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IN PRAISE OF THE LAPD BOARD OF RIGHTS

An Answer To Those Calling For Disciplinary Reform In The LAPD

By Michael P. Stone

Another unpleasant, and maybe even shocking video of a LAPD use of force incident is the topic of community outrage, concern and debate. And just as in 1991 following the so-called "Rodney King beating", there are calls for reform once and for all in the LAPD, particularly with regard to discipline and civilian oversight. These reforms, it is said, will go a long way to restoring public confidence in our police. It all sounds very fine – after all, who would complain about *more* discipline and *more* citizen oversight?

But in this connection, certain activists, and government officials who seem to be partial to their views, have decided it is time to dismantle the LAPD's disciplinary system: the Board of Rights.

This article examines these points of view, and dissects the LAPD disciplinary system, and compares it with those in place in other Southern California communities. The focus is whether the LAPD Board of Rights process is out-dated, ineffective, biased in favor of protecting crooked or violent LAPD cops, and is therefore ultimately a disservice to the Department, the Chief of Police, and the community?

If the first issue results in an affirmative condemnation of the Board of Rights process, the next issue to confront is what do we put in its place?

By way of preview, it seems to this observer that the most significant feature of the Board of Rights process is that it is not known, understood and appreciated outside of the LAPD, even by City Council members, Police Commissioners and concerned community members. It also seems obvious that before it is condemned and pushed aside in favor of some "better system", it ought to be critically examined – especially by those who cry loudest for its abolition.

First of all, Boards of Rights are *public hearings*. That means any interested person can come into a Board of Rights ("BOR") and watch the entire proceedings, except for the review of the officers' confidential personnel records during the penalty phase, which are required by State law, *Penal Code* §832.7, to be done in closed session.

I wonder how many vocal critics of the process have ever bothered to *come and see*? I suspect few of these, if any, have any accurate perceptions of how it works. Rather, they seem prone to condemn the process because, after all, it consists of "cops judging cops". In my view, no one should be offering an opinion on the process unless he or she has witnessed first-hand, how it works.

The discussion also requires an understanding of the principles of procedural and substantive due process, guaranteed to all non-probationary public employees under the Fourteenth Amendment to our Constitution.

The Los Angeles community needs to understand that as far as police disciplinary systems go in California, the LAPD Board of Rights is unique. It is styled upon the military system of justice, employing a court martial-style adversary proceeding to "get to the truth of the matter", and to fashion an appropriate penalty for misconduct.

The system is unique because it requires an *administrative trial* on specific counts or charges of misconduct, *before* a penalty recommendation is ever made, and before any discipline is implemented.

This feature is what sets the Board of Rights apart from every other police disciplinary system. And it is this aspect which apparently rankles the critics who claim that the Chief and the Police Commission ought to have the power to discipline officers as they see fit.

Well, no. The Los Angeles City Charter, including §1070, (formerly §202), makes it clear that the Chief of Police is the final policymaker when it comes to police discipline. The Commission oversees the Chief and the Department, and regularly conducts independent reviews of certain incidents, such as police shootings like that of Margaret Mitchell and two decades before, Eulia Love.

In both cases, the Police Commission reviewed the fatal shootings of Ms. Mitchell and Ms. Love and made determinations that the shootings were out of policy. In the *Love* matter former Chief Daryl F. Gates had already determined the shooting was *in policy*. So, Gates declined to discipline officers Hopson and O'Callahan. In *Mitchell*, former Chief Parks also determined the shooting was *in policy*. But the Commission, by 3 to 2 vote, declared it out of policy. Unlike Gates however, Parks did order the shooting officer, Edward Larrigan, to a Board of Rights to be tried on two counts of misconduct – that the *tactics* Larrigan employed leading up to the shooting of Mitchell were deficient and out of policy, and that the *shooting* was unnecessary and out of policy. This is precisely the same process that would have occurred if Chief Parks had determined in the first instance that the shooting of Ms. Mitchell was out of policy. But the point here is, the Commission has no Charter-approved authority to inject itself into the disciplinary process. That is the exclusive purview of the Chief of Police.

The Charter does describe in detail how the disciplinary system of the LAPD, through the Board of Rights, is to function. Based upon a completed complaint investigation, charges are drawn up in "counts" against the accused officer in a formal complaint verified by the Chief of Police and filed with the Commission, very much like a criminal complaint. The "Accused" as he is thereafter called, must within five days appear to "select" his Board. Names of all eligible command officers (captains and above) are placed on round tags,

and turned in a small round drum from which the Accused blindly draws four tags. The Accused selects two of four names to constitute two of the three-member panel that will try charges against the Accused. The third member, the "civilian" (community member appointed by the Commission) is selected from a list of three provided by Commission staff, by the strike process. Community members' presence on each Board of Rights panel is one of the more obvious reforms generated post-1991 by the Christopher Commission.

Despite all the discussion about the alleged ineffectiveness of the Boards of Rights, I haven't heard one of these Commission-appointed community members join in the call to scrap the Board of Rights. Who are these people? Critics ought to look at the list, which includes the likes of the Honorable Ed Edelman, former County Supervisor, the Honorable Art Mattox, former Police Commissioner, and a diverse group of community activists and leaders, lawyers, arbitrators and business people. These members are not passive observers, content to go along with whatever the two command-officer panelists want to do. The "civilian" members significantly contribute to the fact-finding process, because they recognize their *obligation and duty to do so*, and because they are bright, thoughtful and reasonable people. One "civilian" member, a well–respected lawyer in Los Angeles, consistently refers to his role as "the eyes and ears of the community." Truth be told, the first time I heard him say it on the record, I thought, "Oh no, activist." But you know that is the right idea–that is exactly why he is (and they are) there.

Occasionally, there are differences of opinion on what the evidence shows, just as often occurs in our Courts of Appeal where there are three-justice panels, and the decision is by majority vote. In the Board of Rights, a dissenter may render a minority opinion at the time the majority renders its rationale and decision. Everything is open and on the record. The Boards are *required* to articulate how the fact-finding and deliberative process proceeds through the evidence and the findings to the decision, such that a reviewer can trace the thought processes of the Board members, and "bridge the analytical gap between the raw evidence and the ultimate decision". The hearings are fully reported by a court reporter, and the transcripts are public records (except the review of the Accused's personnel records is in a sealed portion of the transcript).

The Board of Rights hearing proceeds like a military court martial. When the hearing is opened, the Accused is advised of his procedural rights by the Chairperson. The Accused is then arraigned on the charges (counts) set forth in the verified complaint executed by the Chief of Police. The Accused must plead "guilty" or "not guilty". The Advocate presents the evidence against the Accused, examines witnesses, and otherwise prosecutes the case. The Department always bears the burden of proof on charges it brings against the Accused – *another one of those pesky "due process" principles required by the Charter, California law and the U.S. Constitution.* The Accused is also permitted to present a defense (hmmm...imagine that?). The trial proceeds in an orderly and quite formal hearing process: the Department rests its case; the Accused presents the defense and rests; there may be rebuttal and surrebuttal. The case

is argued and submitted. The Board deliberates on the findings, and announces its decision of "guilty" or "not guilty" on each count alleged in the complaint. If there is at least one "guilty" finding, there is a penalty phase, during which the Board hears evidence in aggravation and mitigation of the penalty. Deliberation on penalty is followed by reconvening in open session, where the Board announces its decision in the form of the "Order of the Board of Rights" to the Chief of Police, who may either reduce the penalty, or "Execute the Order" as specified.

Much is said about the fact that the Chief cannot increase the penalty. Well, of course not. The Chief didn't hear the evidence, and sit through (often) days of testimony. Along with the community members appointed by the Commission, the Chief depends on the command officers *he appoints* to properly perform their duties, and does not hesitate to inform them when in his opinion, they have not done so.

Some critics of the Board of Rights process seem to think it is biased in favor of the Accused because two of the three panelists are also police command officers. Frankly, this is plainly silly. Would we seriously say that the Uniform Code of Military Justice system of courts martial, where the triers of fact are military officers, is "soft" on discipline and pre-disposed to find accused military personnel "not guilty" or hand out unreasonably lenient penalties? Remember, the sworn panelists on these Boards are *command* officers (captains, commanders and deputy chiefs) who are simply not disposed to favor the Accused. Indeed, they have been accused from time to time of being the Chief's puppets ("We'll give 'em a fair hearing and THEN we'll hang 'em"). To the contrary, after trying cases continuously before Boards of Rights for nearly 25 years, I can guarantee that the panelists routinely exercise the best efforts of which they are capable to get to "the truth of the matter". Even if the Department's case is lacking in persuasive merit, I have seen countless cases where the Board members themselves pursue the facts by questioning witnesses and the Accused, ordering further investigation, and even calling their own witnesses, all in an effort to make sure that they have all the facts necessary to make a proper decision. That is their duty under the Charter, and *they do not fail it.*

Each month, the Department publishes a report to the Commission on discipline. The document is a public record available for inspection, and lists the rank of each member disciplined during the previous month. There is a description of the misconduct, the penalty in suspended days or removal, and the monetary loss suffered by the suspended member. Anyone who thinks the LAPD is "light" on discipline ought to review these reports.

I regularly practice before many different types of administrative adjudicatory boards in police discipline cases throughout California, including civil service commissions, personnel commissions, arbitration hearings and administrative law judge hearings, as well as Boards of Rights. The single, most obvious difference between the Boards of Rights and all of these other police disciplinary systems is the *timing of the hearing or trial.* In LAPD, as we noted before, the trial *precedes the discipline*; the Accused may then seek review of the Chief's ultimate decision in superior court.

In all of the other systems, the discipline is *finalized and implemented* before the full-blown trial or hearing (termed an "appeal"). The power to amend, modify, revoke, affirm or reduce the findings and penalty resides in the discretion of the appellate body, whether it is a civil service commission, personnel board, arbitrator, or administrative law judge.

So, while chief of police or sheriff may be the final administrative decision-maker and policymaker on discipline of officers and deputies, his decision is *always* subject to review and modification by someone or some adjudicatory body, or in a court of law.

In the more common system where the chief or sheriff acts in the first instance to discipline a member, there has been no evidentiary, adversarial hearing to test the merits of the case against the accused member. Chiefs and sheriffs often rely on investigations and recommendations of subordinates that are flawed, incomplete and sometimes plainly wrong. So, the member is disciplined or removed *before* the merits of the case are tested in an adversarial hearing, which our Constitution guarantees to every non-probationary public employee except those who serve in "at-will" positions.

Because our Due Process Clause guarantees public employees the right to an evidentiary appeal if they suffer removal or significant disciplinary penalties, no chief or sheriff has the final say on discipline of department members. At least in the LAPD, the Chief of Police has the assurance that discipline cases will be decided by command officers appointed by the Chief, and by community members appointed by the Commission. And, while the Chief of Police might be heard to lament that he cannot increase penalties or reverse "not guilty" findings by Boards of Rights, at least when the *final* disciplinary decision is made in the LAPD, there has been a full-blown adversarial, evidentiary trial on the merits (unless the accused waives the right). The decisions are consequently much less vulnerable to reversal, than in the case of disciplinary decisions made in other jurisdictions, where the strength of the departments' cases is not tested until there is an appeal of imposed discipline, to a body, hearing officer or judge wholly outside the departments, and where the chief' and sheriffs' decisions and opinions may be entitled to little or no deference, because it is the merit of the cases which determines whether the decisions are upheld.

With regard to the *Margaret Mitchell* case, I was honored to represented Officer Larrigan through successive federal and state grand jury investigations and at his Board of Rights, ordered after the Commission voted 3-2 to find the shooting out of policy, contrary to Chief Parks' determination.

That Board voted unanimously to find Officer Larrigan "not guilty" of the two charges (deficient tactics and out of policy shooting) after many days of testimony from investigators, officers, the Accused officer and his partner, experts, and lay "eyewitnesses". The Board even visited the scene at 4th Street and La Brea, for a "walk-through" with Officer Larrigan. This exacting process obviously presented the Board members with a view of the evidence that was far more complete and detailed, than what was reviewed by the

Commission, which included *no* live testimony, *no* cross-examination of witnesses, *no* visit to the scene, and *no* adversarial process. Some of the critical assumptions made by the Commissioners turned out to be flawed or mistaken, and not supported by the evidence.

The point is, even if the Charter permitted the Chief of Police or the Commission to decide the merits of the *Mitchell* shooting in the first instance, and to discipline the officer as they saw fit, that decision would necessarily be subject to review and reversal at some point, after a full trial-type hearing, because the Fourteenth Amendment requires that safeguard.

Members of the community who want to dismantle the formal Board of Rights process ought to consider what kind of system would necessarily be instituted in its place – the alternatives do not offer the same exacting standards of fact-finding, merit and accountability, and searching for truth that are integral to the Board of Rights process. Disciplinary penalties tend to be more harsh than elsewhere, I think, although I have not reviewed any statistical or authoritative studies on the subject. Certainly, discipline in the LAPD is not lenient.

Stay Safe!

MICHAEL P. STONE

Note: Michael P. Stone is a veteran police defense attorney who has represented federal, state and local law enforcement officers and agencies for 25 years. He teaches police discipline for agencies throughout the State. He was formerly the General Counsel of the Los Angeles Police Protective League, and is currently General Counsel for the Los Angeles Police Command Officers Association. The views expressed herein are entirely his own.