 10. This proposal completely re-writes the purpose of the Office of Police Complaints, which was established to address citizen complaints against police officers, often times through "conciliation, mediation, or other dispute mechanism techniques," to enhance "communication and mutual understanding between the police and the community." D.C. Code § 5-1101. The Act's proposal would replace this purpose with a system in which the Executive Director generates complaints against police officers where none have been made by a citizen.

As proposed, the Executive Director would be empowered to serve nearly all roles in the "citizen" complaint process, including the role of the complainant, the initial complaint review process, the assigning of the complaint to a complaint examiner, and the ultimate disposition of the complaint to the MPD for discipline or the U.S. Attorney for criminal prosecution. Any hearing then conducted by the Office of Police Complaints for a complaint made by the Executive Director would presumably require the Executive Director to testify as the complainant. This would serve to deprive the sworn member of due process and a fair hearing when the Executive Director, who will ultimately refer the case for discipline or criminal prosecution, also testifies against the member in a hearing before a complaint examiner who was appointed by the Executive Director. It should be noted that the Executive Director and OPC are proposing sweeping changes to the disciplinary process that would effectively take the final decision on discipline away from the Chief of Police and

place it in the hands of the Police Complaints Board in instances where OPC's Executive Director believes the discipline should be harsher.

Moreover, the Executive Director is an unelected official, with no law enforcement background, who is appointed to a three-year term by the Police Complaints Board. *See* D.C. Code § 5-1105. The Act's proposal would greatly expand the jurisdiction of the Executive Director to incidents that involve any purported "abuse or misuse of police powers that was not alleged by the complainant." Currently, the Office of Police Complaint's jurisdiction is limited to citizen complaints involving incidents such as "use of language or conduct that is insulting, demeaning, or humiliating" and "failure to display required identification or to identify oneself by name and badge number when requested to do so by a member of the public." D.C. Code § 5-1107. Empowering the unelected Executive Director with such unfettered discretion and wide-ranging jurisdiction would be unprecedented. Even the D.C. Inspector General, which is an independent office, has limited jurisdiction and scope of its investigatory authority. The proposed Act would remove any such jurisdictional restrictions on the Executive Director while at the same time greatly expanding the scope of his authority. It should be noted that the Executive Director already serves as a member on the Use of Force Review Board that reviews all instances of serious use of force involving sworn officers. Therefore, the Executive Director already actively participates in the review of "excessive force" matters involving police officers and there is no need to expand his jurisdiction and authority to any type of misconduct when the purpose behind the legislative change is to address issues relating to excessive force.

5. <u>Eliminating the Requirements of Bringing Timely Charges Against Officers in Use of Force Cases</u>

The Act proposes to amend D.C. Code § 5-1031 to include a new subsection that states: "If the act or occurrence allegedly constituting cause involves the serious use of force or indicates potential criminal conduct by a sworn member or civilian employee of the Metropolitan Police Department, the period for commencing a corrective or adverse action under this subsection shall be 180 days, not including Saturdays, Sundays, or legal holidays, after the date that the Metropolitan Police Department had notice of the act or occurrence allegedly constituting cause." Act at p. 20-21. The proposed amendment to D.C. Code § 5-1031 does not define "serious use of force." However, the Act's proposal seeks to expand the time for commencing corrective action to 180-days. Corrective action is the lowest level of discipline imposed on sworn members and includes a letter of prejudice or an official reprimand. Thus, the Act's undefined "serious use of force" could encompass any use of force, however minor, involving a sworn officer because it encompasses the commencement of corrective action. The Council should understand that sworn members are placed in non-contact status during the pendency of these investigations. This means the officer has his badge and all weapons taken, his police powers revoked, and has no public contact. Because the vast majority of use of force incidents are ultimately determined to be justified, the proposed amendment will result in countless sworn members being placed on non-contact status for extended periods of time, preventing them from providing necessary policing to the citizens of the District.

To the extent that the Act's proposed amendment intends to adopt the definition of "serious use of force" contained in the MPD's General Orders, the proposed expansion of the time for commencing corrective or adverse action to 180-days is not necessary. The current version of D.C.

Code § 5-1031(b) contains a tolling provision that addresses cases involving ongoing criminal investigations, as follows:

> If the act or occurrence allegedly constituting cause is the subject of a criminal by the Metropolitan Police Department or any law enforcement agency with jurisdiction within the United States, the Office of the United States Attorney for the District of Columbia, or the Office of the Attorney General, or is the subject of an investigation by the Office of Inspector General, the Office of the District of Columbia Auditor, or the Office of Police Complaints, the 90-day period for commencing a corrective or adverse action under subsection (a) or (a-1) of this section shall be tolled until the conclusion of the investigation.

D.C. Code § 5-1031(b).

In practice, when the Department believes that conduct by a sworn member may involve serious use of force or potential criminal conduct, the case is referred to the U.S. Attorney for the District of Columbia to determine whether the U.S. Attorney's Office will pursue criminal prosecution of the sworn member. Pursuant to D.C. Code § 5-1031(b), when the matter is referred to the U.S. Attorney's Office and under active investigation by the office, the 90-day period for commencing corrective or adverse action is tolled until the U.S. Attorney completes its criminal investigation. In cases in which the U.S. Attorney declines to criminally prosecute the sworn member, the U.S. Attorney issues a formal letter advising the Department that it is declining criminal prosecution and that the Department can now proceed with whatever administrative action it deems appropriate. The time period from when the Department refers the matter to the U.S. Attorney until the U.S. Attorney issues its declination letter often takes several months. Thus, in many cases that involve serious use of force or potential criminal conduct well over 180-days passes from the date of the incident to the date that the Department commences any adverse action against the sworn member. Expanding the time to bring a disciplinary action against an officer under the proposed legislation to 180 business days, when combined with the existing tolling provisions and the Department's practice of delaying action until a deadline is upon it, will result in many of these investigations taking well over a year to conclude. These substantial delays will take officers off the streets for extended periods of time, cost the citizens of the District in both wasted tax dollars and a decrease in available crime prevention, and likely violate the officer's dues process rights, resulting in un-sustained disciplinary action.

Notably, this Committee previously considered and rejected a proposal to repeal D.C. Code § 5-1031, determining that such action would result in "abusively long disciplinary investigations." Indeed, this Committee determined that the 90-day deadline currently set forth in D.C. Code § 5-1031 created a "system of accountability that is responsive and effective," as follows:

> The 90-day rule serves multiple purposes, but at its core, it is a protection for the employee. At the time the 90-day rule was established, the committee report for the Omnibus Act stated, "Employees should not be subject to disciplinary action for an incident that occurred three years prior, especially when management knew about the incident and [chose] not to pursue action at that time. How can employees defend themselves or get on with their lives once an allegation has been made? . . . **Without a timeline requirement in place, the Committee found that MPD and FEMS had "failed to process discipline cases in a timely fashion."**

> **The history of the timeline further reveals that a promise by either department to efficiently process disciplinary cases, in place of an enforceable rule, is not sufficient.** Years before the 90-day rule was created, a 45-day rule governed disciplinary proceedings, not just at MPD and FEMS, but across other District agencies, as well. The 45-day rule was repealed by the "Omnibus Personnel Reform Amendment Act of 1997" because it was found to be "unduly restrictive" in some cases. However, the Committee on Government Operations wrote in its corresponding report that it expected that 45 days would "remain the goal, and that agencies will take appropriate action within that time frame in all but the most unusual instances." By 2003, it was clear that goal was not being met. **The committee report for the Omnibus Act concluded that the repeal of the 45-day rule resulted instead in abusively long disciplinary investigations that were conducted against employees by MPD and FEMS in the absence of a mandatory deadline.**
>
> Chief of Police Cathy Lanier testified at the public hearing on Bill 20-810 that the 90-day rule must be repealed in order to increase police accountability and to ensure that officers who should not be on the force are not kept on due to a technicality. The Committee shares the Chief's concerns for accountability; however, the risk of losing disciplinary appeals to the 90-day rule must be weighed against the value that the rule provides. **The 90-day rule protects employees who are being administratively investigated from working under the threat of disciplinary action for an excessive length of time; the rule prevents the government from having to pay employees who are put on administrative leave for an exorbitant length of time during the pendency of these investigations; and the rule incentivizes MPD and FEMS to follow up on allegations of misconduct quickly, to conduct investigations efficiently, and to resolve disciplinary cases in a timely fashion – three things that all lead to a system of accountability that is responsive and effective.**

See Committee Report on Bill 20-810 at 2-3 (emphasis added).

Moreover, "[a]ll incidents involving deadly force, serious use of force, or the use of force indicating potential criminal conduct" are investigated by the MPD's Internal Affairs Division after the U.S. Attorney conducts its criminal investigation. *See* General Order 901.08 at p. 4. "[A]ll use of force investigations completed by the Internal Affairs Division" are then reviewed by the Use of Force Review Board, which includes the Executive Director of the Office of Police Complaints as one of its a members. *See* General Order 901.09 at p.2. Notably, as part of this review process, "The Use of Force Review Board shall review the actions of all members involved in the use of force incident, not just the actions of the member(s) who used force." *Id*. at p. 5. The Use of Force Review Board is then empowered to affirm or reject the Internal Affairs investigation's recommendation and refer the matter for discipline when it determines that a violation has occurred. Importantly, the Use of Force Review Board has an assigned administrator who is required to track all investigations to determine if any are at risk of missing the 90-day deadline contained in D.C. Code § 5-1031, and the Office of Risk Management further conducts periodic audits to review the timeliness of cases submitted to the Use of Force Review Board. *See id*. at p. 8-9. Thus, the MPD

has developed several levels of review for all serious use of force incidents and multiple checks and balances to ensure that such investigations and reviews are completed before the expiration of the 90-day deadline contained D.C. Code § 5-1031.

During these difficult times, the nearly 3,600 members of the D.C. Police Union remain steadfastly committed to serving and protecting the citizens of the District of Columbia. I welcome the opportunity to address the Council on these issues and answer any questions it may have.

Very Truly Yours,

Greggory Pemberton,
Chairman D.C. Police Union