

City of Albany
Citizens' Police Review Board
Albany Public Library, Washington Avenue (HBH Room)
December 8, 2003
6:00 p.m. - 8:00 p.m.

Present: Manuel Alguero, Kenneth E. Cox, Barbara Gaige, Marilyn Hammond, Herman Thomas, Eleanor Thompson, Paul Weafer, and Michael Whiteman.

Absent: Judith Mazza.

I. Call to Order & Roll Call

Chairman Kenneth Cox called the meeting to order at 6:03 p.m.

II. Approval of the Agenda

The agenda was reviewed. Chairman Cox moved to approve the agenda. Vice-Chairman Herman Thomas seconded the motion. The motion carried unanimously.

III. Approval of October 13, 2003 Meeting Minutes and November 2003 Meeting Minutes

The minutes were reviewed. Chairman Cox made a motion to approve the October 2003 and November 2003 meeting minutes. Barbara Gaige seconded the motion, and the motion carried unanimously.

IV. Old Business

A. *Complaints Referred to Mediation*

Chairman Cox noted that there were two (2) "old" complaints previously referred to mediation on the agenda for review. He added, however, that based on a brief discussion with Barbara Gaige at the start of the meeting, the Board would only review and render a final determination for one (1) complaint.

CPRB No. 39-02/OPS No. C02-302 (Presented by Barbara Gaige)

Barbara Gaige summarized the complaint. On June 23, 2002, the complainant alleged she was driving on Route 85 when an off-duty officer "cut her off." The officer claimed she cut him off. The complainant and the officer exchanged hand gestures. The complainant then called the Colonie Police Station. The officer called 911. The complainant alleged the officer proceeded to follow her to the Colonie Police Department (CPD). Both the complainant and the officer ended up in the parking lot of the Colonie Police Station. The complainant was charged with "failure to signal a turn."

Ms. Gaige commented that this complainant appeared to be a matter of “he said, she said.”

Ms. Gaige stated that the investigation conducted by the OPS was thorough, and moved that the Board adopt the OPS’s preliminary finding of “*not sustained*” for the allegation of unprofessional conduct.

Paul Weafer questioned whether this case had been mediated. Ms. Gaige responded that it had been referred to mediation, but was never mediated because the officer did not consent to participate in the mediation session. Mr. Weafer added that he believed the officer did not participate because he realized that he was in error with regard to the incident. In Mr. Weafer’s opinion, the officer did not oppose the Town of Colonie court’s dismissal of the complainant’s summons because he realized “the errors of his ways.”

Ms. Gaige renewed her motion by moving that the Board should adopt the OPS’s finding of “*not sustained*.” Mr. Weafer seconded the motion, and the motion carried unanimously.

CPRB No. 43-02/OPS No. C02-356 (Presented by Barbara Gaige)

Barbara Gaige reported that a lawsuit had been filed by the complainant against the City of Albany, and that Assistant Corporation Counsel Todd Burnham would provide the Board with a letter from Mayor Gerald Jennings suspending the complaint from review pending the completion of the lawsuit.

B. *Final Determination - Second Allegation*

CPRB No. 7-03/OPS No. C03-131 (Presented by Vice-Chairman Herman Thomas)

Vice-Chairman Thomas reported that this complaint was filed by the gentleman who was riding the CDTA bus when he was stopped and questioned by police officers who believed him to be a suspect in a bank robbery. As to the first allegation of use of force, the Board made a finding of “*unfounded*” at its September 8, 2003 Board meeting. Vice-Chairman Thomas noted that the Board had not yet made a finding as to the complainant’s second allegation of racial bias in his being stopped and frisked by officers.

Vice-Chairman Thomas made a motion to adopt the OPS’s preliminary finding of “*exonerated*” as to the allegation of racial bias.

Barbara Gaige questioned whether the complainant was the gentleman who had attended the September 8, 2003 Board meeting. Vice-Chairman Thomas responded that the complainant was present at the September meeting.

Ms. Gaige then seconded the motion made by Vice-Chairman Thomas. The motion carried unanimously.

C. *Complaint Tabled Pending Further Inquiry by Assistant Corporation Counsel*

CPRB No. 22-03/OPS No. C03-355 (Presented by Manuel Alguero)

Assistant Corporation Counsel Todd Burnham stated that he spoke with the Deputy Corporation Counsel regarding this complaint. Mr. Burnham opined that while it is within the Board's discretion to hear these types of cases, the Board should not hear cases which could have been presented to the courts or which have been adjudicated by the courts, and, in which the complainant, as part of a plea bargain, has waived his/her right to an appeal. Mr. Burnham stated that if the Board were to review cases such as this, it would be dealing with a "slippery slope." Mr. Burnham recommended that the Board not review cases that have been previously handled or adjudicated by the court system.

Mr. Burnham noted that the OPS is obligated to accept and investigate all complaints filed that meet their criteria. He added that the OPS does not have the discretion to accept or reject cases as they deem appropriate. The Board, however, does possess the ability to use its discretion in determining which cases are appropriate for review.

Paul Weafer commented that a situation may arise in which the Board is presented with a case for review that the OPS investigated prior to the existence of a plea bargain or "guilty verdict." He added that this situation would make the Board's duty to review the OPS's investigation moot because a final court decision will have already been rendered. Mr. Burnham stated that, as the Board's Corporation Counsel, he believed Mr. Weafer's statement is correct.

Dr. Manuel Alguero stated that according to the law, if and when a complaint is investigated, the Board is obligated to review the OPS's investigation of the complaint. He added that in his opinion the Board has no choice but to review this complaint. If the Board decided not to review complaints such as this, Dr. Alguero commented that there must also be no investigation by the OPS.

Dr. Alguero stated that complaints such this may become moot for several reasons. One such reason is that it has already been adjudicated by the courts. Dr. Alguero referenced an article written in the Sunday, November 23, 2003 edition of the *Times Union*, regarding the issuance of Miranda Warnings in police department investigations. He noted that this issue was being addressed by the Supreme Court.

According to Barbara Gaige, the Board does not have to review this complaint as Dr. Alguero suggested. Ms. Gaige stated that the Board is being asked to make a

determination on an issue that was most appropriately suited for the courts, and despite the fact that the OPS conducted an investigation, the Board is under no obligation to review the complaint.

Chairman Kenneth Cox requested Mr. Burnham restate his recommendation with respect to this complaint for Michael Whiteman, who had joined the discussion after Mr. Burnham's comments were made. Mr. Burnham stated that the complainant plead guilty to a charge of arson, is presently incarcerated, and filed a complaint that alleged he was not read his Miranda Warnings and was denied his right to have counsel during questioning. Mr. Burnham stated that it is his recommendation that the Board not review this complaint because when the complainant chose to enter a plea bargain, he lost his right to appeal. As the Board itself is an appeal process, by reviewing and issuing a final determination on this case, the complainant would be subverting the criminal appeal process.

Mr. Weafer inquired as to why the OPS conducted an investigation if Mr. Burnham was recommending that the Board not review this complaint. Mr. Burnham responded that since he is not the attorney for the OPS, he cannot accurately answer the question. Mr. Burnham stated that although the OPS hears all cases that are presented to them, the Board must make the determination as to whether or not it will hear the case.

Mr. Weafer questioned whether the time-frame for filing a civil action against the City of Albany had expired. Mr. Burnham stated that he believed it had, but a person may go before a judge under hardship to have the filing period extended. Mr. Burnham again noted that if the Board decided to review this complaint, it would be opening itself up for exposure. Mr. Weafer stated that he agreed with Mr. Burnham.

Mr. Weafer suggested that the OPS or the Board meet with the Corporation Counsel or the Mayor to request that the OPS not send complaints to the Board if the plea that was entered into by the complainant is now the subject of the complaint.

Dr. Alguero stated that it appeared the Board was establishing new procedures, and that he was uncomfortable with how it was being done. According to Dr. Alguero, the Board worked to establish procedures they believed to be rational and in conjunction with the law. In determining whether to review this complaint, Dr. Alguero stated that he believed the Board was being asked to disregard the established procedures and create new ones. Chairman Cox responded that if the Board provided a reason as to why it would not review this complaint, that would legitimize the decision. He added that constructive discussions between members of the Board allow for an informed decision.

Mr. Burnham stated that he believed this complaint is an opportunity for the Board to evolve. He added, that if nothing else, the Board should address this issue in writing.

Mr. Whiteman commented that he does not fully understand the context in which the issue in question would arise. He noted that circumstances will vary from case to case, and will be fact specific. He added that the Board would want the option of determining whether to accept or decline review of a complaint on a case-by-case basis. Therefore, there should not be a general rule which states that the Board will never review a particular complaint, or that the OPS will decide whether or not to refer the complaint to the Board. According to Mr. Whiteman, every case should be referred to the Board, and the Board will then determine whether or not it is appropriate to review it. Mr. Whiteman stated that it is unlikely that a court would accord much weight to the Board's determination that a Miranda Warning had not been adequately given since the Board does not hear evidence in the same way as a court of law. Mr. Whiteman added that the Board is not determining whether or not the complainant's Miranda Warnings were properly administered; the Board makes determinations based on whether or not the OPS's investigation was thorough and "came to what appears to be a good result." Mr. Whiteman opined that the Board could trust itself to address the issue on a case-by-case basis. He added, however, that the Board may not wish to hear this particular complaint because it presents a high risk of incongruous results. Mr. Burnham stated that he agreed with Mr. Whiteman.

Dr. Alguero stated that the credibility of the Board is a concern. He commented that the Board must remain focused on the goals and objectives of the law so as to foster relations between the community and the police department. Dr. Alguero stated that the role of the Board is not to decide whether there was a breach of the law by the police officer(s), but rather to review the OPS's investigation of the complainant's allegations.

Dr. Alguero stated that there were several issues that were not addressed by the OPS's investigation. He stated that the timing of the confession and when the Miranda Warnings were read to the complainant were not clearly conveyed to the Board in the OPS's report of its investigation. Dr. Alguero noted that the OPS's preliminary report and its preliminary findings only indicate that the facts, as stated, were either misconstrued or did not take place. Dr. Alguero stated that his primary concern is the OPS's investigation, and not whether the complainant is able to challenge the courts or the police.

George Kleinmeier, the monitor assigned to investigate the complaint, stated that as part of his investigation, he reviewed the police report filed on July 31, 2002. According to the report, lines 1-4 were initialed by the complainant indicating that he understood his Miranda rights.

Dr. Alguero stated that there were two steps to the investigation. The first step was when the officers encountered the individual. Dr. Alguero stated that he did not know whether or not the complainant made a confession at that time, or whether or not the Miranda Warnings were issued at that time. He also stated that it is unclear as to whether or not the complainant, after his confession, was issued his Miranda Warnings. Dr. Alguero noted again that the OPS's investigation did not make these facts clear.

Mr. Weafer commented that the Board should establish criteria, either with the OPS or by itself, setting forth complaints the Board will or will not review when there has been a determination made by a criminal court as to the misconduct alleged.

Mr. Weafer made a motion that the Board should not foreclose on an investigation made from a state prison or county jail. However, he noted that the Board needs to establish definitive criteria that would allow the Board to be consistent in determining what complaints to review on an *ad hoc* basis. Chairman Cox stated that Mr. Weafer's recommendation would address Dr. Alguero's concerns.

Mr. Weafer, recognizing that his recommendation likely did not adequately address Dr. Alguero's concerns as to the particular complaint before the Board, stated that he would support particular procedures, as long as they are written procedures, so that the Board could proceed *ad hoc*. Vice-Chairman Herman Thomas seconded the motion. The motion carried 7-1 with all present members of the Board in favor, except Dr. Alguero who opposed, stating the motion does not address the issues raised in this complaint.

Dr. Alguero stated that the preliminary findings of the OPS were "*unfounded.*" He added that he is uncomfortable supporting a finding that does not clearly address when and how the Miranda Warnings were issued, or the allegation that the complainant was denied counsel while being questioned by the officers, despite his requests for an attorney.

Dr. Alguero moved that the Board not concur with the preliminary findings of the OPS. The motion was not seconded, and failed.

Mr. Weafer reaffirmed his motion for definitive criteria as to what matters the Board would review post-conviction. Ms. Gaige added that the Board will neither act on this case, nor accept the case for review, pending the development of written criteria.

Mr. Weafer then moved to table the case from review pending the Board's development of written standards. Ms. Gaige seconded the motion. The motion carried 7-1 with all present members of the Board in favor, except Dr. Alguero who opposed.

V. New Business

A. *New Complaints*

1. Two (2) new complaints were received since 11/10/03 meeting

Barbara Gaige read summaries of the complaints.

CPRB No. 28-03. The complainant alleged that on November 8, 2003 at approximately 3:30 a.m., he was stopped for speeding and his car was illegally searched. The complainant alleged that as he left Romeo's Pizza, a police car followed him until he parked his car on Lexington Avenue. As the complainant was locking his car door, the police car stopped with its lights flashing. The officer informed the complainant that he had been speeding and requested identification. The complainant complied by giving the officer his driver's license. At this time, four additional police vehicles arrived at the scene. Two officers remained in their vehicles, and two officers approached the car. When the officer returned with the complainant's driver's license, he told him that his license was suspended. The complainant told the officer that the Department of Motor Vehicles (DMV) gave him a receipt to carry with him. The complainant alleged that the officer grabbed his arm, told him to turn, face the car, and put his hands behind his back. The complainant complied, and the officer proceeded to pat him down. The officer asked the complainant for the receipt from the DMV. The complainant told him the receipt was in his glove compartment. The complainant alleged that as he unlocked his car door to retrieve the receipt, the officer grabbed his arm again and told him to go to the back of the car with the other two officers. According to the complainant, the officer searched the glove compartment without permission. The officer exited the complainant's car with a miniature baseball bat and a small bag. The complainant told the officer that the baseball bat was his, but he did not know what the small bag was. The complainant noted that the bag was a marijuana bag, but was unsure whether or not it contained any marijuana. One of the officers at the back of the car told the complainant that "four of us saw him come out of your car with those items. It's five against one, we all saw it." The complainant requested the names and badge numbers of the officers at the scene. The two officers who remained in their cars during the incident drove away. The two officers at the complainant's car returned to their vehicles and also left. The remaining officer handed the complainant a ticket. The complainant told the officer that the speeding ticket did not indicate how fast he was driving. The complainant alleged that the officer then told him to go home. The complainant asked the officer where the small bag was that he had "supposedly" removed from his car. Again, the officer told the complainant to go home before he arrested him for driving

with a weapon. According to the complainant, the officer then returned to his police car and drove away. *A monitor was appointed.*

CPRB No. 29-03. The complainant alleged that on Friday, November 28, 2003, two police officers entered his apartment without his permission. At approximately 5:30 p.m., the complainant was watching television when two officers knocked on his door. The complainant opened the door and asked the officers why they were there. The complainant alleged that one of the officers came forward and began to enter his apartment. The complainant told the officer that he did not invite him into the apartment. He then stood in the doorway to prevent the officer from entering. According to the complainant, the officer pushed him aside and entered the apartment. Again the complainant expressed to the officers that he did not wish them to enter his home, and requested to see a search warrant. One of the officers asked the complainant for identification showing that he lived in the apartment. The complainant responded that he had lived in the apartment for eight years, and the “only thing I’m going to show you [is] a picture of me and Willie Nelson together in my frame.” Again, the complainant asked the officers why they were in his apartment. The second officer questioned the complainant as to whether he knew “Pattey and some guy.” The complainant responded, “no because I work each day.” The complainant asked the officers to please leave his apartment. Both officers left. *A monitor was not appointed.*

2. One (1) new complaint for review

CPRB No. 18-03/OPS No. C03-295 (Presented by Michael Whiteman)

Michael Whiteman stated that this complaint was not difficult substantively, however, he did not necessarily agree with the preliminary findings of “*exonerated*” made by the OPS with respect to each aspect of the complaint. Mr. Whiteman suggested that perhaps the OPS had intended to make findings of “*not sustained*” or “*unfounded*” with respect to three of the four aspects of the complaint.

Mr. Whiteman summarized the complaint. The complainant alleged that during an investigation into allegations of improper sexual conduct with minors, three detectives were present during his polygraph examination. The complainant alleged that the detectives conducted the polygraph examination in a coercive, speculative, and intimidating way. Specifically, the detectives continued to question the complainant after he asked for an attorney; the detectives fabricated the results of the polygraph test for purposes of frightening the complainant in order to persuade him to admit to the charges; and one of the detectives made threatening gestures by flailing his arms, yelling, and using profanity.

Mr. Whiteman noted that during the course of the OPS's investigation, the complainant withdrew his complaint against one of the three detectives, stating that he did not do any of the acts he had alleged in his complaint. Mr. Whiteman stated that according to the complainant, the investigating officer was the one who flailed his arms, used profanity, and detained the complainant after he requested an attorney. The complainant alleged the fabrication of the results of the polygraph examination were done by the officer who conducted the polygraph.

Mr. Whiteman noted that according to the OPS's report, the complainant admitted that he never felt physically threatened by the officer's gestures or flailing arms. Although the officer did admit to waving his arms, he stated that he did not intend it to be in a threatening manner. Mr. Whiteman stated that a finding of "*exonerated*" would be appropriate for the allegation of flailing arms, because the officer did not intend it to be threatening, and the complainant stated he was not threatened. Mr. Whiteman noted that if no threat was intended and no threat was felt, then "*exonerated*" is an appropriate finding.

With respect to the complainant's allegation that the officer used profanity during the questioning, the OPS reported that there was not enough proof to make an appropriate determination one way or the other. The complainant alleged the officer used profanity, while the officer alleged that he did not. Mr. Whiteman commented that this appeared to be a matter of "he said, she said." Mr. Whiteman stated that he would recommend a finding of "*not sustained*" as to the allegation of profanity.

As to the allegation that officers continued to detain and question the complainant after he requested an attorney, Mr. Whiteman noted that the OPS reported there was not enough proof to make an appropriate determination. The complainant alleged that he requested an attorney during the questioning, but was refused, and continued to be questioned by the officers. According to the police officers, after they completed the questioning, the complainant was allowed to leave. Mr. Whiteman noted that no criminal chargers were brought against the complainant. He then stated that a finding of "*not sustained*" would be appropriate for the allegation of denial of attorney.

Mr. Whiteman then addressed the complainant's allegation that the officers fabricated the results of the polygraph examination. He stated that in the OPS's report, the officer claimed there was no fabrication of the results of the examination. Mr. Whiteman stated that although he did not see the results of the exam, the OPS's statement concurred with the findings of Theresa Balfe, the monitor appointed to the complaint. Both Ms. Balfe and the OPS stated that there was no evidence presented

offering a rational explanation as to why the officer would have fabricated the results of the polygraph examination. Mr. Whiteman suggested that the most appropriate finding as to the allegation that the officer fabricated the results of the polygraph test, is “*unfounded*,” because there does not appear to be any evidence that fabrication of test results occurred.

Mr. Whiteman made a motion that as to the allegation of flailing arms and threatening gestures, the Board make a finding of “*exonerated*.” With respect to the allegation of fabricated polygraph results, Mr. Whiteman recommended a finding of “*unfounded*.” As to the allegations of use of profanity, and detainment after requesting an attorney, Mr. Whiteman stated that a finding of “*not sustained*” was appropriate. Paul Weafer seconded the motion.

Sergeant Steven Krokoff stated he agreed with the separate findings proposed by Mr. Whiteman. He added that when he re-reviewed the case, he had made similar findings as those proposed by the Board. Assistant Corporation Counsel Todd Burnham suggested the Board allow the OPS time to revise their findings. Mr. Whiteman responded that the OPS could verbally change its findings on the record at the meeting. The OPS’s revised findings were noted for the record.

Mr. Weafer renewed his second to Mr. Whiteman’s motion. The motion carried unanimously.

B. *Appointment of two new members to the Committee on Complaint Review for January 2004.*

The following Board members were appointed to the Committee on Complaint Review for January 2004: Manuel Alguero, Barbara Gaige, Marilyn Hammond, Judith Mazza, and Eleanor Thompson.

C. *Policy Review/Recommendations*

Chairman Kenneth Cox asked Government Law Center Staff Attorney Justina Cintrón Perino to report on any policy recommendations or requests for review. It was reported that the Board has not yet received a response from the Commissioner with respect to its outstanding policy recommendations and/or requests for policy review.

It was reported that at the Board’s request, a letter was drafted by the GLC and forwarded to the Board for its approval regarding CPRB No. 14-03/OPS No.C03-216. The letter, addressed to Commissioner John Nielsen, recommended that the officer(s) identified in the complaint receive additional training/counseling.

Barbara Gaige made a motion to approve the letter as prepared. Marilyn Hammond seconded the motion, and the motion carried unanimously.

D. *Report from the GLC*

Government Law Center Staff Attorney Justina Cintrón Perino gave the report.

Status of Complaints

It was reported that the GLC was in the process of preparing a report regarding the status of all pending complaints before the Board. It was noted that the report would include all active complaints, any complaints previously referred to mediation, and any complaints suspended from the Board's review. Upon its completion, the report will be forwarded to the Board and the OPS.

It was reported that the GLC is currently in the process of drafting a letter to the Corporation Counsel seeking an update as to the status of four complaints suspended from the Board's review in 2001 and 2002. It was noted that three of the four complaints were suspended pending a criminal investigation, while the fourth was suspended pending a civil action brought by the complainant against the City of Albany. Under the law, a suspended complaint may be reviewed by the Board upon the conclusion of any separate criminal or civil proceeding.

It was reported that the Board currently has less than twenty (20) active complaints.

Communication with Complainants

It was reported that the GLC received a FOIL request from a complainant seeking a copy of the Board's March 2002 meeting minutes. It was reported that the GLC prepared, at no charge to the complainant, a duplicate copy of the audio tape of the meeting and a copy of the minutes summary for forwarding to the City Clerk.

Correspondence

It was reported that three (3) written opinion letters were received from Assistant Corporation Counsel Todd Burnham. The first letter addressed disclosure of the Board's monthly meeting minutes. It was noted that at its November 10, 2003 meeting, the Board voted unanimously to post its approved monthly meeting minutes online.

The second letter addressed the issue of whether or not a Board member could hold a city or county office while also serving as a member of the Board.

The third letter addressed whether or not copying the Union President on all

police officer correspondence constituted a violation of the officer's privacy rights.¹

Mediation

Barbara Gaige stated that with respect to mediation, the Board should meet with the OPS to determine whether the policies that the Board would like to implement are in conjunction with the OPS's ideas regarding mediation. Ms. Gaige also stated that she believes it would be beneficial to have a representative from the Union present at the meeting as well.

Paul Weafer added that when the Board meets, the Commissioner as well as individuals from the Corporation Counsel's Office and the Common Council should also be present.

Training

It was reported that the Board members participated in a training session on November 24, 2003 at Albany Law School. Barbara Gaige reported on the NACOLE Conference she and Michael Whiteman attended in September 2003. The session, which was coordinated and facilitated by the GLC staff, addressed best practices in successful civilian oversight mediation programs from across the country.

Board Appointments/Re-appointments

Helen DesFosses, the President of the Common Council, was recognized. It was reported that both Judith Mazza and Michael Whiteman were invited to meet with the Common Council to discuss their re-appointment to the Board. It was noted that Ms. Mazza has already met with the Common Council and that Mr. Whiteman would be meeting with the Common Council. It was reported that both members are expected to be re-appointed for an additional three year term.

It was reported that the GLC had not yet received a response from the Mayor's Office regarding the status of Marilyn Hammond's re-appointment and the appointment of a new member to replace Paul Weafer. The GLC agreed to place a follow-up call with the Mayor's Office.

Miscellaneous

Copies of the Fall 2003 issue of New York State Bar Association's (NYSBA)

¹ The third opinion letter was inaccurately reported at the meeting. The third letter addressed the procedure for appealing a Review Board finding.

Government, Law and Policy Journal was distributed to all members of the Board. It was reported that the fall 2003 issue was devoted to citizen oversight of law enforcement, and included an article written by the Board's law student intern, Kyle McCauley, summarizing her interview with Board member Michael Whiteman.

F. *Report from the OPS*

Sergeant Steven Krokoff stated, with his apologies, that the OPS had no new information to report.

Michael Whiteman commented that it would be of assistance to the Board if the OPS could replace redacted officer names with letters or numbers for purposes of reviewing the OPS reports where multiple officers are involved. Sergeant Krokoff responded that he did not believe it would be a problem for the OPS to accommodate this request.

VI. Public Comment

Chairman Cox opened the meeting for public comment.

Common Council President Helen DesFosses was recognized, and thanked the Board for the time and effort it has devoted to running a successful program. President DesFosses also noted that the work of the Board, the OPS, and the GLC all contribute to the success of the Board.

VII. Adjournment

Chairman Cox moved to adjourn the meeting at 7:06 p.m.

Respectfully Submitted,

Michael Whiteman
Secretary