

# CITY OF BERKELEY



## POLICE REVIEW COMMISSION

- ANNUAL REPORT (2011)
- PRC ORDINANCE
- PRC REGULATIONS



# CITY OF BERKELEY

## POLICE REVIEW COMMISSION

### Commissioners

Russell Bloom, Chair  
Kiran Shenoy, Vice-Chair

Marco Amaral  
Nathan Glasper  
Vonnie Gurgin (through October)  
George Perezvelez  
Michael Sherman  
Sherzry Smith  
William White

### Mayor

Tom Bates

### Council members

Linda Maio (District 1)  
Darryl Moore (District 2)  
Maxwell Anderson (District 3)  
Jesse Arreguin (District 4)  
Laurie Capitelli (District 5)  
Susan Wengraf (District 6)  
Kriss Worthington (District 7)  
Gordon Wozniak (District 8)

### City Manager

Phil Kamlarz (through November)  
Christine Daniel

### Deputy City Manager

Christine Daniel (through November)  
William Rogers (Interim)

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The Berkeley Police Review Commission (PRC) would like to present the 2011 Statistical Report to the Community of Berkeley. It is our hope that the Report provides the Community with statistical data concerning misconduct complaints filed this year as well as an outline of the complaint process.


2011 proved to be an interesting year. The Commission began the daunting task of reviewing several policies, procedures and agreements by which the Berkeley Police Department operates. The Commissioners have dedicated themselves to working with the City Council, the Police Department and the Community in tackling these issues through the formation of several subcommittees. It is our hope that the efforts of all those involved will come to fruition in 2012.

Over the year, we saw a renewed Community interest in participation at PRC meetings. Such participation has brought vitality to the Commission, and the Community's contribution should be applauded. It is this spirit that reminds us all of the founding of the PRC more than 35 years ago.

This year has also been one of transition. Mid-year we were happy to receive two new appointments to the Commission. Their fresh perspectives will carry us forward in achieving our goals and satisfying our obligations. However, the Commission was also faced with the sudden and sad loss of one of our fellow Commissioners, Vonnie Gurgin. She was not only an outstanding Commissioner, but an outstanding member of our Community. She will be remembered.

On behalf of the PRC, I would like to thank staff for their hard work and perseverance in a year when we were so markedly impacted by budget constraints. Their work is integral to the daily operations of the PRC and provides a platform from which this Commission can grow. I would also like to thank the Berkeley Police Department for its tireless effort to keep our Community safe. Their service is a necessary and valued component of our everyday lives.

Respectfully,



Kiran Shenoy  
Vice-Chair (Acting Chair)  
Police Review Commission





Police Review Commission (PRC)

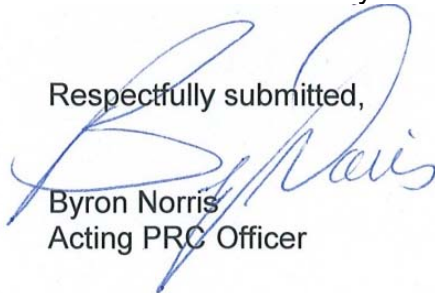
June 2012

Christine Daniel  
City Manager  
2180 Milvia Street  
Berkeley, CA 94704

Dear Ms. Daniel,

Pursuant to Ordinance No. 4644-N.S., I am pleased to present the PRC 2011 Statistical Report. The report provides data on complaints filed and complaints closed in 2011, the manner of closure and, for complaints that went to hearing, the Board of Inquiry's findings. The report also provides data on complainants' ethnicity and gender, and compares the 2011 data with recent years.

Respectfully submitted,



Byron Norris  
Acting PRC Officer

I would also like to acknowledge the contributions of the following individuals who worked tirelessly to produce this report:

Lillian Mayers  
Interim PRC Officer (through May 2012)

Maritza Martinez  
Office Specialist





# 2011 PRC STATISTICAL REPORT

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# I. INTRODUCTION

Berkeley's Police Review Commission (PRC) was established by voter initiative in 1973. The PRC is one of the oldest civilian oversight agencies in the nation and has been an important model and source of information for other oversight bodies.

The PRC's mandate is to provide for community participation in setting and reviewing police department policies, practices, and procedures, and to provide a means for prompt, impartial, and fair investigation of complaints brought by individuals against the Berkeley Police Department (BPD). The PRC strives to ensure that BPD policies reflect community values.

# II. COMMISSIONERS

The PRC consists of nine Berkeley residents, appointed by the Mayor and City Council members. The PRC generally meets every two weeks, and Commissioners are required to attend regular and special commission meetings. Commissioners are also expected to participate in subcommittees, where policy recommendations often originate, and in Board of Inquiry (BOI) Hearings on complaints directed against individual BPD officers or BPD policies.



(T-B, L-R): Commissioners Russell Bloom, Kiran Shenoy, Marco Amaral, Nathan Glasper  
Michael Sherman, Sherry Smith, William White and George Perezvelez.

## A REMEMBRANCE

Vonnie Gurgin was appointed to the Police Review Commission by City Councilmember Susan Wengraf in December 2008. Ms. Gurgin was an exceptional individual who served as an exemplary Commissioner until her unexpected death in October 2011. Her death was a shock and a profound loss to those who had the good fortune to know and/or work with her. She was committed to the Berkeley community, where she resided since attending U.C. Berkeley in the 1960's. She was considerate, thoughtful, professional and responsive, both in her role as a Police Review Commissioner and in her personal interactions with other Commissioners and staff. She was truly a pleasure to work with, and is greatly missed by her fellow Commissioners and staff.



Commissioner Vonnie Gurgin

## III. STAFF

PRC staff processes, investigates and prepares individual complaints for hearing by a three-Commissioner Board of Inquiry (BOI); and reviews and may make recommendations on policy complaints. The PRC Officer also assists and advises the Commission.



(L-R) Maritza Martinez, Office Specialist III, Lillian Mayers, Interim PRC Officer, Mary Matambanadzo, Office Specialist II (through October), Byron Norris, PRC Investigator.



## IV. COMPLAINTS

### PROCESS

#### 1. INDIVIDUAL COMPLAINTS

A complaint consists of one or more claims of alleged misconduct by one or more individual BPD officers. Timely-filed<sup>1</sup> complaints are investigated and prepared for hearing or, if the complainant and subject officer agree, referred for mediation. Upon the completion of an investigation, (which includes interviewing witnesses and collecting other evidence) the PRC investigator prepares a report. A Board of Inquiry (BOI) Hearing (held by three Commissioners impaneled to hear testimony and render findings) is scheduled. The BOI's findings are forwarded to the City Manager and the Chief of Police, who may consider them for disciplinary purposes. Subject officers can appeal sustained allegations to the Office of Administrative Hearings (OAH).

The standard of proof, i.e., the amount of evidence required for a BOI to sustain an allegation is "clear and convincing evidence;" i.e., more than a preponderance but less than beyond a reasonable doubt. There are four categories of findings:

1. Sustained means the alleged act did occur, and was not lawful or justified;
2. Not Sustained means the evidence is insufficient to establish whether the alleged act did or did not occur;
3. Unfounded means the alleged act did not occur; and
4. Exonerated means the alleged act did occur but was lawful, justified and proper.

#### 2. POLICY COMPLAINTS

Complaints or concerns about BPD policies, practices or procedures are presented to the full commission by staff at a regularly scheduled meeting, as soon after receipt as is feasible. The Commission may conduct its own review; form a subcommittee to review the policy, practice or procedure; or ask staff to conduct an investigation and present a report at a future meeting. After conducting its own review, or receiving a report from a subcommittee or staff, the PRC may recommend changes in policy, practice or procedures to the BPD and the City Manager, or close the complaint without further action.

### 2011 STATISTICS

#### 1. COMPLAINTS RECEIVED

There were fifteen complaints filed with the PRC in 2011; thirteen individual complaints and two policy complaints. This is the lowest number of complaints filed since 1986, the earliest year for which those records are readily available. The number of complaints filed with BPD Internal Affairs also declined, to one of the lowest since 1993, the earliest year for which those records are readily available.<sup>2</sup> It is worth noting that, in 2011, the BPD was involved in three high-profile political events (a UC Berkeley student protest, and encampments in Oakland and Berkeley) and a labor protest at Pacific Steel; and that, while the student and labor protests gave rise to one policy complaint each, these events did not result in any individual complaints.

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<sup>1</sup>Complaints must be filed within 90 calendar days of the alleged misconduct, unless a complainant is incapacitated or otherwise prevented from filing a complaint. A complaint filed between 91 and 180 calendar days of the alleged misconduct can be accepted as a late-file if at least 6 Commissioners find, by clear and convincing evidence, good cause for the complainant's failure to timely file.

<sup>2</sup> Except that there are no records for 2004 and 2005.



## 2. COMPLAINTS CLOSED

### A) Individual complaints

The PRC closed 30 individual complaints in 2011 -- Twelve of the complaints were filed in 2011, and 18 were carried over from 2010. One complaint remained open at year's end.

Ten complaints were closed after a BOI hearing; four of these were filed in 2011. Seventeen complaints were administratively closed; seven of these were filed in 2011. Two complaints were withdrawn; one of these was filed in 2011; and the late-filed complaint that was rejected was filed in 2011.

### B) Policy Complaints

The PRC closed one policy complaint in 2011 and one remained open at year's end.

The table below provides a quarterly breakdown of complaints received and complaints closed in 2011.

### 2011 QUARTERLY BREAKDOWN

	1 <sup>st</sup> Q Jan-Mar	2 <sup>nd</sup> Q Apr-Jun	3 <sup>rd</sup> Q Jul-Sep	4 <sup>th</sup> Q Oct-Dec	Total
<b>COMPLAINTS RECEIVED</b>					
Individual	6	3	3	1	13
Policy	1	1	0	0	2
<b>Total</b>	<b>7</b>	<b>4</b>	<b>3</b>	<b>1</b>	<b>15</b>
<b>COMPLAINTS CLOSED</b>					
<b>Board of Inquiry (BOI)</b>	<b>3</b>	<b>2</b>	<b>2</b>	<b>3</b>	<b>10</b>
<b>No BOI</b>	<b>6</b>	<b>4</b>	<b>10</b>	<b>0</b>	<b>20</b>
Admin Closure	4	3	10	0	17
Withdrawn	1	1	0	0	2
Mediation	0	0	0	0	0
Reject	1	0	0	0	1
<b>Policy</b>	<b>0</b>	<b>0</b>	<b>1</b>	<b>0</b>	<b>1</b>
<b>Total</b>	<b>9</b>	<b>6</b>	<b>13</b>	<b>3</b>	<b>31</b>



Allegations are categories of misconduct, e.g., violation of department regulations or procedures, by individual BPD officers. They are categorized by PRC staff, based upon the complaint. The table below provides a quarterly breakdown of the disposition of allegations at BOI Hearings in 2011.

<b>DISPOSITION OF ALLEGATIONS AT BOI HEARINGS</b>					
	1 <sup>st</sup> Q Jan-Mar	2 <sup>nd</sup> Q Apr-Jun	3 <sup>rd</sup> Q Jul-Sep	4 <sup>th</sup> Q Oct-Dec	Total
Sustained	2	0	3	2	7
Not Sustained	4	0	2	3	9
Unfounded	6	1	2	1	10
Exonerated	3	0	0	2	5
<b>Total</b>	<b>15</b>	<b>1</b>	<b>7</b>	<b>8</b>	<b>31</b>

The table below provides a three-year comparison of complaints received and complaints closed.

### THREE-YEAR COMPARISON

	2011	2010	2009
<b>COMPLAINTS RECEIVED</b>			
Individual	13	26	29
Policy	2	3	1
<b>Total</b>	<b>15</b>	<b>29</b>	<b>30</b>
<b>COMPLAINTS CLOSED</b>			
<b>Board of Inquiry (BOI)</b>	<b>10</b>	<b>9</b>	<b>11</b>
<b>No BOI</b>	<b>20</b>	<b>19</b>	<b>29</b>
Admin Closure <sup>3</sup>	17 <sup>4</sup>	15	14
Withdrawn	2	2	5
Mediation	0	0	1
Sum. Dismissal	0	1 <sup>5</sup>	8
Reject	1	1 <sup>6</sup>	1
<b>Policy</b>	<b>1</b>	<b>4<sup>7</sup></b>	<b>0</b>
<b>Total</b>	<b>31</b>	<b>32</b>	<b>40</b>

<sup>3</sup> In the 2010 and 2009 Statistical Reports, the Admin Closure and Withdrawn categories were combined.

<sup>4</sup> Seven complaints were administratively closed because they did not allege prima facie misconduct or were frivolous or retaliatory.

<sup>5</sup> The 2010 Statistical Report lists three cases as having been Summarily Dismissed, but the data shows that only one case was.

<sup>6</sup> The 2010 Statistical Report lists two cases as having been Rejected, but the data shows that only one case was.

<sup>7</sup> The 2010 Statistical Report lists one policy complaint, but the data shows that there were four.



The table below provides a three-year comparison of the disposition of allegations at BOI Hearings.

<b>DISPOSITION OF ALLEGATIONS AT BOI HEARINGS</b>						
	<b>2011</b>	<b>% of total</b>	<b>2010</b>	<b>% of total</b>	<b>2009</b>	<b>% of total</b>
Sustained	7	23%	5	13.5%	14	18%
Not Sustained	9	29%	11	30%	9	11%
Unfounded	10	32%	15	40.5%	17	22%
Exonerated	5	16%	6	16%	39	49%
<b>Total</b>	<b>31</b>		<b>37<sup>8</sup></b>		<b>79</b>	

## ANALYSIS

The number of complaints filed in each of the three years is relatively small. As a result, small changes appear significant when comparisons are made. Thus, while 14 fewer complaints were filed in 2011 than in 2010, this represents a 48% decrease; and 15 fewer complaints were filed in 2011 than in 2009, which represents a 50% decrease.

The total number of complaints closed in each of the three years, which is not directly related to the number of complaints filed in that year, is also relatively small, with little variation between 2011 and 2010, and greater variation between 2011 and 2009. In 2011, one fewer complaint was closed than in 2010, and nine fewer complaints were closed than in 2009.

The manner of complaint closure, i.e., with or without a BOI hearing, similarly, shows little variation between 2011 and 2010, and greater (23%) variation between 2011 and 2009. In 2011, one more complaint was closed without a BOI hearing in 2011 than in 2010, and 9 fewer complaints closed without a BOI than in 2009. In 2011, one more complaint closed after a BOI hearing than in 2010, and one fewer complaint closed after a BOI hearing than in 2009.

The number of allegations considered at the BOI hearings also shows little variation between 2011 and 2010, and greater (61%) variation between 2011 and 2009. In 2011, 6 fewer allegations were considered at BOI hearings than in 2010, and 48 fewer allegations were considered at BOI hearings than in 2009. The percentage of sustained allegations relative to the total number of allegations was 23% in 2011, 13.5% in 2010 and 18% in 2009. Thus, the percentage of sustained allegations was highest in 2011, when the total number of allegations was lowest, and it was lowest in 2009, when the total number of allegations was highest.

<sup>8</sup> The 2010 Statistical Report includes Summary Dismissal as an Allegation Finding and, thus, yields 38 Total Allegations.





The table below provides a three-year comparison of the specific allegations considered at a BOI and their disposition.

<b>DISPOSITION OF SPECIFIC ALLEGATIONS AT BOI HEARINGS</b>											
<b>2011</b>	<b>EXF</b>	<b>DIS</b>	<b>ASD</b>	<b>DET</b>	<b>PRJ</b>	<b>HAR</b>	<b>PRO</b>	<b>CIT</b>	<b>OTH</b>	<b>INV</b>	<b>TOTALS</b>
Sustained	2	1	1	2	0	0	0	0	0	1	7
Not Sustained	3	1	1	0	1	2	0	0	0	1	9
Unfounded	2	2	1	0	0	1	1	1	1	1	10
Exonerated	1	0	2	0	0	0	0	0	2	0	5
<b>Totals</b>	<b>8</b>	<b>4</b>	<b>5</b>	<b>2</b>	<b>1</b>	<b>3</b>	<b>1</b>	<b>1</b>	<b>3</b>	<b>3</b>	<b>31</b>

<b>2010</b>	<b>EXF</b>	<b>DIS</b>	<b>ASD</b>	<b>DET</b>	<b>PRJ</b>	<b>HAR</b>	<b>PRO</b>	<b>CIT</b>	<b>OTH</b>	<b>INV</b>	<b>TOTALS</b>
Sustained	1	3	1	0	0	0	0	0	0	0	5
Not Sustained	2	3	0	1	1	0	1	0	2	1	11
Unfounded	2	0	1	1	3	0	1	0	4	3	15
Exonerated	0	0	3	0	0	0	1	0	2	0	6
<b>Totals</b>	<b>5</b>	<b>6</b>	<b>5</b>	<b>2</b>	<b>4</b>	<b>0</b>	<b>3</b>	<b>0</b>	<b>8</b>	<b>4</b>	<b>37</b>

<b>2009</b>	<b>EXF</b>	<b>DIS</b>	<b>ASD</b>	<b>DET</b>	<b>PRJ</b>	<b>HAR</b>	<b>PRO</b>	<b>CIT</b>	<b>OTH</b>	<b>INV</b>	<b>TOTALS</b>
Sustained	0	3	4	0	0	0	6	0	0	1	14
Not Sustained	2	5	0	0	0	0	2	0	0	0	9
Unfounded	2	3	6	1	6	5	6	0	5	5	39
Exonerated	5	2	6	0	0	0	3	0	1	0	17
<b>Totals</b>	<b>9</b>	<b>13</b>	<b>16</b>	<b>1</b>	<b>6</b>	<b>5</b>	<b>17</b>	<b>0</b>	<b>6</b>	<b>6</b>	<b>79</b>

**Allegation Legend**

**EXF**=Excessive Force

**DIS**=Discourtesy

**OTH**=Other

**ASD**=Improper Arrest, Search, Seizure, Stop or Detention

**DET**=Improper Detention Procedures

**PRO**=Improper Police Procedures

**INV**=Improper Investigation

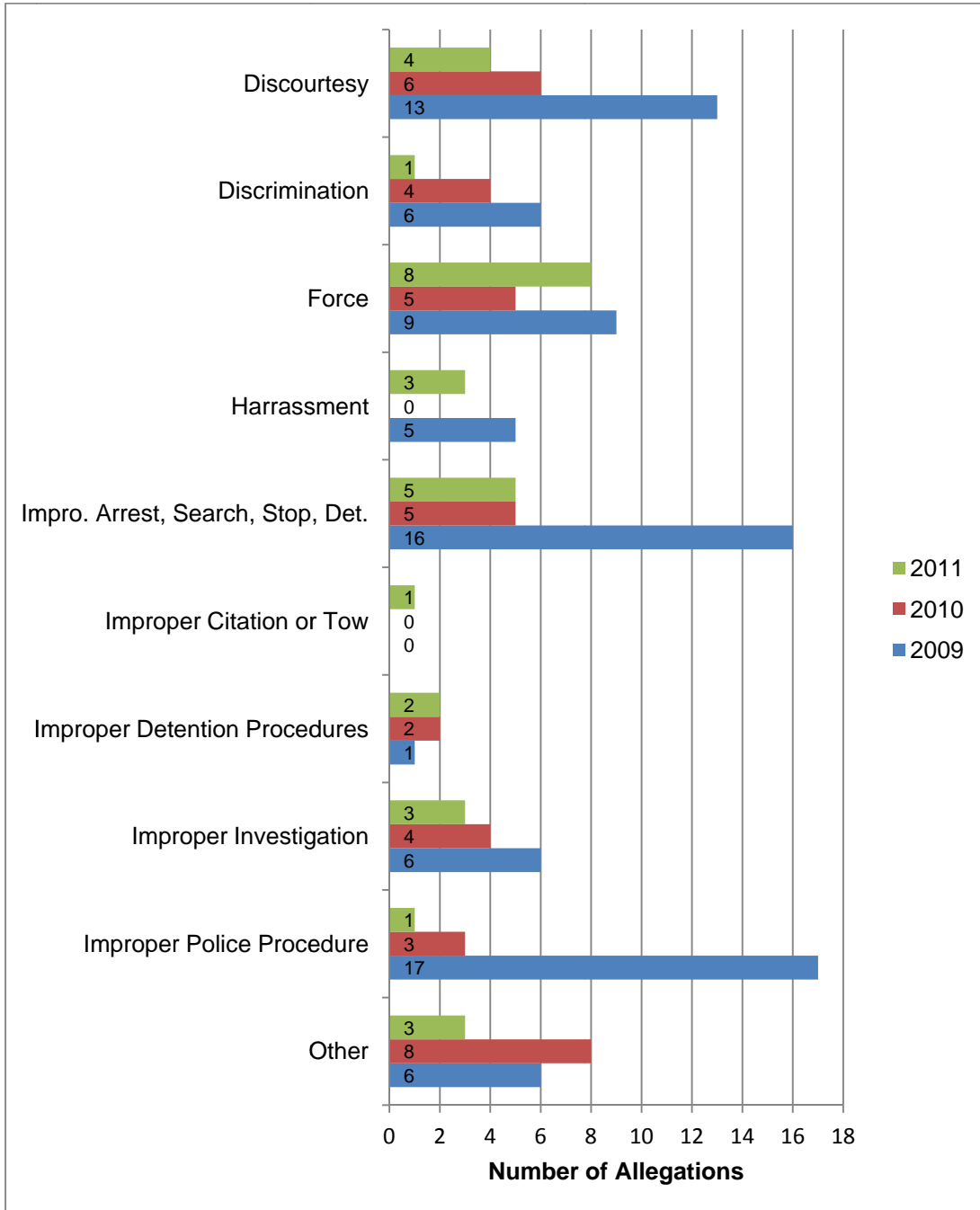
**HAR**=Harassment

**PRJ**=Discrimination

**CIT**=Improper Citation or Tow



## GRAPH OF 2011-2010-2009 DISPOSITION OF SPECIFIC ALLEGATIONS AT BOI HEARINGS



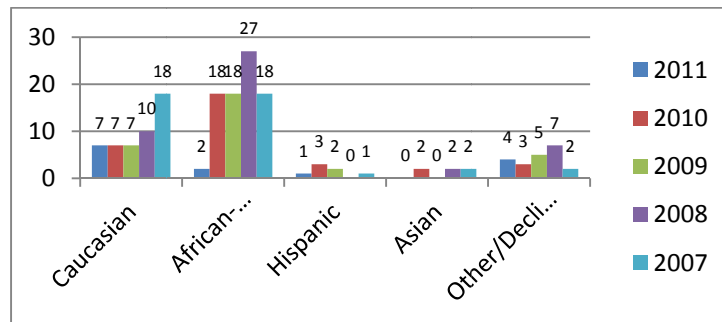


### COMPLAINANTS' ETHNICITY AND GENDER

Individual complaint filers' ethnicity and gender is tracked for statistical purposes. In 2011, the majority of individual complaint filers, 50%, identified themselves as Caucasian; 14% identified themselves as African-American, 7% identified themselves as Hispanic; 0% identified themselves as Asian; and 29% identified themselves as "other" or declined to state. This is a departure from recent years, as evident in the chart below.

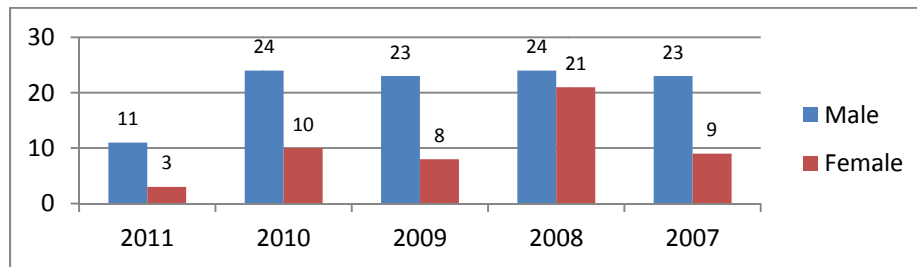
(Of the 15 complaints filed in 2011, 13 were individual complaints, one of which was filed by two co-complainants. Thus, the total number of complainants whose ethnicity is represented is 14. This methodology may differ from that used in prior years, which would affect the validity of the comparison.)

**COMPLAINANTS' ETHNICITY 2011 - 2010 - 2009 - 2008 - 2007**



In each of the five years, the majority of individual complaint filers were male. In 2011, 78.5% of complaint filers were male; in 2010, 70.5% were male; in 2009, 74% were male; in 2008, 53% were male; and in 2007, 72% were male. (Again, because one individual complaint was filed by co-complainants in 2011, the total number of complainants whose gender is represented is 14.)

**COMPLAINANTS' GENDER 2011 - 2010 - 2009 - 2008 - 2007**



The ethnicity and gender numbers for 2010-2007 are derived from the Statistical Reports issued for those years.



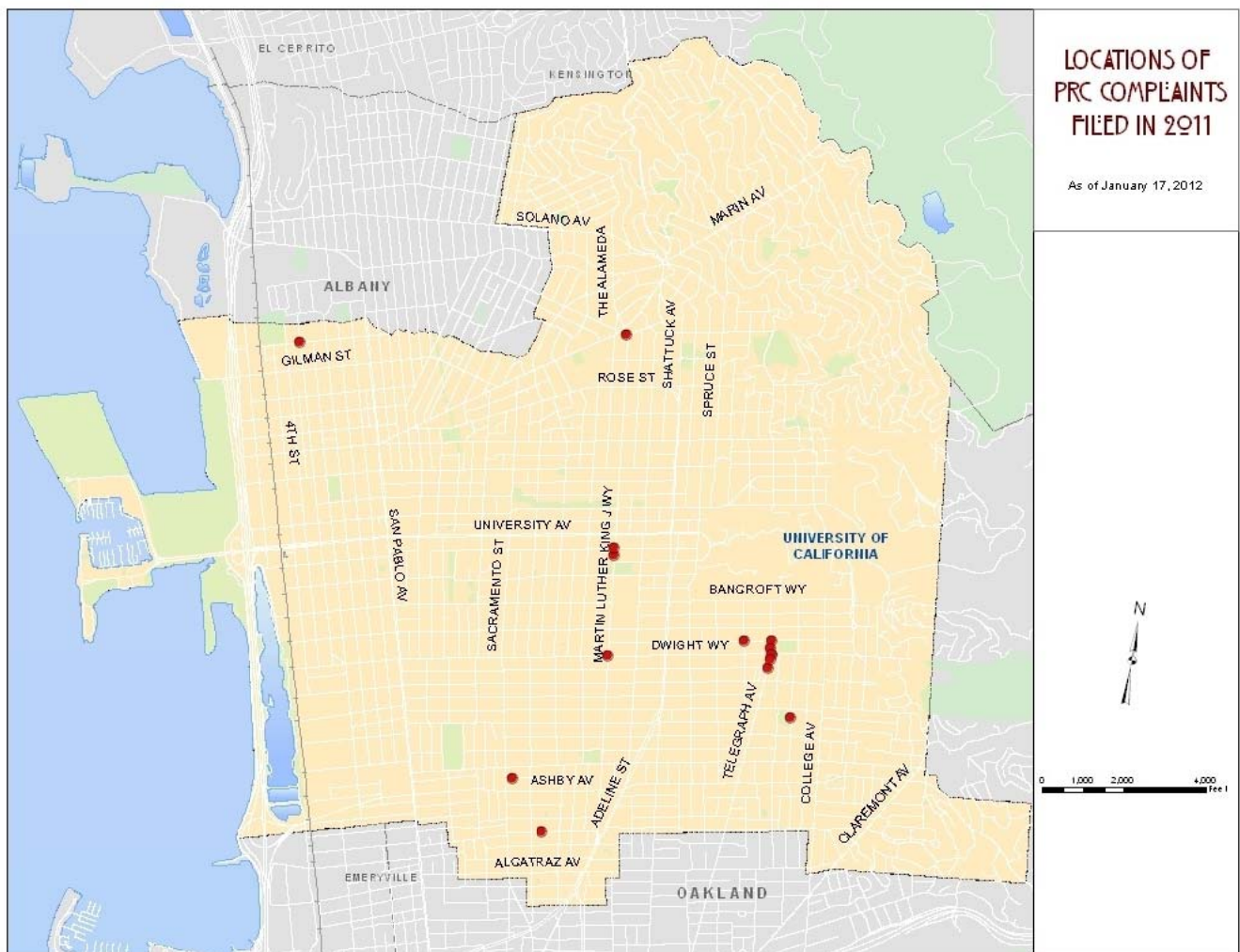
### CALOCA OFFICER APPEALS: POST PRC REVIEW

Police can appeal misconduct allegations that are sustained by a BOI. (See Caloca v. County of San Diego (2002) 102 Cal. App. 4th 433 (“*Caloca*”). Berkeley contracts with the Office of Administrative Hearings (OAH) in Oakland to adjudicate *Caloca* appeal hearings.

In 2011, one appeal was filed, challenging two sustained allegations. The Administrative Law Judge (ALJ) sustained the BOI’s finding on one allegation and reversed its finding on the other. In 2010 and 2009, no appeals were filed.

Year	Cases with <i>Caloca</i> Review	<i>Caloca</i> Findings
2011	1 Case	1 Sustained Allegation; 1 Not Sustained.
2010	0 Cases	n/a
2009	0 Cases	n/a

### INCIDENT LOCATION



The incidents that gave rise to individual complaints in 2011 occurred in a variety of locations, with the majority in Southeast Berkeley.

# **PRC ORDINANCE**



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***CITY OF BERKELEY***

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**ORDINANCE NO. 4644-N.S.**

**Establishing a Police Review Commission  
Adopted by People of Berkeley  
April 17, 1973**

**(Referenced by Court Decision April 12, 1976)**

**Amended To: April 15, 1975  
Annotated: June 9, 1976  
Amended To: December 3, 1982**

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***POLICE REVIEW COMMISSION***

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## ORDINANCE NO. 4644-N.S.

ESTABLISHING A POLICE REVIEW COMMISSION, PROVIDING FOR THE APPOINTMENT AND REMOVAL OF MEMBERS THEREOF, AND DEFINING THE OBJECTIVES, FUNCTIONS, DUTIES AND ACTIVITIES OF SAID COMMISSION.

The people of the City of Berkeley do ordain as follows:

Section 1. The general purpose of this Ordinance is to provide for community participation in setting and reviewing police department policies, practices, and procedures and to provide a means for prompt, impartial, and fair investigation of complaints brought by individuals against the Berkeley Police Department.

Section 2. There is hereby established a Police Review Commission for the City of Berkeley. Said Commission shall consist of nine (9) members. Each Council member shall appoint (1) member to the Commission. All members shall be residents of the City of Berkeley. No officer or employee of the City shall be appointed to the Commission.

~~Section 3. The term of each member shall be two (2) years commencing on October 4 of each odd numbered year and ending on October 3 of each succeeding odd numbered year. Any vacancy occurring during the term of any member shall be filled by the Councilmember whose appointee has ceased to serve, or, if such Councilmember is no longer a member of the Council, by the Councilmember who has no appointee then serving on the Commission, or, (i) if there be more than one, by such of said Councilmembers as shall be determined by lot, or, (ii) if there be none, by the Council. No member shall serve more than two (2) consecutive terms or portions thereof.~~

Section 4. Vacancies on said Commission, from whatever cause, except temporary vacancies as hereinafter provided, shall be filled for the unexpired term by the City Councilmember whose appointee has ceased to serve. The appointment of any member of the Commission who has been absent and not excused from three (3) consecutive regular or special meetings shall automatically expire effective on the date the fact of such absence is reported by the Commission to the City Clerk. The City Clerk shall notify any member whose appointment has automatically terminated and report to the City Council that a vacancy exists on said Commission and that an appointment should be made for the length of the unexpired term. A member of the Commission may be granted a leave of absence not to exceed three (3) months by the City Council, and a temporary vacancy shall thereupon exist for the period of such leave of absence. During the period of such temporary vacancy, the Council may fill such vacancy by a temporary appointment to said Commission; provided, however, that the period of such temporary appointment shall not exceed the period of the temporary vacancy. At the expiration of a leave of absence so granted, the member shall automatically resume full and permanent membership on said Commission.

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\*Section 3 amended December 3, 1982; see attachment.

Section 5. The Commission shall elect one of its members as Chairperson and one as Vice-Chairperson, who shall each hold office for one (1) year and until their successors are elected. No officer shall be eligible to succeed himself or herself in the same office. Officers shall be elected no later than the second meeting of the Commission following its appointment.

Section 6. The Police Review Commission shall be a working Commission. In order to compensate Commissioners for their time and work in investigating complaints, reviewing policies and practices, and attending meetings, Commissioners shall receive \$3.00 (three dollars) per hour, but in no case shall compensation for any one Commissioner exceed \$200 (two hundred dollars) per month. Procedures and regulations for accounting for hours worked and compensation shall be developed and adopted by the Commission and filed with the office of City Clerk.

~~Such clerical and secretarial assistance as are needed by the Commission shall be provided by the office of the City Clerk. The Commission is further authorized to secure and define the duties of same, in the manner consistent with existing law, as it may deem necessary or appropriate.~~

Section 7. The Commission shall establish a regular time and place of meeting and shall meet regularly at least once every two weeks or more frequently as workload requires. The regular place of meeting shall be in an appropriate central location in the City capable of accommodating at least 75 people, but shall not be held in the building in which the Police Department is located. At least once every three (3) months, or more frequently if the Commission desires, the Commission may meet in other places and locations throughout the City for the purpose of encouraging interest and facilitating attendance by people in the various neighborhoods in the City at the meetings.

Special meetings may be called by the Chairperson or by three (3) members of the Commission, upon personal notice being given to all members or written notice being mailed to each member and received at least thirty-six (36) hours prior to such meeting, unless such notice is waived in writing.

All Commission meetings, and agendas for such meetings shall be publicized in advance by written notice given to newspapers, radio and television stations serving the City at least three (3) days prior to regular meetings, and at the same time as members are notified of special meetings. In addition, notice of meetings shall be posted regularly on such bulletin boards and at such locations throughout the City as are designated by the Commission.

All meetings shall be open to the public, unless the Commission, in order to protect the rights and privacy of individuals, decides otherwise and if such closed meeting is not waived by the individual concerned. The Commission shall cause to be kept a proper record of its proceedings. The records and files of the Commission and its officers shall include, but not be limited to, all official correspondence, or copies thereof, to and from the Commission and its members, gathered in their official capacities, and shall be kept and open for inspection by the public at reasonable times in the office of the Secretary of the Commission.

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\*Language shown in ~~strike-out type~~ was declared invalid by the California Court of Appeal on April 12, 1976.

A majority of the appointed Commissioners shall constitute a quorum for the transaction of business, and the affirmative vote of a majority of those present is required to take any action.

The Commission may appoint such subcommittees as are deemed necessary or desirable for the purposes of this ordinance, provided that, membership on such subcommittees shall not be limited to the Commission members but may include members of the public who express an interest in the business of the subcommittees. The members of such subcommittees shall serve without compensation.

Section 8. On the petition of fifty (50) or more citizens in the City of Berkeley filed in the office of the Secretary of the Commission, the Commission shall hold a special meeting in an appropriate and convenient location for the individuals so petitioning for the purpose of responding to the petition and hearing and inquiring into matters identified therein as the concern of the petitioners. Copies of the petition shall be filed by the Commission with the City Clerk and the City Council. Notice of such meeting shall be given in the same manner as notice is given for other meetings of the Commission. In no case shall the Commission meet later than five (5) working days following the date the petition is filed.

~~Section 9. In carrying out its objectives, the Commission shall receive prompt and full cooperation and assistance from all departments, officers, and officials of the City of Berkeley. The Chief of Police, or his deputy if the Chief is ill or absent from the City, shall as part of his duties attend meetings of the Commission when so requested by the Commission, and shall provide such information, documents, or materials as the Commission may request. The Commission may also require the attendance at its meeting of any other Police Department personnel or City officials it deems appropriate in the carrying out of its responsibilities under this Ordinance.~~

Section 10. The Commission established by this Ordinance shall have the following powers and duties:

- a) to advise and make recommendations to the public, the City Council, and the City Manager;
- b) to review and make recommendations concerning all written and unwritten policies, practices, and procedures of whatever kind and without limitations, in relation to the Berkeley Police Department, other law enforcement agencies and intelligence and military agencies operating within the City of Berkeley, and law enforcement generally, such review and recommendation to extend to, but not be limited to, the following:
  - i) treatment of rape victims;
  - ii) police relationship with minority communities;
  - iii) use of weapons and equipment;
  - iv) hiring and training;

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\*The language shown in ~~strike-out type~~ was declared invalid by the California Court of Appeals on April 12, 1976.

- v) priorities for policing and patrolling;
- vi) budget development;
- viii) other concerns as specified from time to time by the City Council;

~~e) to request and receive promptly such written and unwritten information, documents, and materials and assistance as it may deem necessary in carrying out any of its responsibilities under this Ordinance from any office or officer or department of the city government, including but not limited to the Police Department, the City Manager, the Finance Department, the Public Works Department, and the City Attorney, each of all of which are hereby directed out of its responsibilities; provided that information the disclosure of which would impair the right of privacy of specific individuals or prejudice pending litigation concerning them shall not be required to be made available to the Commission except in general form to the extent police activities in specific cases reflect Police Department policies and; provided that the individual involved in the specific situation may consent in writing to the disclosure of information concerning him or her, in which case it shall be made available to the Commission;~~\*

d) to receive complaints directed against the Police Department and any of its officers and employees, and fully and completely investigate said complaints and make such recommendations and give such advice without limitation including disciplinary and action relating to departmental policies and procedures to the City Council and the City Manager in connection therewith as the Commission in its discretion deems advisable; provided as follows:

- i) that investigation of all complaints filed with the Commission shall begin immediately after complaints are filed and proceed as expeditiously as possible;
- ii) that all such complaints filed with other offices, boards, bureaus, and departments of the City, including the Police Department, shall be referred to the Commission for investigation and that the Police Department shall conduct its own investigation only at the request of said Commission, and;
- iii) that regular quarterly reports relating to the number, kind, and status of all such complaints shall be made by the Commission to the City Council and the City Manager;

e) consistent with provisions of the Berkeley City Charter and to the extent permissible by law, to exercise the power of subpoena;

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\*The language shown in ~~strike-out type~~ was declared invalid by the California Court of Appeal on April 12, 1976.

\*\*The language shown in ~~strike-out type~~ was declared invalid by the California Court of Appeals on April 12, 1976.

f) to adopt rules and regulations and develop such procedures for its own activities and investigations as may be necessary and to publish and file same with the office of the City Clerk, and to do such other things not forbidden by law which are consistent with a broad interpretation of this Ordinance and its general purposes.

Section 11. That Ordinance No. 4061-N.S. and Ordinance No. 4149-N.S. and No. 4887-N.S. in amendment thereof are each and all repealed by this Bill. To assist in an orderly transition between the Citizens Committee on Public Safety, herein abolished, and the Police Review Commission established by this Bill, all files, records, books, and publications, and documents of whatever kind of the former Committee shall be promptly deposited in the Office of the City Manager for the use and benefit of the newly created Police Review Commission.

Section 12. If any provision of this Ordinance or its application is held invalid by a court of competent jurisdiction, such invalidity shall not affect other provisions, sections, or applications of the Ordinance which can be given effect without the invalid provisions or applications, and to this end any phrase, section, sentence, or word is declared to be severable.

In effect: April 17, 1973

**ORDINANCE NO. 5503-N.S.**

AMENDING SECTION 3 OF INITIATIVE ORDINANCE NO. 4644-N.S. ENTITLED "ESTABLISHING A POLICE REVIEW COMMISSION, PROVIDING FOR THE APPOINTMENT AND REMOVAL OF MEMBERS THEREOF, AND DEFINING THE OBJECTIVES, FUNCTIONS, DUTIES, AND ACTIVITIES OF SAID COMMISSION."

BE IT ORDAINED by the People of the City of Berkeley as follows:

That Section 3 of Initiative Ordinance No. 4644-N.S., as above entitled, is hereby amended to read as follows:

Section 3. The term of each member shall be two (2) years commencing on December 1 of each even numbered year and ending on November 30 of each succeeding even numbered year. Any vacancy occurring during the term of any member shall be filled by the Councilmember whose appointee has ceased to serve, or, if such Councilmember is no longer a member of the Council, by the Councilmember who has no appointee then serving on the Commission, or (i) if there be more than one, by such of said Councilmembers as shall be determined by lot, or, (ii) if there be none, by the Council.

This Ordinance was approved by the electors of the City of Berkeley at the General Municipal Election held in the City of Berkeley on November 2, 1982.

In effect: December 3, 1982

## INDEX TO TEXT CHANGES

	<u>Section</u>	<u>Action</u>	<u>Ordinance No.</u>	<u>Eff. Date</u>
	2	Amended	4779-N.S. (Vote of the People)	4-15-75
	3	Amended	4779-N.S. (Vote of the People)	4-15-75
Attached	3	Amended	5503-N.S. (Vote of the People)	12-3-82





# **PRC REGULATIONS**



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# ***CITY OF BERKELEY***

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# **REGULATIONS**

**For Handling Complaints Against  
Members of the Police Department**

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## ***POLICE REVIEW COMMISSION***

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*POLICE REVIEW COMMISSION OFFICES: 1947 Center Street, Third Floor, Berkeley, CA 94704  
510.981-4950 TDD: 510.981.6903 FAX: 510.981-4955  
e-mail: [prc@cityofberkeley.info](mailto:prc@cityofberkeley.info) <http://www.cityofberkeley.info/prc>*



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**BERKELEY POLICE REVIEW COMMISSION**  
**REGULATIONS FOR HANDLING COMPLAINTS AGAINST**  
**MEMBERS OF THE POLICE DEPARTMENT**

(Adopted May 13, 1975)  
(Amended August 8, 1984)  
(Amended April 30, 1990)  
(Amended May 26, 1993)  
(Amended November 7, 2007)  
(Amended July 14, 2010)

**PREAMBLE**

The following procedures for handling complaints against members of the Berkeley Police Department (BPD) have been drawn up in accordance with the enabling Ordinance establishing the Police Review Commission for the City of Berkeley. That Ordinance, No. 4644-N.S., passed by the voters April 17, 1973, was intended to provide prompt, impartial, and fair investigation of complaints brought by individuals against the BPD and these regulations are adopted by the Commission to carry out that purpose.

That Ordinance, by setting up this Commission made up of community residents, is intended to establish a process for reviewing Police Department policies, practices and procedures and for handling individual complaints against members of the BPD that is available to any individual, free of charge and without the need for attorneys or other professional advisors. The Ordinance gives the Commission the power to adopt rules and regulations and develop procedures for its own activities and investigations. Consistent with the powers granted to it by the enabling Ordinance, the Commission reserves the right to establish and interpret its procedures in the spirit of the Ordinance and in the best interests of the City of Berkeley.

These regulations incorporate the confidentiality provisions required by the Decision in Berkeley Police Association v City of Berkeley (2008) 167 Cal.App.4th 385.

**I. GENERAL**

- A. Application of Regulations-Confidentiality of Complaint Proceedings. The following regulations govern the receipt and processing of complaints submitted to the Police Review Commission (PRC or Commission). All Board of Inquiry (BOI) and Commission proceedings relating to the investigation of an individual complaint against an officer shall be closed to the public. Records of these investigations shall be treated as confidential and will not be disclosed to members of the public. Any public records included in, or attached to, any investigative reports shall remain public records, and copies shall be made available to the complainant and subject officer.
- B. Definitions. The following definitions shall apply in these regulations:
1. Administrative Closure: Complaint closure before a BOI hearing. Administrative closure requires a majority vote of the Commissioners, in closed session, at a regularly scheduled meeting, and does not constitute a judgment on the merits of the complaint.
  2. Allegation: A specific assertion of police misconduct by a complainant or the Commission.
  3. Board of Inquiry (BOI): Three Commissioners impaneled to hear and render findings on complaints; a BOI Commissioner is required to sign a confidentiality and nondisclosure agreement.

4. *BOI Hearing Packet*: Evidence and information for the hearing, issued no later than 10 business days before the scheduled hearing.
5. *Commissioner*: A resident of Berkeley appointed by a City Council member or the Mayor to serve on the PRC.
6. *Complaint*: A declaration that alleges misconduct by a Berkeley Police Department (BPD) employee (including employees of the Public Safety Communications Center) while engaged in official duties.
7. *Complainant*: Any person who files a complaint with the PRC; is considered a witness to the complaint during a BOI hearing.
8. *Duty Command Officer (DCO)*: A sworn BPD officer designated by the BPD's Chief of Police to appear at a Board of Inquiry and answer procedural questions clarifying BPD policy.
9. *Findings Report*: Summary of the BOI's findings, provided to the City Manager and the Chief of Police within 30 calendar days of the hearing.
10. *Investigation*: A formal process of resolving complaints.
11. *Mediation*: A process of resolving complaints informally, without investigation, in conjunction with a local mediation agency, if both the complainant and the subject officer agree. Mediation may be considered in all cases except those involving the death of an individual.
12. *Policy Complaint*: A declaration alleging that a BPD policy, practice or procedure is improper or should be reviewed or revised.
13. *PRC Investigator*: A person employed by the City Manager and assigned to the PRC to investigate complaints.
14. *PRC Officer*: A person employed by the City Manager and assigned to the PRC as the office administrator and secretary to the Commission.
15. *Report of Investigation*: Report issued within 75 calendar days of the filing date of the complaint.
16. *Subject Officer*: A sworn BPD officer, or other BPD employee, against whom a complaint is filed.
17. *Summary Dismissal*: Dismissal of any or all of the allegations in a complaint prior to the start of a BOI hearing; requires a unanimous vote of the BOI Commissioners, and constitutes a judgment on the merits.
18. *Supplemental Report of Investigation*: Report issued no later than 10 business days before a BOI hearing, as part of the BOI Hearing Packet.
19. *Toll*: Stop the running of the clock/investigation timeline.
20. *Witness Officer*: A sworn BPD officer, or other BPD employee, who has personal knowledge of events described in a complaint, but is not the subject officer.



## **II. INITIATING THE PROCESS**

### **A. Filing a Complaint**

#### **1. Complaint Form**

Complaints and policy complaints must be filed on a form provided by the PRC and, except as provided in section 3, signed by the complainant. Non-policy complaint forms will include information about the difference between mediation and an investigation; and language advising a complainant who is the subject of, or has commenced, litigation relating to the incident that gave rise to the complaint to consult an attorney before filing a complaint. Non-policy complaint forms will conclude with the following: "I hereby certify that, to the best of my knowledge, the statements made herein are true. I also understand that my oral testimony before the Board of Inquiry shall be given under oath."

#### **2. Filing Period**

- a. To be considered timely, a complaint must be filed within 90 calendar days of the alleged misconduct, except that the 90-day period shall be tolled when a complainant is incapacitated or otherwise prevented from filing a complaint. Any complaint filed after 90 calendar days of the alleged misconduct shall be dismissed, unless accepted as a late-file. A complaint filed between 91 and 180 calendar days of the alleged misconduct must include a late-file form, and can be accepted as a late-file if at least 6 Commissioners find, by clear and convincing evidence, good cause for the complainant's failure to file in a timely fashion. The PRC Officer or Investigator will submit a late-file to the Commission for a vote in closed session at the next regularly scheduled meeting. Any complaint filed after 180 calendar days of the alleged misconduct will not be accepted.
- b. For late-filed complaints, the subject officer(s) are not required to appear before a Board of Inquiry, and the Board's findings will not be considered in any disciplinary actions by the City Manager or the Chief of Police.

#### **3. Unavailability of Complainant**

If there is no complainant able to initiate a complaint, and in any case where a sworn officer or other BPD employee is involved in a death, 5 Commissioners may vote to authorize an investigation or take such other action they deem appropriate.

#### **4. Sufficiency of Complaint**

- a. Complaints must allege facts that, if true, would establish that misconduct occurred. Complaints that do not allege prima facie misconduct, or are frivolous or retaliatory shall be referred by the PRC Officer or Investigator to the Commission for administrative closure at the next regularly scheduled meeting, provided there is sufficient time to give the complainant notice (see Sec. IV(A)(2)), and before the Notice of Allegations is issued. If a majority of the Commissioners agree, the case will be closed; if not, the Notice of Allegations will be issued within 10 calendar days after the date of the vote rejecting the PRC Officer's recommendation for closure, unless the complainant has elected mediation.
- b. Policy complaints will be brought to the Commission, within 30 calendar days of filing, at a regularly scheduled meeting for discussion or action. If a majority of the Commissioners feel that a policy review is warranted, they may take appropriate action, including, but not limited

to, initiating a formal investigation or establishing a subcommittee; a subcommittee, if established, will seek BPD involvement in its review of a BPD policy. Upon completion of its review, the subcommittee will present its conclusions and recommendations to the full Board.

## 5. Right to Representation

Complainants and subject officers have the right to consult with, and be represented by, an attorney or other representative, but an attorney is not required. If PRC staff is notified that a complainant or subject officer is represented by an attorney, PRC staff shall thereafter send copies of any materials and notification provided to the complainant or the subject officer(s) to their representative.

## B. Mediation

### 1. Election

- a. The PRC Officer or Investigator shall, prior to, or concurrent with, the filing of a complaint, provide the complainant with information about the difference between mediation and an investigation. PRC staff shall make all reasonable efforts, and document their efforts, to contact the complainant within 2 business days of the filing of the complaint to discuss the complainant's preference, provided the complaint is appropriate for mediation.
- b. If the complainant elects mediation, the PRC staff shall provide the subject officer with a copy of the complaint and notify him or her of the complainant's election, within 10 calendar days.
- c. If the subject officer agrees to mediation, s/he shall notify the PRC Officer or the Investigator within 10 calendar days of being informed of the complainant's election. A subject officer who agrees to mediation must agree to toll the City's 120-day disciplinary deadline should the mediation break down and the mediator determine that the officer is acting in bad faith.<sup>1</sup>

### 2. Conclusion

- a. Mediation may continue as long as the mediator feels that progress is being made; it may be terminated if the mediator determines that either party is acting in bad faith. If the mediator terminates the mediation because the subject officer is acting in bad faith, the complainant will be advised of his/her right to proceed with the PRC investigation and hearing. If the mediator terminates the mediation because the complainant is acting in bad faith, the PRC Officer or Investigator shall submit the complaint to the Commission for administrative closure.
- b. If mediation is successfully concluded, the mediator will provide written notice to the PRC and the BPD within 5 calendar days of the last mediation session. The PRC will consider the matter resolved and the complaint will be submitted for administrative closure.

### 3. Records retention

Mediation records will be destroyed 1 year from the date of election by the complainant.

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<sup>1</sup> Bad Faith: An intentional dishonest act by not fulfilling legal or contractual obligations, misleading another, entering into an agreement without the intention or means to fulfill it, or violating basic standards of honesty in dealing with others. (West's Encyclopedia of American Law, edition 2, Copyright 2008).

### **III. COMPLAINT INVESTIGATION**

#### **A. Notice and Availability of Complaint**

##### **1. Notice of Allegations**

Within 20 business days of the date a timely-filed complaint is received at the PRC office, unless it is submitted to the Commission for administrative closure or the complainant elects mediation, the Investigator shall prepare a Notice of Allegations. The Notice of Allegations shall be sent in hard copy and, when feasible, electronically, to the complainant, the Chief of Police and/or BPD Internal Affairs, and, by delivery to the BPD, each identified subject officer. If the Notice of Allegations is not issued in the time required, the PRC Officer or Investigator shall submit the case to the Commission for administrative closure at the next regularly scheduled meeting; the complaint shall be closed, unless the Commission determines that good cause exists for the delay.

##### **2. Availability of Complaint**

The complaint shall be available at the PRC office, and a copy shall be provided to the subject officer with the Notice of Allegations. PRC staff shall maintain a central register of all complaints filed.

#### **B. Investigation Process**

##### **1. Nature of Investigation**

The investigation of a complaint shall consist of conducting recorded interviews with the complainant, the subject officer(s), and any witnesses to the incident that gave rise to the complaint;<sup>2</sup> collecting relevant documentary evidence, including, but not limited to: police reports and records, photographs, and visual or audio records; and issuing a Notice of Allegations, Report of Investigation, and a Board of Inquiry Hearing (Hearing) Packet.

##### **2. Time for Investigation**

- a. The investigation must be completed within one year, unless a Government Code Sec. 3304(d) exception applies.
- b. If the investigation is not completed within one year, the PRC Officer or Investigator shall submit the case to the Commission for administrative closure at the next regularly scheduled meeting; the case shall be closed, unless the Commission determines that a Government Code Sec. 3304(d) exception applies.
- c. If a Government Code Sec. 3304(d) exception to the one-year limitation period applies, the BOI Hearing Packet shall state the applicable exception.

##### **3. Pending Criminal Action**

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<sup>2</sup> Recordings of interviews shall be kept for 100 days or until the Board of Inquiry's Findings Report has been provided to the City Manager, whichever is later.

If the complainant or the subject officer is the subject of criminal proceedings related to the matter of the complaint, the PRC shall not undertake an investigation until the criminal matter has been adjudicated or dismissed. All time limitations applicable to the processing of PRC complaints shall be tolled during the pendency of any such criminal proceedings. Within one week of the filing of the complaint, or as soon thereafter as possible, the PRC Officer shall determine the status and anticipated resolution of the criminal proceedings by communicating, in writing, directly with the District Attorney's Office.

### C. Interviews

#### 1. Conduct

Interviews should be conducted in a manner that will produce a minimum of inconvenience and embarrassment to all parties. BPD officer interviews must be conducted in compliance with the Peace Officers Procedural Bill of Rights, Government Code Section 3303. When possible, BPD employees should not be contacted at home, and others should not be contacted at their places of employment.

#### 2. Notice

PRC staff shall notify subject and witness officers at least 2 weeks before the scheduled interview date by providing a hard copy and, when feasible, an electronic mail notification. Follow-up notices will be sent at least one week before the scheduled date. An officer who is unavailable for an interview shall contact the PRC Officer or the Investigator immediately to state the reason for his/her unavailability.

#### 3. Exercise of Constitutional Rights

Subject officer testimony shall be required, in accordance with the City Manager's policy (see Exhibit B). While all BPD employees have a right to invoke the Fifth Amendment, they also have a duty to answer questions before the PRC regarding conduct and observations that arise in the course of their employment and may be subject to discipline for failure to respond. The exercise of any or all constitutional rights shall not be considered by the Commission in its disposition of a complaint.

### D. Reports

#### 1. BPD Reports

- a. The PRC should receive un-redacted police reports from BPD once the PRC Officer has established and implemented security and chain of custody procedures that satisfy the City Manager and the Chief of Police. Police reports will be redacted when distributed to BOI Commissioners, but un-redacted reports will be available at the PRC Office for BOI Commissioners to review.
- b. Whenever a PRC investigation is tolled, the Chief of Police shall take appropriate steps to assure preservation of the following items of evidence:
  - (1) The original Communications Center tapes relevant to the complaint.
  - (2) All police reports, records, and documentation.
  - (3) Names, addresses, telephone numbers, and statements of all witnesses.

## 2. Report of Investigation

- a. The PRC Officer or the Investigator shall assemble all relevant information in a confidential Report of Investigation. The Report shall list the allegations, provide a summary of the complaint, provide the applicable BPD, state or local rules and regulations, and include a copy of the interview transcripts.
- b. The Report shall be provided to the subject officers, with a copy to the Chief of Police, within 75 calendar days of the date of filing of the complaint. If the Report is not timely, the PRC Officer or Investigator shall submit the case to the Commission for administrative closure at the next regularly scheduled meeting; the complaint shall be closed, unless the Commission determines that good cause exists for the delay.

## **IV. PRE-HEARING COMPLAINT DISPOSITION**

### A. Administrative Closure

#### 1. Grounds

The grounds upon which a complaint may be administratively closed include but are not limited to the following:

- a) Complaint does not allege prima facie misconduct or is frivolous or retaliatory.
- b) Request for closure by complainant.
- c) Unavailability of complainant where staff has attempted at least 3 telephone, electronic mail and/or regular mail contacts. Attempts to reach the complainant by telephone and/or mail shall be documented in the recommendation for Administrative Closure.
- d) Mootness of the complaint including but not limited to situations where the subject officer's employment has been terminated or where the complaint has been resolved by other means (e.g. mediation)
- e) Failure of the complainant to cooperate, including but not limited to: refusal to submit to an interview, to make available essential evidence, to attend a Board of Inquiry hearing, and similar action or inaction by a complainant that compromises the integrity of the investigation or has a significant prejudicial effect.
- f) Failure to timely issue the Notice of Allegations, as set forth in Section III(A)(1).
- g) Failure to timely issue the Report of Investigation, as set forth in Section III(D)(2)(b).
- h) Failure to timely complete its investigation, as set forth in Section III(B)(2).
- i) A policy complaint that has been considered by the Commission.

#### 2. Procedure

A complaint may be administratively closed by a majority vote of Commissioners during closed session at a regularly scheduled meeting. The complainant shall be notified of the

opportunity to address the commission during closed session at this meeting and such notice shall be sent no later than 5 calendar days prior to said meeting. Cases closed pursuant to this section shall be deemed "administratively closed" and the complainant, the subject officer, and the Chief of Police shall be notified by mail.

A policy complaint may be administratively closed by a majority vote of Commissioners during open session at a regularly scheduled meeting.

### 3. Effect of Administrative Closure

Administrative Closure does not constitute a judgment on the merits of the complaint.

### B. No Contest Response

A subject officer who accepts the allegations of the complaint as substantially true may enter a written response of "no contest" at any time before a hearing. Upon receipt of a "no contest" response, the PRC Officer or Investigator shall refer the file and the response to the City Manager and the Chief of Police for appropriate action.

### C. Waiver of Hearing

Either the complainant or the subject officer may request that findings be rendered without a hearing. If both the complainant and the subject officer sign a written waiver of their right to a hearing, a Board of Inquiry may issue findings based on interview statements and documentary evidence.

## **V. BOARDS OF INQUIRY**

### A. Composition

A Board of Inquiry (BOI) shall consist of 3 Commissioners, who shall designate one of them to be Chairperson. In cases involving the death of a person, and in such other cases as the Commission shall determine by a vote of 6 Commissioners, the Commission shall sit as a Board of the whole, with a minimum of 6 Commissioners.

### B. Designation

#### 1. Obligation to Serve

Commissioners will volunteer for dates upon which hearings have been scheduled, without knowledge of the factual dispute to be heard. PRC staff will keep a record of the number of cases heard by each Commissioner, who will be expected to hear an approximately equal number of cases over each three-month period. A BOI Commissioner is required to sign a confidentiality and nondisclosure agreement.

#### 2 Unavailability of BOI Member

If any member of a Board of Inquiry becomes unavailable, s/he shall be replaced by another Commissioner. Notice of this substitution shall be made as soon as possible to the subject officer. If a Commissioner is substituted within 7 calendar days of a Board of Inquiry, the subject officer will retain the right to challenge said Commissioner for cause under Section 4(C) below. The notice of challenge of a substituted Commissioner must be made at least 3

business days prior to the convening of a Board of Inquiry and shall be deemed as just cause for a continuance of the hearing.

### 3. Effect of Continuance

If a hearing is rescheduled due to the unanticipated unavailability of the complainant(s), the subject officer(s) or the complainant's or subject officer's attorney, the case may be reassigned to another Board of Inquiry. The Board composition shall not change once a hearing has been convened, however.

## C. Challenge of BOI Commissioner

### 1. Basis for Challenge

A Commissioner who has a personal interest, or the appearance thereof, in the outcome of a hearing shall not sit on the Board. Personal interest in the outcome of a hearing does not include political or social attitudes or beliefs. Examples of personal bias include, but are not limited to:

- a) a familial relationship or close friendship with the complainant or subject officer;
- b) witnessing events material to the inquiry;
- c) a financial interest in the outcome of the inquiry;
- d) a bias for or against the complainant or subject officer.

### 2. Procedure

- a. Within 7 calendar days from the date of mailing of the Board of Inquiry hearing packet, which includes the names of the Commissioners constituting that Board, the complainant or the subject officer(s) may file a written challenge for cause to any Commissioner. Such challenge must specify the nature of the conflict of interest.
- b. The PRC Officer or his/her designee shall contact the challenged Commissioner as soon as possible after receipt of the challenge.
- c. If the Commissioner agrees, PRC Officer or his/her designee shall ask another Commissioner to serve.
- d. If the Commissioner does not agree that the challenge is for good cause, PRC Officer or his/her design shall poll the other members of the Board and, if both agree that the challenge is for good cause, shall inform the challenged Commissioner and ask another to serve.
- e. If a challenge to a Commissioner is rejected, and the Commissioner serves, the written challenge and the Commissioner's written response shall be part of the record of the complaint.

### 3. Replacement of Commissioners

Any Commissioner who is unable to serve for any reason shall be replaced by another Commissioner, except in cases involving a death.

#### D. Responsibilities of BOI Commissioners

1. Confidentiality
  - a. Each Commissioner shall maintain strict confidentiality.
  - b. Each Commissioner shall return the confidential portions of the Hearing Packet and any other confidential documents to PRC staff after the hearing has been concluded.
2. Conduct
  - a. Commissioners shall not publicly comment on any complaints.
  - b. Commissioners shall not discuss any of the facts or analysis of a pending complaint.
  - c. Commissioners shall not pledge or promise to vote in any particular manner in a pending complaint.
3. Breach

Failure to comply with these provisions shall be grounds for removing a Commissioner from a BOI. In addition, a Commissioner or the PRC Officer may bring a violation to the attention of the full Commission, for discussion or action, at a regularly scheduled meeting. Possible action, which requires a two-thirds vote, may include notification of the breach to the appointing City Councilmember.

#### E. Function

1. The BOI members shall review the confidential Hearing Packet and the evidence gathered in connection therewith, hear testimony in closed session, prepare findings, and advise the Chief of Police and the City Manager of its findings.
2. The BOI members shall accept court disposition of traffic or parking citations. It shall assume that uncontested citations are justified, and shall make no assumptions regarding dismissed citations.

#### F. Subpoena Power

The Commission's subpoena power shall be used to the extent necessary to insure fairness to all parties.

### **VI. HEARINGS**

#### A. Scheduling and Notice

##### 1. BPD Schedules

The Chief of Police, or his designee, shall provide PRC staff with a subject officer's schedule prior to the scheduling of a hearing. Hearings shall not be held on an officer's regular days off, scheduled vacation, or authorized leave of absence. PRC staff shall determine the complainant's and the subject officer's availability before scheduling a hearing.

##### 2. Notice

No later than 10 business days before the hearing date, the PRC Officer or the Investigator shall provide written notice of the date, time and location of the hearing, and the composition of the



Board of Inquiry, to the complainant, the subject officer(s), any representatives, civilian witnesses, witness officers, the BOI members and the Chief of Police.

## **B. Board of Inquiry Hearing Packet**

No later than 10 business days before the hearing date, the PRC Officer or the Investigator shall provide a Hearing Packet to the BOI members, the complainant, the subject officer(s), any representative(s), any witnesses, the DCO and the Chief of Police.

1. The BOI members shall receive a Hearing Packet that contains:
  - a) The PRC Officer's or the PRC Investigator's recommendations, if any, concerning summary disposition or procedural matters.
  - b) A copy of the complaint.
  - c) The Supplemental Report of Investigation, which includes a summary of the complaint, a summary of the interview statements, the applicable BPD, state or local rules and regulations, and a brief analysis.
  - d)** Police reports and any other relevant documentary evidence, including evidence submitted by the complainant.
  - e) A copy of all the interview transcripts.
2. The subject officer(s), the officer's representative, the DCO, and the Chief of Police shall receive a Hearing Packet that contains the documents listed in Section V(B) (1)(a, c, d) above; a copy of the complaint (Section V(B) (1)(b)) and the interview transcripts (Section V(B) (1)(e)) shall be provided only if they have not been provided previously.
3. The complainant shall receive a Hearing Packet that contains:
  - a) A copy of the complaint.
  - b)** Police reports and any other non-confidential, relevant documentary evidence, including evidence submitted by the complainant.
  - c) A copy of the complainant's interview transcript.
4. Each witness shall receive a copy of his/her interview transcript.

## **C. Pre-Hearing Motions**

### **1. Newly Discovered Evidence and/or Witnesses**

The complainant and subject officer shall provide any newly discovered evidence or witnesses' names to the PRC Officer or Investigator no later than 10 business days before the scheduled hearing date, with an explanation as to why the evidence or witnesses could not have been discovered earlier and its significance. The PRC Officer or Investigator shall inform the BOI of the newly discovered evidence or witnesses as soon as possible.

The BOI shall decide whether or not to allow the evidence or witnesses no later than 4 business days before the scheduled hearing date, and the PRC Officer or Investigator shall notify both the complainant and the subject officer of the Board's decision.

## 2. Procedural Issues

The complainant and subject officer shall raise any procedural issues, by submitting them to the PRC Officer in writing, no later than 5 business days before the scheduled hearing date. Procedural issues can include, but are not limited to, the expiration of the 1-year limitation period and/or whether an officer should testify.

## 3. Summary Disposition

### a. Summary Dismissal

After reviewing the Hearing Packet, the BOI may summarily dismiss any or all of the allegations that it finds clearly without merit, by unanimous vote, on the recommendation of the PRC Officer or Investigator, its own motion, or that of the subject officer. Parties to the complaint shall be notified of the summary dismissal, and may appear to argue for or against summary disposition.

### b. Summary Affirmation

After reviewing the Hearing Packet, the BOI may summarily sustain any or all of the allegations that it finds clearly meritorious, by unanimous vote, on the recommendation of the PRC Officer or Investigator, or its own motion. The subject officer shall be notified of the summary affirmation, and may appear to object to the summary affirmation, which shall not occur over the subject officer's objection.

## 4. Continuances

a. A continuance may be granted by a majority of the BOI. In considering whether to grant such a continuance, the BOI members shall consider the reason for the request; the timeliness of the request; the prejudice to the other party; the date of the filing of the complaint; previous continuance requests; and other relevant information.

b. A continuance request shall be presented to the BOI as soon as the cause for continuance arises.

c. A continuance shall not be granted in the absence of good cause.

d. A request for continuance made within 3 business days of the hearing date shall not be granted unless the moving party can demonstrate a grave emergency that will unduly prejudice him or her if the hearing is not continued.

e. A continuance granted at the request of the subject officer shall toll any BPD disciplinary time period.

## D. Procedure

1. All BOI hearings shall be closed to the public. PRC staff may be present during the entirety of the closed hearing, and the DCO shall be present for all but the Commissioners' deliberations.
2. An attorney or other person acting on behalf of any complainant or subject officer may participate in the hearing. However, a representative is not required and the complainant and subject officer is each responsible for insuring his/her counsel's presence at the hearing.
3. If good cause is shown, the BOI may continue the hearing due to the unanticipated unavailability of a witness or a representative.

4. Absent good cause, if the complainant fails to appear within 30 minutes after the scheduled time for the hearing, the complaint will be dismissed. Absent good cause, if the subject officer fails to appear within 30 minutes after the scheduled time for the hearing, the hearing will proceed and the allegations may be sustained.
5. If a third Commissioner fails to appear within 30 minutes after the scheduled time for the hearing, the hearing will be continued until a third Commissioner is seated unless all the parties present agree to proceed with 2 Commissioners. If the hearing proceeds with 2 Commissioners, all findings must be unanimous.
6. The PRC Officer or Investigator will present the complaint, introduce witnesses, if any, and answer appropriate questions addressed to them.
7. The complainant and any civilian witnesses will be called into the hearing room to testify separately; the subject officer and the officer's representative may be present during the complainant's and the civilian witnesses' testimony. The complainant may make a statement or rely on the interview statements, and will then answer questions from the subject officer(s) or the subject officer's representative(s) and the Commissioners. After questioning is completed, the complainant will have up to 15 minutes to provide a summary of his/her case and/or closing statement. The complainant and any civilian witnesses will each be excused from the hearing room after his/her testimony is completed.
8. The subject officers and any witness officers will be called into the hearing room to testify separately. Each officer may make a statement or choose to rely on the interview statements. The subject officer(s) will be questioned by his/her representative first, after which the officer may be questioned by 2 Board members, unless s/he waives this requirement. After questioning is completed, each subject officer will have up to 15 minutes to provide a summary of his/her case and/or closing statement. The subject officers and any witness officers will each be excused from the hearing room after his/her testimony is completed.
9. No person who is present at a BOI hearing shall become the subject of undue harassment, personal attack, or invective. If the Chairperson fails to maintain reasonable order, BPD employees may leave the hearing without prejudice. The burden shall be upon the BPD employee to establish to the City Manager's satisfaction that his/her reason for leaving was sufficient.

#### E. Evidence

The hearing need not be conducted according to technical rules of evidence. Any relevant evidence shall be admitted if it is the sort of evidence on which reasonable persons are accustomed to rely in the conduct of serious affairs. Hearsay evidence may be used to supplement or explain other evidence, but shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions. "Hearsay evidence" is evidence of a statement that was made by someone other than the witness testifying at the hearing.

Evidence shall be taken in accordance with the following provisions:

- a) The complainant and subject officer(s) shall have the right to testify and refer to any relevant documentary evidence and exhibits. If the complainant or subject officer does not testify on his/her own behalf, he/she may be called and examined as if under cross-examination.
- b) Oral evidence shall be taken only under oath.

- c) The Chairperson shall exclude irrelevant and unduly repetitious evidence.
- d) The Chairperson shall exclude unruly or disruptive persons from the hearing.
- e) The Chairperson will conduct the hearing subject to being overruled by a majority of the BOI members. BOI members shall be primarily responsible for obtaining testimony. The PRC Officer or his/her designee will answer Commissioner's questions on the evidence, points of law, and procedure.
- f) The City Attorney's opinion will be sought whenever the interpretation of City of Berkeley Ordinance is contested and pivotal in the case, or when a case raises substantial legal issues of first impression.
- g) If the BOI needs additional evidence to reach its findings, it will continue the hearing to a future date, unless the parties agree to allow the Board to receive such material in writing without reconvening.
- h) If upon the petition of either party, the hearing is continued for consideration of motions or points of law, any applicable BPD disciplinary time limit shall be tolled for the period of such continuance.

## **VII. DELIBERATION AND FINDINGS**

### **A. Deliberation**

After the hearing has been concluded, the Board will deliberate outside of the presence of the complainant, the subject officer(s), and any witnesses or representatives. The Board shall not consider any information not received in the Hearing Packet or during the hearing.

### **B. Majority Vote**

All action by the Board shall be by majority vote, except as specified in these procedures. A dissenting member shall set forth the reasons for dissenting in writing, and such dissent shall be circulated in the same manner as the decision of the majority.

### **C. Standard of Proof**

No complaint shall be sustained unless it is proven by clear and convincing evidence presented at the hearing or otherwise contained in the record. "Clear and convincing" is more than a preponderance of the evidence, but less than beyond a reasonable doubt.

### **D. Categories of Findings**

1. If the evidence shows that the alleged act did not occur, the finding shall be "Unfounded."
2. If the evidence fails to support the allegations, but the allegations cannot be shown as false, the finding shall be "Not Sustained."
3. If the evidence shows that the alleged act did occur, but was lawful, justified, and proper, the finding shall be "Exonerated."
4. If the evidence shows that the alleged act did occur and the action was not justified, the finding shall be "Sustained."

E. Findings Report and Notification

1. Within 7 calendar days of the hearing, the PRC office shall inform the complainant and subject officer, in writing, whether the allegation was sustained, not sustained, unfounded or exonerated, and about the right to petition for rehearing.
2. Within 30 calendar days of the hearing, the PRC office shall submit a Finding Report, together with the Hearing Packet, to the City Manager and the Chief of Police.

F. Petition for Rehearing

1. Within 15 calendar days of the mailing of the Board's findings, any party to the complaint may petition in writing for a rehearing. A rehearing may be granted only if the applicant establishes that: there is newly discovered, material evidence that, with reasonable diligence, could not have been discovered and produced at the hearing; or, that there was substantial procedural error likely to have affected the outcome.
2. Within 21 calendar days of the receipt of a petition for rehearing by either party, the Commission shall vote in closed session whether to grant or deny it. Both the complainant and the subject officer shall receive notice that the Commission will vote on the petition for rehearing. If, by a majority vote of the Commissioners, a rehearing is granted, it shall be held within 35 calendar days of the receipt of the petition. If the officer makes the request, the officer must agree to toll the 120-day disciplinary period, provided the request is granted; tolling reverts back to the date the request is submitted and continues until the hearing is concluded and the findings are issued. However, there shall be no tolling if the 120 days has already passed.

**VIII. AMENDMENT AND AVAILABILITY OF REGULATIONS**

- Amendments to the Regulations for Handling Complaints Against Members of the Police Department (Regulations) require a majority vote of the Commission.
- Amendments shall be distributed to Commissioners, the Berkeley Police Association, the City Manager, the City Attorney, and the Chief of Police.
- The PRC office shall maintain a complete set of the current Regulations.

SUBJECT OFFICER TESTIMONY

MEMORANDUM

July 20, 1990

To: Ronald D. Nelson, Chief of Police  
Police Review Commission  
Berkeley Police Association

From: Michael F. Brown, City Manager

Subject: SUBJECT OFFICER TESTIMONY

The purpose of this memorandum is to set forth my policy regarding testimony by accused officers at Police Review Commission (PRC) Boards of Inquiry.

Subject officer testimony has been required since July 1, 1983 based on agreements reached in negotiations between the PRC, the Berkeley Police Association (BPA), and the City Manager's Office (CMO) in the fall of 1982.

The requirement is as follows:

Each Subject Officer, each BPD Member Witness, the Duty Command Officer (DCO), the Complainant, and the Police Review Commission's Investigator shall be present at PRC Boards of Inquiry and shall testify unless otherwise directed by the City Manager.

If the DCO observes actions which in his/her opinion constitute a violation of PRC rules and Regulations, the DCO shall request of the Chairperson that the violation be corrected. If the violation is not corrected, the DCO may direct the Subject Officer to leave the hearing. Such a decision should only be reached under very extreme circumstances after all other means of resolving the situation have failed.

The requirement of the Subject Officer to testify shall not apply in cases where the complaint was filed during the 90-day filing extension period.

The requirements to testify before the PRC shall not apply to non-sworn employees of the Parking Division.



