



POLICE ACCOUNTABILITY BOARD | PABNOW.COM

## The Way Forward

### Police Accountability in Rochester

Police Accountability Board Alliance

August 1, 2018

## 1 Introduction

Since February 2017, activists have pushed with renewed vigor for the passage of legislation that has been needed for well over a half century in Rochester, NY. Police have evaded responsibility for far too long. Rochester needs and demands a powerful Police Accountability Board (PAB)<sup>1</sup>. True accountability requires the power to make decisions and enforce them. Thus, the following five pillars are essential:

1. The PAB will be an independent agency of city government, separate from the RPD;
2. The PAB will have independent investigative authority;
3. The PAB will have subpoena power to compel the production of evidence and witnesses;
4. The PAB will have disciplinary authority using a disciplinary matrix; and
5. The PAB will have the power to evaluate systemic patterns, practices, policies, and procedures of the RPD to recommend changes and prevent misconduct.

<sup>1</sup>See also the proposed ordinance: <http://rochester.indymedia.org/node/147924>

In addition to the five pillars, sufficient funding is required so that complaints of misconduct are resolved efficiently and effectively in, 90 days. To handle the volume of complaints that are filed in Rochester, the PAB will require a funding equal to 1% of the Rochester Police Department (RPD) budget, one million dollars, a reasonable cost of true accountability, and an investment which will result in far fewer costly lawsuits concerning excessive force against the city.

**City Council has the power and legal authority to establish a strong Police Accountability Board. Neither state law, nor the police union contract, nor the City Charter, nor the City Code are obstacles. We call on City Council to pass the PAB now.**

## 2 Background

In February of 2017, Enough Is Enough (EIE) and the Rochester Coalition for Police Reform, jointly released *The Case for an Independent Police Accountability System: Transforming the Civilian Review Process in Rochester, New York*<sup>2</sup> (PAB report). The report, authored by Barbara Lacker-Ware and Theodore Forsyth, reviewed the process for civilians to make complaints regarding police misconduct. The researchers looked at annual reports from the Professional Standards Section (PSS, the Rochester Police Department's internal affairs division) and the Civilian Review Board (CRB) administered by the Center for Dispute Settlement (CDS) as well as reports of racial profiling and police misconduct by members of the community. According to CRB annual reports (2001-16), of the 923 civilian-generated allegations of force over 16 years, the Chief of Police sustained only 16 of them (1.7%). According to PSS annual reports (2002-15), there were only 13 instances of officer discipline stemming from such allegations. Of those, the harshest were six suspensions. No officer was fired as a result of a civilian-generated allegation of force.<sup>3</sup>

The PAB report as well as several high-profile cases of police brutality in the news, prompted City Council to thoroughly investigate the process used by civilians who have experienced police misconduct. City Council used its subpoena power for the first time to review the PSS investigation of the claims made by Rickey Bryant Jr., a minor who was brutalized by over a dozen officers in a case of apparent mistaken identity as he was riding his bike in the summer of 2016. Although Mr. Bryant was never charged with a crime, he sustained severe injuries, for which the police were not held accountable. Simultaneously, on June 20, 2017 City Council contracted with the Center for Governmental Research (CGR), to conduct an independent review concerning “the functioning and outcomes related to civilian complaints about police conduct, and how they have been handled/disposed of by PSS, CRB, and the Chief of Police,” as well as “information on best practices and options to consider for civilian oversight of police, based on a review of practices in other New York cities.”

A draft of CGR's report, *Police Oversight In Rochester: An Examination of Outcomes and Other Models*<sup>4</sup> (CGR report), was completed by the end of September 2017, whereupon

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<sup>2</sup><http://rochester.indymedia.org/node/147894>

<sup>3</sup>The PAB report analyzed CRB reports over the period 2001-15 and PSS reports over the period 2002-15. Here we have also included the data for 2016, which has since become available.

<sup>4</sup><http://rochester.indymedia.org/node/147915>

City Council requested more information. CGR then presented their report to City Council on November 30, 2017. The report was released to the public that night by the city of Rochester on their website.

One of the fundamental problems with the CGR report was the misconception that New York State law prevented a body such as the proposed Police Accountability Board from disciplining police officers. Enough Is Enough released its own report, *Achieving Police Accountability in Rochester: Clarifying misconceptions and adding commentary to the report on police oversight commissioned by City Council*<sup>5</sup> looking specifically at the disciplinary issue and as well as data analysis issues and problematic comparisons with Syracuse, NY's Citizen Review Board.

In early February 2018, members of the newly established Police Accountability Board Alliance (the "Alliance"; the community mechanism that will select six members from the community to sit on the proposed PAB) met with City Council President Loretta Scott, Vice President Adam McFadden, and Public Safety Chair Willie Joe Lightfoot to discuss the disciplinary issue, highlight problems with the CGR report, and find out if there was a timeline for passage of the proposed PAB. In the meeting, President Scott stated her commitment to passing a PAB and that City Council was contracting with an independent legal firm to "obtain a legal opinion that would answer the critical question of whether or not a Police Accountability Board could be legally empowered to discipline police officers," according to a press release<sup>6</sup> from June 21, 2018. Harris Beach, PLLC. was the firm selected to provide a legal opinion.

Harris Beach was explicitly asked to address the question, "**May the proposed PAB be legally empowered to discipline police officers of the Rochester Police Department?**" The Harris Beach Opinion<sup>7</sup> (Opinion), released to the City on May 3, 2018, stated "Based on our legal analysis, as set forth below, of the applicable N.Y. Civil Service Law provisions, as well as the pertinent provisions of the Charter and Code of the City of Rochester, relevant statutes and case law, we have concluded that the proposed PAB may be legally empowered to discipline police officers, provided that certain amendments are made to the Charter of the City of Rochester that delegate such authority to the PAB."

Nearly a week later, on May 9, Corporation Counsel Tim Curtin for the city of Rochester issued his rebuttal<sup>8</sup> (Rebuttal) to the Opinion. Mr. Curtin concludes that "Due to the [Harris Beach] Opinion's misreading of the [proposed PAB] Ordinance, compounded by the failure to appropriately evaluate the implications of both the CBA and the Taylor Law, the Law Department recommends that the City not rely on the Opinion as drafted."

Which brings us to today.

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<sup>5</sup><http://rochester.indymedia.org/node/147931>

<sup>6</sup><http://rochester.indymedia.org/node/147961>

<sup>7</sup><http://rochester.indymedia.org/node/147959>

<sup>8</sup><http://rochester.indymedia.org/node/147960>

### 3 Analysis of the Opinion and Rebuttal

The Police Accountability Board Alliance has thoroughly reviewed both the Opinion as well as the Rebuttal and we believe that they both offer clarifying information that favors the passage of the proposed Police Accountability Board by City Council with the five pillars called for by advocates.

The Police Accountability Board Alliance lauds the independent legal opinion that City Council obtained insofar as it confirms the Alliance's interpretation of New York State law. In particular, nothing in New York State law would prevent Rochester from establishing a Police Accountability Board (PAB) with disciplinary power. Although Rochester's city attorney (Corporation Counsel) alleges that the Rochester Police Locust Club collective bargaining agreement and the Taylor Law prevent changes to police disciplinary procedures, Corporation Counsel fails to respond to cases from the Court of Appeals which have allowed other New York State municipalities to change police disciplinary procedures despite conflicting collective bargaining agreements.<sup>9</sup> Corporation Counsel relied on a lower court opinion in the Schenectady case to support its position. That case was overturned by the Court of Appeals, the highest court in New York. **Therefore, despite Corporation Counsel's claims to the contrary, according to the Court of Appeals, the Harris Beach Opinion, and the Alliance, nothing in New York State law would prevent Rochester from establishing a PAB with disciplinary power.**

However, the Alliance disagrees with the independent legal opinion insofar as it indicates that a Police Accountability Board must be controlled by the Mayor, under the Mayor's disciplinary power. To the contrary, the Rochester City Charter explicitly grants disciplinary power over police officers to the Chief of Police (§8A-1). Corporation Council states that "The Mayor's powers cannot be diminished without a City-wide mandatory referendum." He cites Municipal Home Rule Law §23(2)(f). However, MHRL §23(2)(f) applies to elected officials, not appointed officials. In this case, the Chief of Police is appointed by the Mayor and is the appointing authority for all Rochester Police Department employees. The establishment of a PAB with disciplinary power would not abolish, transfer, or curtail the power of an elected official and thus would not require a mandatory referendum. The City Charter under §3-3(G) says that the Mayor has the power "to appoint all subordinate officers and employees and to remove all such officers and employees and department heads and members of boards, *except as otherwise provided in the Charter.*" Therefore, the clause at the end of §3-3(G) "except as otherwise provided," in the City Charter gives City Council the room it needs to amend the City Charter to establish a PAB with disciplinary authority which does not fall under the authority of the Mayor. Independence from the Mayor is a vital component to an effective PAB because (1) to date, mayors past and present have not shown a willingness to ensure that police officers are held accountable for their misconduct, (2) even if the Mayor were fully supportive of a strong PAB, one election cycle and one new mayor could severely undermine the PAB, and (3) independence from the mayor and the existing disciplinary system will finally give the Rochester community direct control over how they are policed.

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<sup>9</sup>See *Police Benevolent Ass'n of New York State Troopers, Inc. v. Div. of New York State Police*, 11 N.Y.3d 96 (2006) (<https://www.courtlistener.com/opinion/2223990/benevolent-assn-v-perb/>) and *Schenectady v. New York State Pub. Employment Relations Bd.*, 30 N.Y.3d 109 (2017) (<https://law.justia.com/cases/new-york/appellate-division-third-department/2016/521077.html>).

## 4 The way forward

For too long, the police in Rochester have had a disproportionate amount of power over the community. An important first step to correct the imbalance of power is to establish a PAB as an independent agency of city government with the power to investigate complaints of police misconduct, with subpoena power to compel the production of evidence and witnesses, with disciplinary power to ensure that officers are actually held accountable for their misconduct, and with the power to evaluate systemic patterns, practices, policies and procedures to prevent misconduct from happening in the first place. Given that there is no state law preventing the establishment of such a strong PAB, the only thing standing in the way of progress is the allure of the status quo. The Alliance calls on all city officials to resist this allure for the sake of the Rochester community, for the sake of individuals affected by police violence, and for the sake of justice. Pass the proposed Police Accountability Board now.