

**City Attorneys Department
League of California Cities
Spring Conference
May 2001**

**Wendy P. Rouser
Labor Arbitrator**

INDEPENDENT POLICE REVIEW BOARDS

TOPIC OUTLINE

I. INTRODUCTION

II. BASIC STRUCTURE OF CITIZEN OVERSIGHT MODELS AND KEY LEGAL ISSUES IN STRUCTURING CITIZEN POLICE OVERSIGHT

III. AN OVERVIEW OF THE KEY LEGAL ISSUES IN CIVILIAN OVERSIGHT

1. Will your civilian authority have the power to recommend discipline to your chief managerial officer?
2. To what extent can police officer cooperation with the citizen oversight process be compelled?
3. To what extent must the conduct of a review board comport with due process, and if there is such a necessity, what process is due?
4. To what extent can a civilian oversight system function independently of the police department's "internal affairs" division and to what extent do the protections of police officer personnel records come into play?

IV. THE OAKLAND EXPERIENCE: A MATTER OF NEGOTIATION

APPENDIX A COMPARISON OF FEATURES OF ENABLING LEGISLATION OR REGULATIONS CREATING CITIZEN POLICE REVIEW IN VARIOUS JURISDICTIONS

“Karl von Clausewitz wrote that war is a continuation of politics by ‘other means’ [citation omitted]. In an all too similar way litigation can be a continuation of labor negotiations by other means: while it may reflect the failures of its less bloody alternative, there is no guarantee the eventual result of war or litigation will be timely, or even that it will resolve what was at issue in the original diplomacy or negotiation.”

City of Fresno v. People ex. Rel. Fresno Firefighters (1999) 71 Cal. App. 4th 82

INTRODUCTION

If your city today does not have some form of civilian oversight of its police, you can expect it with the very next police-involved shooting. Or it may even appear with less dramatic police conduct that nevertheless generates public controversy. And at the outset, when your police chief looks to you to cite some law that would prevent the citizens from “running his department,” you will have to demur with “it’s a policy issue.” And when your city council looks to you with perhaps the same view as the police chief or, if not, looks to you to arbitrate via legal opinion the latent tension between the police department and the citizens, you again will have to demur: the role of citizen oversight is basically a matter of policy. And, with a gentle murmur, you might quote Charlie Kluge, director of Philadelphia’s Police Advisory Commission: “I can tell you most civilian boards are funded to fail.”¹ Or, with another sigh short of a legal opinion you may note that “it seems San Francisco spent over two million in 1997 to makes its Office of Citizen Complaints work.”²

At least a demurrer will be your prevailing opinion until you are directed to draft enabling legislation. At that point you will opine that although citizen oversight is a matter of public policy, there are aspects to the design of an oversight system that require consideration of legal issues. And who will raise issues of legal limits at every juncture? Your police officers association will.

The purpose of this paper is threefold: 1. To acquaint the city attorney with the basic structure of citizen oversight models and several key legal issues in structuring a citizen police oversight office, or board or commission³; 2. To identify existing case law and statutes that come into play depending, of course, on the scope of powers the city council wishes to confer upon the review board; and, finally, 3. To share the experience of the City of Oakland with its review board, its police union, arbitration and the court.

¹“ Public Urges Civilian Oversight of Police”, Detroit News, April 28, 1998.

² The 1997 budget for the operation of the Office of Citizen Complaints was 2.1 million dollars (“Police Review: Separate Approaches”, Santa Rosa Press Democrat, April 27, 1998). This expenditure is Charter driven by the mandate that the OCC be staffed with “ no fewer than one line investigator for every one hundred and fifty sworn members.”

³ For ease of reference, this oversight entity shall be referred to as a board, although it may in fact consist of only a civilian investigator.

I. BASIC STRUCTURE OF CITIZEN OVERSIGHT MODELS AND KEY LEGAL ISSUES IN STRUCTURING CITIZEN POLICE OVERSIGHT

Civilian oversight of police conduct, to the extent it currently exists in approximately a dozen California public entities and almost half of the nation's largest cities⁴, has two basic forms.⁵ One form, commonly referred to as the auditor or auditor/monitor model, is the civilian investigator empowered to monitor, and often to investigate and create findings with regard to some or all citizen complaints of police misconduct. The other is the citizen board or commission functioning with limited investigative procedures but often assisted by civilian staff employed by the city; this board is often charged with making findings of facts and conclusions as to whether the alleged misconduct occurred and whether it constituted a violation of law or police department rules. Rarely do any of these models have the power to recommend discipline and even more rarely to these models have the power to impose discipline. Both the auditor and board forms usually involve some policy input to the elected officials.

In its 1999-year end report, the San Jose Office of the Independent Police Auditor summarized the difference between the auditor and the commission models. "The major difference on how the two models function is that civilian review boards are usually investigative bodies which focus a major portion of their resources on a case by case approach versus an auditor model which focus [sic] on identifying and changing the underlying causation factor that give rise to complaints."⁶ In a more operational way, the auditor model monitors police activity connected to citizen complaints: the auditor is given access to police files and departmental misconduct investigations and often is permitted to observe internal affairs interviews. Sometimes the auditor is permitted to submit questions to the internal affairs interviewers. The auditor reports back to the city's chief administrative officer as to her conclusions about specific case investigations and about policies and practices. In one of the most empowered auditor-based model (Boise, Idaho), the auditor is authorized to direct police staff in the investigation of a citizen complaint.⁷ Boards, on the other hand, investigate, if at all, with the assistance of city staff technically under the direction of the city chief administrator and hold hearings

⁴ "Civilians Do Better At Judging Cop Misconduct", *Los Angeles Times*, February 5, 2001. Moreover, the ACLU reports that by the end of 1991, more than 60 percent of the nation's 50 largest cities had civilian review systems, half of which were established between 1986 and 1991 (ACLU publication "Fighting Police Abuse: A Community Action Manual").

⁵ One can find variants of either the board model or the auditor model. For example, Santa Cruz has a board which functions primarily to review the police department's own internal investigations in closed session. Novato's board hears only complaints after they have been investigated by the police department to the dissatisfaction of a complainant.

⁶ City of San Jose, Office of the Independent Police Auditor, 1999 Year End Report, p. 1. Perhaps this assessment from the San Jose Independent Auditor is self-serving: that office has been inundated with adverse criticism ranging from ranging from a Grand Jury report in June of 2000 on its inadequacies in use of force cases to a hostile website calling for a board to replace the auditor (San Jose Advisor.com 12/13/00).

⁷ The City of Sacramento auditor to some extent is structured on the Boise model.

where fact-finding takes place. Some conduct full or partial hearings of all or select complaints. Findings of the hearing usually are forwarded to the authority charged with the discipline function.⁸

A third form is worthy of mention here not only because it has generated litigation, but also because many citizens, including city staff, often think of it as the typical model for citizen oversight: specifically, the San Francisco Police Commission working with the San Francisco Office of Citizen Complaints (OCC). Both bodies result from voter initiated Charter enactments. The powers conferred upon civilians by the San Francisco City Charter are unusual among citizen oversight bodies. The Police Commission has the final decision about the more serious levels of police discipline.⁹ The OCC, working under the auspices of the Police Commission (San Francisco City Charter Sec. 3.530-2) investigates complaints and makes findings that are forwarded to the Chief of Police for disciplinary action. In some instances, the Director of the OCC can forward a complaint directly to the Police Commission.

Described by its Executive Director in 1999, “the OCC has a total staff of 30 persons working in free-standing public offices . . . to receive complaints, interview witnesses, gather evidence, conduct litigation of sustained cases, maintain and provide police discipline records resulting from civilian complaints (e.g., on Pitchess motions and for SFPD itself) and make policy recommendations and studies of patterns of complaints — all in order to improve the SFPD’s services and communications to the public”¹⁰.

Appendix A contains in table form a list of “issues” that can be found in legislation creating and empowering several select California review boards. Here the focus is on several key issues raising legal consideration in the review process design or in enabling legislation. Or if there is to be oversight without legislation, then several important legal issues will arise in creating a functional job description for your civilian investigator/auditor. The most salient of these issues is simply listed below. Section II, following, discusses the legal implications of each of these issues:

1. Will your civilian authority have the power to recommend discipline to your chief managerial officer?
2. To what extent can police officer cooperation with the civilian oversight process be compelled?

⁸ Some boards, such as the City of San Diego, hold no hearings but examine internal affairs investigations.

⁹ Only the Police Commission can impose a penalty greater than 10 days suspension. There is no post-imposition administrative proceeding regardless of the severity of the penalty. Although civilians sitting on civil service commissions have the final word (short of a Code of Civ. Proc. Sec. 1094.5 writ) with regard to police discipline, the citizens on the San Francisco Police Commission decide pre-imposition discipline without further administrative review.

¹⁰“BASF and the OCC: Honoring twenty years of a vital alliance” *San Francisco Bar Association Magazine*: (February-March 1998)

3. To what extent must the conduct of a citizen board comport with due process, and if there is such a necessity, what process is due?
4. To what extent can a civilian oversight system function independently of the Departments "internal affairs" division and to what extent the protections of police officer personnel records come into play.

SECTION II AN OVERVIEW OF THE KEY LEGAL ISSUES IN CIVILIAN OVERSIGHT

1. Will your civilian board have the power to recommend discipline to your chief managerial officer?

Many charter cities invest some office or agency with the power to discipline employees. In Brown v. City of Berkeley (1976) 57 Cal. App. 223, the Court of Appeal concluded that when a city charter vests the city manager with the power to discipline employees (in this case, police officers), local legislation may not empower a citizen body to influence that disciplinary function. In Brown the ordinance reviewed by the court empowered the Berkeley police commission not only to investigate complaints of police misconduct but also to "make recommendations in connection therewith to the city council and city manager." The Court first noted that an ordinance cannot conflict with a city charter. Berkeley's city charter provided that the City Manager had both the power and the duty "to appoint, discipline, or remove. . . all subordinate officers and employees of the City, subject to the Civil Service provisions of this Charter." The Court held that although the Council-appointed Police Commission "could properly hear and investigate complaints against specific police department officers and employees, it is beyond the council or Commission's power to recommend specific action and/or disciplinary action as to individuals. To do so would usurp the powers and functions of the city manager."

2. To what extent can police officer cooperation with the citizen oversight process be compelled?

"Cooperation" with a civilian investigator, be it an individual or board, is critical to the investigative function. No competent investigation can be done without at least one interview of the officers involved: both the officer(s) who is the subject of the complaint and the witness officers. In the instance of a city with a review board, this board often has city staff to assist it preparing a background investigative report. Thus, it may become necessary for the officer to be subjected to questioning twice: once by the staff investigator and once by the board itself in a hearing.

If the City Charter has created subpoena power that can be extended to the a citizen board, then it is that subpoena power that is employed to compel the officer's testimony before the board. Absent charter specificity, the ability to direct the activity of city

employees, be they sworn or civilian, must not come from the Board by ordinance or resolution if a city charter vests such authority with another agent such as the City Manager (see Brown v. City of Berkeley, supra). Thus, if the City's key administrative or executive officer holds the power to direct staff, that officer must be willing to use that power in assistance of the board. In such a case, mention of the role of staff should be omitted from the board's enacting ordinance. An administrative order compelling attendance or mandating staff cooperation with the board would be the legally proper vehicle.

That being said, it is necessary to consider the extent that a work rule such as an order by the City Manager or the Chief of Police to an officer to "cooperate" with a board or a civilian investigator is subject to collective bargaining. Work rules generally are the subject of collective bargaining under the Meyers Milius Brown Act (hereafter MMBA), (Gov. Code Sec. 3400 et. seq.)¹¹. How the MMBA interfaces with the civilian oversight process is the subject of Section III of this commentary.

3. To what extent must the conduct of a citizen board comport with due process, and if there is such a necessity, what process is due?

The Public Safety Officers Procedural Bill of Rights (Gov. Code Section 3300 et. seq.) creates a due process template for interrogation as a key element in investigating officer misconduct. However, the limits of Government Code Section 3303 essentially address interrogation by a member of the "employing public safety department that could lead to punitive action". Neither civilian review boards nor investigative staff assigned to them is considered a member of the public safety department. Nevertheless, the more prudent structuring of the civilian review process for prehearing investigation would heed the limits of the Government Code Section 3303: namely, advise the subject officer in advance of the nature of the investigation, limit the number of interrogators to two, provide the subject officer with a copy of his statement in whatever form the board will preserve it, interrogate at a reasonable time (preferably when the officer is on duty to avoid overtime costs) and for a reasonable length of time, allow the officer to have a representative attend the interrogation and finally, precede the interrogation with a Lybarger admonition (Lybarger v. City of Los Angeles, 1985, 40 Cal. 3d 822).

At a board hearing itself, particularly if there are multiple board members present, moving a hearing efficaciously, comporting with minimal due process, and creating the "illusion" that there is a full and fair hearing in a short period of time will often be conflicting goals. Achieving these goals in a manner such as modeling the various processes on applicable provisions of the California Administrative Procedures Act (Gov. Code Sec. 11500, et. seq.) may create a forum that to the lay person will seem "overly

¹¹ Quoting textbook authority, the Court of Appeal in Vernon City Firefighters Association v. City of Vernon (1980) 107 Cal. App. 3d 802 wrote: "Numerous topics fall within 'other terms and conditions of employment' as this phrase is used in the [MMB] Act. Many are now so clearly recognized to be mandatory subjects for bargaining that no discussion is required. Among these topics are the following: Provisions for a grievance procedure and arbitration, layoffs, discharge, work loads, vacations, holidays, sick leave, **work rules**. . . ."(emphasis added).

bureaucratic” but in a final analysis will help generate police officer confidence in the process and certainty among board members and citizens.

4. To what extent can a civilian oversight system function independently of the department’s “internal affairs” division and to what extent the protections of police officer personnel records come into play?

In theory there is no reason why civilian investigation need interact with a police department investigation. Given an adequate allocation of resources to both systems (a budget that is certain to make city council members cringe over seemingly duplicative spending), the two systems should be able to proceed independently.

Yet as a practical matter, internal affairs investigators have accesses to information resources that civilian investigators lack. For example, asking a citizen to identify which officer was involved in the incident can be problematic unless the citizen investigator is given easy access to departmental officer photos for a photo show. In the egregious case, a search warrant as an investigative tool is available to the sworn investigator but not to the civilian investigator. The ability to command a forensics team for investigative purposes is also available to the sworn but not the civilian investigator. And the internal affairs investigator is able to call upon the cooperative resources of the entire police department with much greater ease than is the civilian investigator no matter how forceful a chief’s written order is worded to provide the civilian investigator with the cooperation he needs.

Some civilian investigators consider access to internal affairs investigations as a compromise solution to the issue of resource imbalance. This raises the issue of Penal Code Sections 832.5 which makes an internal affairs investigation a personnel record and 832.7 which provides that police officer personnel records are “confidential and shall not be disclosed in any criminal or civil proceeding except by discovery pursuant to Section 1043 and 1046 of the Evidence Code.” Typically the results of citizen complaints are not made known to the general public due to Penal Code Section 832.7. This mandate of silence stymies and frustrates the sense of accomplishment of many California police review boards. Mary Dunlap, executive director of San Francisco’s OCC wrote:

The public rarely knows the outcome of the bulk of the 1000 or more cases closed each year that the OCC makes painstaking professional efforts to investigate fully and fairly. If I could change this mandated confidentiality of California law addressing civilian complaints about police misconduct, at least as it governs agencies like San Francisco's OCC, I would do so. I would legislate openness of the complaint files to the public, so that officers who have engaged in wrongdoing will be known and recognizable, that officers who have been exonerated will be known and recognizable, and, that the nature and quality of the work of the OCC would be accessible to the agency's multitude of critics as well as to those who do not know what to believe about our work. I do not believe that police (or any other group's) accountability to the public can thrive in secrecy from the public. Meanwhile, as long as Penal Code Section 832.7 provides the type and degree of

confidentiality as to officer records that it does, SF's OCC will rigorously and diligently protect the confidentiality of officer records. Those who work at OCC know that the utmost respect for due process to officers and for officers' legal rights, as defined by the Constitutions and state laws, is a key ingredient to OCC's respectability and effectiveness. (Mary Dunlap, *Civilian Review of the Police: The San Francisco Experience* Newsletter of CAHRO, California Association of Human Rights Organizations)

Would disclosure of a police officer personnel record to a civilian investigator or members of a review board in the course of an investigation be considered disclosure of a confidential record in a civil proceeding? An investigator or an investigative body can be considered an agent of the City with a "need to know".¹² An argument can be made in such a case that there is no breach of confidentiality if the internal affairs files were to be inspected. In Berkeley Police Association v. City of Berkeley (1977) 76 Cal. App. 3d 931 the Court of Appeal addressed the issue of internal affairs records being accessible to the Police Review Commission. Finding that the City Charter implicitly invested the City Manager with control over those records, the Court of Appeal noted:

. . . both Berkeley Police Department regulations and the city charter limit the power of department officials to keep confidential investigative records exclusively within the department. (PR 253; charter, art.VII, @ 28(b).) Furthermore, since under the city charter the police department is subordinate to the supervision and control of the city council and city manager (Brown, supra, 57 Cal.App.3d at p. 233), allowing the doctrine of estoppel to be used to prevent release of department information outside the department itself would endow the police department with greater powers than are granted it under the city charter. Finally, in light of the city's announced policies of closer cooperation between the police review commission and the department, permitting the doctrine to bar implementation of the new procedures would "effectively nullify 'a strong rule of policy, adopted for the benefit of the public, . . .'" (City of Long Beach v. Mansell, supra, 3 Cal.3d at p. 493) namely, the decision of public officials in the delicate area of police-community relations. We therefore conclude that under the circumstances here presented, appellants may not properly invoke the doctrine of equitable estoppel to prevent effectuation of the practices and procedures announced by Chief Pomeroy.

¹² In Dibb v. County of San Diego (1994) 8 Cal. 4th 1200 the Court of Appeal held that members of the law enforcement board are county officers: "Accordingly, we conclude that members of the CLERB possess the essential attributes of county officers: They are appointed under the law for a fixed term of office and are delegated a public duty to investigate specified citizen complaints against county sheriff and probation department employees, and to make recommendations to the board of supervisors. Coulter v. Pool, supra, 187 Cal. 181, 186-187.)"

The Berkeley Police Association¹³ decision notwithstanding, it should be noted that police oversight watchdogs such as the American Civil Liberties Union urge the citizen oversight body to maintain true independence by operating without reference to the department's investigation. It should also be noted that some police unions such as the Oakland Police Officers' Association may be willing to waive the protections of Section 832.7 to allow for review by an investigator or board (with limitation) with the expectation that a departmental investigation will either help exonerate the officer or beat the civilian body to the disciplinary punch.

III THE OAKLAND EXPERIENCE: A MATTER OF NEGOTIATION

In 1980 the City of Oakland, following on the innovative heels of the City of Berkeley and triggered by a controversial officer involved shooting, set out to create its first civilian police oversight body. At the time the City Attorney was asked to render an opinion on the legal issues involved in the establishment of the first Oakland citizen complaint board (hereafter "CCB"). Among the multiple issues addressed by the City Attorney was the question of whether creating such a board would be subject to the then relatively new requirements of the MMBA. Treading on legal uncharted waters and desirous of maintaining the delicate positive relationship the City had with its police union (Oakland's Charter providing for interest arbitration for police was also then relatively new), the City Attorney opined that the CCB would be subject to meet and confer.

In its first years the Oakland CCB lacked impact. Police officer attendance at hearings was non-mandatory and lax. CCB hearings of citizen complaints lacked the semblance of a structure that would comport with due process. The CCB lacked any staff assistance to investigate. The City Attorney was omitted from any but the most perfunctory of advisory roles and only upon specific request. The CCB only haphazardly learned what the City Manager thought of its findings. Yet, the furthest the Oakland's police officer's union (hereafter OPOA) would commit to the CCB process in negotiation was to promise to "encourage attendance." Frustrated by the non-attendance of police officers at CCB hearings¹⁴, the City Council pressed the City Attorney in the mid 1980s

¹³ The Court of Appeal in Dibb. v. County of San Diego, supra, sidestepped the legality of conveying police personnel records to a citizen review board. In a footnote response to a challenge to San Diego's charter giving subpoena power to the county law enforcement review board, the Court of Appeal stated: "On a related point, plaintiff suggests the CLERB's subpoena power conflicts with general law because the board might issue subpoenas that seek information made confidential by Penal Code section 832.7, which imposes on the sheriff the duty to maintain the confidentiality of peace officer personnel sheriff the duty to maintain the confidentiality of peace officer personnel records or information obtained from those records. No such conflict exists. The charter amendment does not (and may not) supersede general law governing privileges or confidentiality of records, and any subpoena that seeks privileged information is subject to a motion to quash."

¹⁴ This frustration over the nonattendance of officers was not unique to Oakland. Recently the City of Pittsburgh's (Pennsylvania) review board filed suit to compel police officer testimony at its hearings (*Pittsburgh Post Gazette*, March 6, 2001)

to implement the City Charter's subpoena powers¹⁵ to compel officer attendance. Meeting resistance from the OPOA, the City intended to shore up its legal position by seeking declaratory relief from the court on the issue of its ability to subpoena officers. However, negotiation with OPOA and intense political pressure led the City to take a step in another direction: in lieu of seeking declaratory relief, the City agreed to be bound by the decision of an arbitrator on whether police officer attendance could be compelled. The OPOA's demand for arbitration came under its MOU with the City.

At the time (mid 1980s) the City's police MOU had a variant of a traditional zipper clause. The traditional zipper clause binds the parties to waive all rights to negotiate new terms and conditions during the life of a MOU with regard to 1. issues covered in the MOU and 2. issues raised at the negotiation table but thereafter withdrawn in an effort to reach contractual agreement. Oakland's zipper clause went one huge step further: it promised that during the life of the MOU the City could not demand to meet and confer on any issue that was within the scope of representation.¹⁶ Over the years in the City of Oakland, this zipper clause came to be called the "beneficial past practices clause": City practices that were "normally subject to meet and confer" would not change – unless of course, the Union consented – during the term of the MOU.

Once the City agreed to submit to binding arbitration the issue of its ability to compel attendance at the CCB hearings, the arbitral issue submitted under the MOU was whether compelling officer attendance violated the "beneficial past practices clause". The arbitrator looked to whether compelled attendance at CCB hearings, under the terms of the MOU, was a matter "normally subject to meet and confer". The parties could not assist the arbitrator with NLRA or MMBA precedent: then, as now, no court case discusses the whether a governmental employer compelling police officer attendance at civilian oversight hearings is a matter within the scope of representation: that is, whether it is subject to meet and confer¹⁷.

Absent legal authority, bargaining history, or any other indicia of the intent of the parties, the arbitrator took what can most charitably be described as a commonsense view of the issue. He determined that attendance at CCB hearings was a matter "normally subject to meet and confer" (at least between the City and the OPOA). He reasoned that the parties had negotiated the terms of the operation of the CCB for seven years by the time the case came before him and, in that context, the past practice between the parties was that attendance had been voluntary. And since the attendance issue had been negotiated, the parties by their own conduct had defined the meaning of the phrase

¹⁵ The Oakland City Charter vests subpoena power in City Boards provided for in the Charter (Oakland City Charter Section 1207) and power in the City Council to provide for the creation of boards and commissions not specifically enumerated in the Charter. The language of the Oakland City Charter is similarly to language discussed in Dibb v. County of San Diego, supra, extending the subpoena power in the Charter to San Diego's law enforcement review board. The City of Oakland's dispute with its police union over subpoena power of police officers to testify antedates Dibb by almost a decade.

¹⁶ That an MOU promise to not change existing past practices can haunt an employer is illustrated in Long Beach Police Officer Association v. City of Long Beach, 156 Cal. App. 3d 996 (1984)

¹⁷ Dibb v. County of San Diego, supra, while addressing the legality of board subpoenas of police officers, was not decided as an MMBA issue, but rather as a "county home rule powers" issue.

“normally subject to meet and confer”. The MMBA played no articulated role in his analysis.

After that arbitration the City and the OPOA continued to negotiate a “CCB MOU” apart from its master labor contract for nearly another decade, essentially rolling over the terms of the previous MOU each time the CCB MOU came up for renewal. Then, in the mid 1990s, a citizen police watchdog group, joined by the ACLU, pressed for a revised civilian oversight process that had more clout. After lengthy meetings with city officials and the citizens, whose message was carried back by the City to the OPOA at the negotiating table, the former CCB became the CPRB (Citizen Police Review Board) enacted in 1996 City of Oakland Ordinance 11905 C.M.S. And under City Ordinance 11905 C.M.S. the CPRB did have more powers. Police attendance at CPRB hearings became mandatory. And not only would the CPRB engage in fact-finding, but it would make specific disciplinary recommendations to the City Manager and the City Manager would be required to publicly respond to them.

The OPOA agreed to all these changes in the review process in an attitude of cooperation to reach a new MOU. However, the MOU had two lashlines to tie the City’s hands with regard to further future changes: the OPOA could cite the still continuing beneficial past practices clause in the master MOU and further, it exacted an MOU promise that the OPOA could essentially declare all its prior assents to the CPRB void and rescinded were the City to change Ordinance 11905 C.M.S.

Shortly after this new CPRB MOU went into effect, the citizen watchdog group and the ACLU began to press for even more expanded CPRB powers. These groups convinced the CPRB of the desirability of thirteen changes to the operation of the CPRB. The CPRB took its recommendations to the City Council. Clearly the majority of these thirteen recommendations could not be considered in any fashion matters normally subject to meet and confer. For example, one of the recommendations involved how the City would publicize the existence of the CPRB to the community; another involved increased City expenditure for additional CPRB investigative staff. However, several of these recommendations arguably were matters that could be considered “negotiable” subject to the MMBA. Not surprisingly, when the City brought these matters to the OPOA in negotiation for a new CPRB in 1998 (the existing CPRB MOU was about to expire), the OPOA balked, particularly in light of the fact that one of the proposals was to cease all negotiations with the OPOA.

Here are the controversial CPRB proposals for change in its operation listed by the alpha designation used not only by the City in its documents but also by the Superior Court after litigation ensued:

A. Change the number of votes required to finding misconduct against an officer. The existing vote required five votes of a nine-member board. The proposal suggested a simple majority of the quorum.

B. Extend the jurisdiction of the Board from hearing only cases alleging excessive force or bias to all allegations of officer wrongdoing involving citizens.

C. Televisе CPRB hearing on the City's cable station.

E. Establish penalties in the ordinance for officer noncompliance with the CPRB.

G. Stop negotiating the CPRB with the OPOA. But if the negotiations continue, allow the public to attend the negotiating sessions.

I. Advise the CPRB not only if the City Manager intends to implement any discipline recommended against an officer, but also if in fact the officer has served that discipline.

J. Allow the CPRB to attend the City's negotiations with the OPOA of such negotiations continue to occur.

K Show the CPRB the past disciplinary records of any officer who the CPRB finds culpable so that the CPRB may make a more meaningful disciplinary recommendation.

The City Council, upon receiving these recommendations and knowing that the CPRB MOU was to expire, met in closed session to prepare for negotiations (in addition to preparing for negotiations of a new main police MOU, a fact that would be of some significance in the ensuing litigation). The City Council favored some of the thirteen CPRB recommendations, including some of those listed above: others it did not. Its labor negotiators were directed in closed session as to how to proceed in negotiations, eventually announcing in open session that it had taken proposals B, G and K to the negotiation table. That was in March of 1998.

Two months later the ACLU and the citizen watchdog group with the acronym PUEBLO (hereafter collectively referred to as ACLU) filed a complaint with the City's Public Ethics Commission which was charged, *inter alia*, with monitoring the City's Sunshine Ordinance. In turn, the Sunshine Ordinance contained an open meeting exception for labor negotiations. That exception closely resembled the exception under the Brown Act.

The Brown Act (Gov. Code Sec. 54957.6) permits the city council to meet in closed session "with the local agency's designated representative regarding....any other matter within the statutorily-provided scope of representation." In other words, if the matter being discussed in closed session is a term or condition of employment within the

meaning of MMBA (Gov't Code Sec. 3504), then a closed session is proper. The City's Sunshine Ordinance did not materially provide otherwise:

(A) body covered by this Ordinance with authority over matters within the scope of collective bargaining or meeting and conferring with public employee organizations may hold closed sessions with the covered body's designated representatives regarding such matters. Closed session shall be for the purpose of reviewing the covered body's position and instructing its designated representatives and may take place solely prior to and during active consultations and discussions between the covered body's designated representatives and the representatives of employee organizations or the unrepresented employees. . . .

(B) In addition to the closed sessions authorized by Sec. 0013(A) a Body covered by this Ordinance subject to Government Codes section 3501 may hold closed session with its designated representatives on mandatory subjects within the scope of representation of its represented employees as determined pursuant to Government Code section 3504

The complaint before the Public Ethics Commission cleverly attacked the City Council for meeting in closed session to discuss the CPRB. The position of the complainants was that none of the thirteen proposals were subject to meet and confer and therefore closed session discussions of these proposals were a violation of the Sunshine Ordinance. It was this argument that wound its way to the Superior Court after the Public Ethics Commission found that the City Council had, in fact, violated its Sunshine Ordinance by meeting in closed session to discuss the CPRB.

This finding by the Public Ethics Commission placed the City literally between a rock and hard place. First, it was not clear that the Public Ethics Commission was empowered to make such a finding against the City Council. Second, it was not clear that as a matter of law the Public Ethics Commission's interpretation of the "closed session exception for labor negotiations" was correct. Third, to the extent that there was a finding implicating a Brown Act violation, each council member faced potential criminal liability for any continuing violation that would now, of necessity, constitute "knowing" conduct by the council member. Finally, the City was still bound to the 1987 arbitrator's award that said police officer attendance at the CPRB was subject to meet and confer. The OPOA's agreement to mandatory attendance was the cornerstone of the existing CPRB. The empowering of the current CPRB threatened to crumble.

In open session the City Council voted to challenge the Public Ethics Commission in Superior Court seeking declaratory relief¹⁸ as to whether all or any of the thirteen recommendations were subject to labor negotiation with the OPOA. And, of course, the City would seek to undo the decision of the Public Ethics Commission regarding the open meeting violation. Upon hearing of this decision, the ACLU raced the City to the courthouse step, apparently in an effort to garner attorney's fees for legal work it would have to do anyway if it succeeded in intervening in the City's lawsuit. The ACLU won

¹⁸ Alameda County Superior Court consolidated action No. 805369-1.

the race by four days, filing its declaratory relief/injunction action alleging the City violated not only its own Sunshine Ordinance but also the Brown Act.

With regard to the threshold labor questions, none of the parties¹⁹ could rely on established law to present to the Superior Court, for there was none on point, although several cases that seemed to favor the position of the ACLU. The two that most impressed the Superior Court were Berkeley Police Officers v. City of Berkeley (1977)76 Cal. App. 3d 931, and San Jose Peace Officers Association v. City of San Jose. (1978) 78 Cal. App. 3d 935. In Berkeley Police Officers, the Berkeley Chief of Police made two decisions with regard with regard to the Police Commission: he decided to allow a member of the Commission to attend a department internal review board considering officer conduct and he agreed to send a member of the internal affairs division to Commission hearings. The Berkeley police union challenged the Chief's actions under the MMBA as a violation for not having met and conferred. The Court of Appeal considered the Chief's action "a fundamental policy decision." (Berkely Police Officers at p. 937).

The San Jose Peace Officers Association, supra, case did not involve civilian oversight: it involved the ability of the Chief of Police to formulate a use-of-force policy without meeting and conferring. The Oakland Superior Court found import in the overall vision of the Court of Appeal in San Jose Peace Officers Association, which the appellate court expressed in these words: "The forum of the bargaining table with its postures, strategies, trade-offs, modifications and compromises is no place for the 'delicate balance of interests'."

The ACLU argued that essentially the work of a police oversight body is investigative, not disciplinary. None of the proposals for change were "mandatory subjects of bargaining". The ACLU clung to the phrases "mandatory subjects of bargaining" rather than the more general language of the MMBA "matters within the scope of representation." It made a cogent if inconclusive argument that the matters within the scope of representation embraced only mandatory subjects of bargaining. If the topics were not mandatory subjections of bargaining, argued the ACLU, the City had no obligation to meet and confer with its police union. All issues connected to the civilian oversight policy were basically managerial policy issues, the ACLU contended.

At first blush the City and the OPOA seemed to have an aligned position in defending their collective history, although in fact their goals in litigation were quite distinct. The City was seeking to gain clear definition as to whether it had a continuing obligation to meet and confer with the OPOA over any aspect of the CPRB's operation, although it knew it was limited to a ruling on the specific proposals. The City was also concerned with extricating itself from the overreach of the Public Ethics Commission's ruling. The OPOA, on the other hand, cared little about the Public Ethics Commission ruling, but did not wish to see the City released from its long-existing practice of

¹⁹ There were actually five parties total in two Superior Court actions: the City sued the Public Ethics Commission, an action in which the OPOA intervened, and the ACLU and PUEBLO sued the City. These two actions were eventually consolidated.

negotiation over the functioning of the CPRB. And the OPOA certainly did not want to establish appellate precedent with an adverse ruling on the MMBA issues. The OPOA did not desire the definitive ruling the City desired: it eschewed the basic question of whether any of the thirteen proposals were mandatory subjects bargaining, arguing instead that if the CPRB proposals are “permissive” subjects of bargaining, the City comported itself within the meaning of the Brown Act by meeting about these subjects.

The OPOA argued that the Court of Appeal in City of Fresno ex. Rel. Fresno Firefighters 71 Cal. App. 4th 82, supra, by acknowledging that there can be permissive subjects of bargaining, implicitly approved the ability of the City Council of Fresno to meet in closed session to craft its bargaining strategy with the Fresno firefighters.²⁰ Clearly the court in the City of Fresno recognized a distinction between mandatory subjects of bargaining and permissive subjects. The Fresno court further noted that there was no precedent for determining whether the matter before it -- repealing a charter provision establishing a formula for firefighter salary minimums -- was mandatory or permissive (ultimately the Court found the subject “permissive”). And in all probability, formulation of the decision to not bargain in City of Fresno was done with the city council and its labor negotiators in closed session. However, the OPOA was making a leap of faith that this Superior Court would decide this case based upon a conclusion that the City of Fresno court, in the words of the OPOA “approved, sub silentio, the ability of the City Council to meet privately” with its labor team.

Perhaps in an effort to avoid a fatal blow by the Superior Court on the issue of its ability to demand negotiation of any CPRB issue, the OPOA wrote: “If the Oakland City Council, a democratically elected body, can choose to bargain with labor organizations such as the OPOA, it can also choose to meet in private to caucus and give direction to its labor negotiators in preparation for bargaining.”

Although the emphasis of the City’s argument to the Superior Court was on the actions of the Public Ethics Commission and the nature or remedies in light of the Brown Act and the Sunshine Ordinance, the City joined the OPOA in its position that certain of the thirteen proposals were much more rooted in the disciplinary process than were any of actions in Berkeley Police Officers Association or in San Jose Police Officers Association. The OPOA cited Cerini v. City of Cloverdale (1987) 191 Cal. App. 3d 1471 where the court found the City violated a MOU involving the discipline process when the city converted an appeals board from an independent body to that of fact-finder with a more limited role. The OPOA also cited Taylor v. Crane (1979) 24 Cal. 3d 442 where the court stressed that the resolution of individual cases in which rules created by the employer are interpreted and applied are not matters of general public policy. The OPOA also cited Long Beach Police Officer Assn. v. City of Long Beach (1984) 256 Cal. App. 3d 1996 finding that investigative procedures that into play after a use of force policy is established is within the scope of representation and thus the city could not unilaterally abrogate the established past practice of allowing police officer to consult with attorneys.

²⁰ The ACLU responded that it was not true that the Fresno court’s decision had any impact on the case at hand because Fresno did not address closed sessions.

However, none of the cases cited by the OPOA (or the City for that matter) touched upon “citizen police oversight”.

There was a concession by the City and the OPOA that only those eight propositions (A, B, C, E, G, I, J and K, enumerated above) were arguably within the scope of representation, although the OPOA placed the heart of its argument on Propositions B, G, and K as bargainable issues. B, G and K became the focus of the litigation because these were the proposals the City Council admitted it discussed in closed session resulting in directions to its labor negotiators to take them to the bargaining table.

The OPOA pointed the Superior Court to CPRB proposal K that called for disclosure of personnel records statutorily protected under Penal Code 832.7. The OPOA argued the language in Matter of Amoco Petroleum Additives Co. 964 Fed 706 (7th Cir., 1992) “Privacy in the workplace is an ordinary subject of bargaining” And to the extent that privacy rights are implicated in CPRB proposal K and a negotiation strategy must be formed by Council to address that bargaining subject, then other CPRB topics can also be discussed in closed session. And it could be argued that the California Supreme Court had already addressed proposal E (penalties for officer nonattendance at Board hearings) when it noted years earlier in Fire Fighters Union v. City of Vallejo (1974) 12 Cal.3d 608, 615 where the Court of Appeal wrote: “The fact that penalties were prescribed for breaches thereof [certain work rules] sufficiently affected the conditions of employment to make them mandatory subjects of bargaining.”

It appeared that both the City and the OPOA’s unspoken message was that the OPOA had remained silent on claims of Penal Code Section 832.7 and Brown v. City of Berkeley violations in the existing ordinance,²¹ thus allowing the City Manager to report back to the CPRB as to whether its recommendations on discipline were to be adopted.²² Now the CPRB proposals were pushing the Brown/ Penal Code Section 832.7 limit even one step further, asking to know as a matter of public record whether the officer actually served any disciplinary “sentence.” And the arguments of the litigants could publicly provoke the OPOA into withdrawing its silence as to Brown v. City of Berkeley and Penal Code Section 832.7 violations.

The framing of the City’s declaratory relief action obliged the Superior Court to examine all of the specific CPRB proposals in the context of Government Code Section

²¹ Less directly uttered was that through the “cooperative” history between the OPOA and the City, the CPRB had been able to forestall a charge by the OPOA that its ability to recommend discipline violated Brown v. City of Berkeley (supra).

²² Even with these atypically expansive powers, the local press, probably lending an ear to the ACLU, managed to take the following recent but inaccurate swipe at the CPRB “ And yet nearly 40 years later -- in Oakland where it all started --there is still feverish debate about how and who will monitor the cops under a toothless process that allows the police to resolve the bulk of charges against them. While Oakland's Citizens Police Review Board has sustained about 50 percent of the complaints it receives, the police routinely find less than 3 percent of their fellow officers guilty of any misconduct, raising doubts about whether they're taking the matters seriously. Moreover, the officers can fail to show up for hearings without any penalty. And even when found guilty, it's hard to know how or even if the officers were disciplined because the public is not necessarily informed one way or the other.” (*The San Francisco Chronicle* July 5, 2000)

3504 which defines the scope of union representation to “include all matters relating to employment conditions and employer-employee relations, including, but not limited to, wages, hours, and other terms and condition of employment” but excepts from the scope “consideration of the merits, necessity, or organization of any service or activity provided by law or executive order.” Were the enumerated proposals akin to work rules which were terms and conditions of employment or were the akin to fundamental managerial policy akin to police department use of force policies in San Jose Peace Officer’s Assn., supra?

The City hoped for a clear ruling to serve as future guidance in the historical tension between the OPOA’s insistence on bargaining and the ACLU’s crying foul. But the City suspected that the Court would split on the proposals, finding some (particularly C, E, J or K) subject to meet and confer²³ and others not, although not surprisingly, the City had no compelling interest in a ruling that would find any of the proposal covered by the MMBA. A broad-brush ruling eliminating the need to meet and confer about any CPRB-related issue would serve many of the City’s interests.²⁴ However, logic dictated the question of whether civilian oversight is subject to negotiation could not be addressed in a broad-brush fashion: that each particular aspect or proposal would have to be examined on an *ad hoc* basis. Perhaps that is what the Superior Court thought it was doing when it asked the parties at oral argument: “You don’t think that the facts in this particular case are similar to those in the *Berkeley Police Association v. the City of Berkeley*?”²⁵ Not surprisingly, the parties had conflicting responses to the court’s query.

The ACLU was asking the Court to extend broad language about the establishment of civilian oversight, as a policy matter, to individual proposals, some of which seemingly impacted the terms of a police officer’s employment. And even if the City and the OPOA could not point to clear precedent that the some of the disputed proposals were matters within the scope of representation, they argued that both the City of Fresno case and common sense dictated that the City of Oakland’s desire to craft its bargaining strategy with respect to the OPOA need not be carried out in a fishbowl. But the Court sent the City and OPOA into the drink: the ACLU was right and the City and OPOA wrong, said the Superior Court. In denying the City’s motion for summary judgment the Superior Court judge wrote:

- a. The Court finds as a matter of law that the Meyers-Milias-Brown Act does not necessarily obligate the City to meet and confer with the OPOA before amending the CPRB ordinance in any way, because the proposed amendments here primarily involve general managerial policy decisions.
- b. The Court also finds as a matter of law that CPRB recommendations A,

²³ The OPOA emphasized proposals B, G and K as having the greatest bearing on working conditions. And both parties emphasized that B, G and K were being discussed in the broader sphere of total contract negotiations involving such other indisputably mandatory bargaining as salary and the grievance process.

²⁴ However, not all interests would be served by eliminating the need to meet and confer about the operation of the CPRB. Farfetched proposals to change its structure would have to be tackled head on by the City Council if it could let the proposal “disappear from the table” during negotiations.

²⁵ Reporter’s Transcript of Oral Argument (6: 19-21), June 21, 1999, Alameda County Superior Court Case No. No. 805369-1.

B, C, E, G, and K do not primarily related to employment conditions so as to take them within the scope of the Meyers Milias Brown Act. See *Berkeley Police Association v. City of Berkeley* (1977) 76 Cal. App. 3d 931; *San Jose Peace Officers Association v. City of San Jose* (1978) 78 Cal. App. 3d 935.

A judgment ultimately issued that “ permanently enjoined [the City] from holding closed door sessions regarding Recommendations B, G, and K other than those expressly permitted by the Ralph Brown Act (Government Code Section 54956.9).”

Had the Superior Court ruling not found a Brown Act violation, and had it not awarded the ACLU attorneys’ fees, the City would have easily disposed of the issue of appeal. But this judgment left much to debate about the merits. However, after filing a notice of appeal, the parties settled their dispute by entering a stipulated consent decree in the fall of 2000. Other than recitals that, in effect, stated that the governing law is the governing law, the parties agreed that the City Council in the future would hold no closed session discussions of the CPRB unless they involved attorney consultation over litigation. Disputes on whether any issue involving the CPRB is covered by the MMBA will be brought to an arbitrator after notice under the Brown Act of such arbitration. The public shall be permitted to attend the arbitration but shall not be allowed to participate in the arbitration process. To the extent the City and the OPOA engage in negotiations over permissive topics related to the CPRB, staff direction and reporting to Council shall be done publicly although the negotiations themselves need not be public.

The loggerhead of litigation that had its seeds in the 1987 arbitrator ruling on compelling police officer attendance came full circle in 2000 with an agreement that disputes over what is subject to meet and confer shall be submitted in the future to an arbitrator. What accompanies the new millennium is a process that embraces (and binds - - to the extent an arbitration decision is final) the public in the arbitration process, compelling it to “live with” the results. And the model in this Decree obligating the City Council to prepare for negotiations (over CPRB issues) in public should prove educational to all California cities. In truth the vision of the City of Fresno court lingers: there is no guarantee that litigation will eventually resolve the matters that triggered it.

And as for the future of civilian review boards in general? Perhaps public sector counsel can look to the musings of the 10th Circuit Court of Appeals as prophesy: the independent police review board to replace the exclusionary rule! “The fact that independent disciplinary review boards are consistently opposed by police organizations suggests their use should be more seriously considered. Such a board could have broad powers to suspend or dismiss offending officers and require further training and education to prevent future violations. More than one study suggests that a two-week suspension without pay would be a more efficacious deterrent than application of the exclusionary rule.” United State of America v.Cusumano 67 F.3d 1497 (10th Cir. 1995)

APPENDIX A

**COMPARISON OF FEATURES OF ENABLING
LEGISLATION OR REGULATIONS CREATING
CITIZEN POLICE REVIEW IN VARIOUS JURISDICTIONS**

ISSUE	SELECT CALIFORNIA JURISDICTIONS				
	Berkeley	Sacramento²⁶	City of San Diego	Oakland	San Diego County²⁷
Auditor, Board, or Commission	Commission	Auditor	Board	Board	Board
# of members on the Board	Yes	N/A	Yes	Yes	Yes
Term of member	Yes	N/A	Yes	Yes	Yes
Who appoints	Yes	N/A	Yes	Yes	Yes
Residency of member	Yes	N/A	No	Yes	Yes
Member is non employee of City	Yes	N/A	No	Yes	Yes
Non-employee of City law enforcement agency	Silent	N/A	No	Yes	Yes
Manner of filling vacancies	Yes	N/A	Yes	Yes	Yes
Member as Chair/how long serves & when election occurs	Yes	N/A	Yes	Yes	Yes
Addresses compensation of members	Yes	N/A	Yes	No	Yes
Time and place and notice of meeting set	Yes	N/A	Yes	Yes	Yes

²⁶ Sacramento follows the “auditor” model which was established by the City Manager issuing a “Purpose, Authority and Procedures” Statement,

²⁷ Applies to the sworn members of the County Sheriff’s Department and custodial officers working for the County Probation Department.

APPENDIX A

	Berkeley	Sacramento	City of San Diego	Oakland	San Diego County
Quorum provision	Yes	N/A	Yes	Yes	Yes
Power to make policy recommendations	Yes	Yes	Yes	Yes	Yes
Power to receive complaints against police	Yes	Yes	No (complaint referred to police department)	Yes	Yes (against sheriffs and custodial)
Power to receive complaints against employees in other agency departments	No	No	No	Yes	No
Power to advise on type of discipline	No	No	Yes	Yes	Yes
Responsible for investigation of complaints	Yes	Yes	No	Yes	Yes
Responsible for monitoring police internal investigation	No	Yes	Yes (investigation file review)	No	N/A
Power to review internal affairs file	No	Yes	Yes	No (by negotiated agreement)	N/A
Mandating complaints filed with any department be forward to the Board	Yes	No	No	No	No

APPENDIX A

	Berkeley	Sacramento	City of San Diego	Oakland	San Diego County
Subpoena power	Yes	Silent	No	Yes	Yes
To adopt its own rules for its own operating procedures	Yes	No	No	Yes	Yes
Complaint investigation procedures	Yes ²⁸	Yes	Yes	Yes	Yes
Timeliness of Complaint	Yes	Yes	No	Yes	Yes
Establish who can file a complaint	Yes	No	No	Yes	Yes
Timelines for completing investigation	Yes	No	No	No	Yes
Timelines for commencing a hearing	Yes	No	No	No	No
Special Provision for Complaints in Litigation	Yes	No	No	No	No
Provides for documents as public or confidential	Yes	Yes	Yes	Yes	Yes
Mandates law enforcement agency cooperate	No	Yes	Yes	Yes	No (only through subpoena)
Incorporation of PSO Bill of Rights	Yes	No	Yes	Yes	No (only Lybarger)
Provisions for the interviewing Law Enforcement	Yes	Yes	No	Yes	No
Authority of Staff to Dismiss a Complaint	No	No	No	No	No
Establish board staffing	No	No	No	Yes	Yes

²⁸ By ordinance all the boards or commissions in this appendix are authorized to establish their own investigation and hearing procedures

APPENDIX A

	Berkeley	Sacramento	City of San Diego	Oakland	San Diego County
Specify types of issues that may be reviewed ²⁹	No	Yes	No	Yes	Yes
Provisions for board dismissing complaint	Yes	N/A	No	Yes	Yes
Provides for hearing by Hearing Officer	No	No	No	No	No
Provides for Hearing by Full Board	Yes	N/A	Yes (file review by full board)	Yes	Yes
Provides for hearing by board subcommittee	Yes	N/A	Yes (file review by subcommittee)	No	Yes
Addresses absence or recusal of board members from hearing	Yes	N/A	Yes	Yes	Yes
Active role of staff in presenting evidence	No	N/A	N/A	Yes	Yes
Addresses rules of evidence	Yes	No	No	Yes	Yes
Addresses right to cross examine	Yes	No	No	Yes	Yes
Provision for continuances	Yes	N/A	No	No	No
Provision for witness oath	Yes	N/A	No	Yes	Yes
Role for board counsel	Upon request	No	No	Yes	Yes
Written findings required	Yes	No	Yes	Yes	Yes
Burden of proof standard set	Yes	N/A	No	Yes	Yes

²⁹ All citizen review board ordinances examined for this study limited jurisdiction to law enforcement conduct as alleged in a complaint by a civilian. None allowed complaints by one officer against another.