


REPORT OF THE CHIEF LEGISLATIVE ANALYST

DATE: May 22, 2024

TO: Honorable Members of the City Council

FROM: Sharon M. Tso 
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Council File No: 23-0187-S2
Assignment No: 24-03-0202

SUBJECT: Recommendations and Implementation Plans to Modify Charter Section 1070, Related to the Police Department's Board of Rights

SUMMARY

On March 20, 2024, the Council adopted the Public Safety Committee Report relative to a Motion (McOsker - Soto-Martinez - Krekorian), which among other actions instructed this Office, with the assistance of the City Attorney, City Clerk, Police Department (LAPD), the Civil, Human Rights and Equity Department (CHRED) and any other department, to report with recommendations and implementation plans to modify Charter Section 1070. The Motion directs this office to provide various options, subject to their compliance with all applicable labor and employee relations laws, which should include, but not be limited to the following options:

- A. Alternative models for the Board of Rights (BOR), including a modified composition of civilian and sworn personnel serving on a BOR;
- B. Authorizing the Chief of Police to terminate officers immediately (prior to a BOR or other due process proceeding) in appropriate cases, as to be determined by the severity of the misconduct; and
- C. Incorporating binding arbitration as a component of the discipline process in termination cases, where appropriate.

This report, which was compiled with assistance and input from the LAPD, City Attorney, City Clerk, City Administrative Officer and CHRED, provides options for the Council's consideration on altering the composition of the BOR, granting the Chief of Police the authority to terminate officers prior to a BOR proceeding, and background on the alternative appeals processes of arbitration.

RECOMMENDATIONS

1. That the Council choose one or more of the following Options related to Charter Section 1070 (Disciplinary Procedures for the Police Department):
 - A. **Relative to Alternative models for the Board of Rights (BOR), including a modified composition of civilian and sworn personnel serving on the BOR:**

Option 1: Do nothing and maintain the current BOR structure and process, where an employee with peace officer status accused of misconduct can choose to have their disciplinary matter heard by a traditional panel of two sworn officers with the rank of captain or above and one civilian Hearing Examiner, or a panel consisting of three civilian Hearing Examiners.

Option 2: Repeal Ordinance No. 186100, which would revert BOR panels to having two sworn officers with the rank of Captain or above and one civilian Hearing Examiner.

Option 3: Request the City Attorney to prepare and present the required resolution(s) to place a measure on the November 5, 2024 General Election Ballot to amend the Charter Section 1070 to allow the composition of the three member BOR Panel to be established through ordinance with any combination of sworn officers of the rank of Captain or above and civilian Hearing Examiners. This Amendment could be structured to enable Council to amend the composition of the panels in the future via ordinance.

B. Relative to authorizing the Chief of Police to terminate officers immediately (prior to a BOR or other due process proceeding) in appropriate cases, as to be determined by the severity of the misconduct.

Option 1: Do nothing and maintain the current process in which all decisions to terminate an employee are made by the BOR.

Option 2: Request the City Attorney to prepare and present the required resolution(s) to place a measure on the November 5, 2024 General Election Ballot to amend Charter Section 1070 to grant the Chief of Police the power to terminate a peace officer for cause, including but not limited to the types of misconduct described in SB 2, *prior to a BOR proceeding*. Such terminated officers must still be afforded an appeal process after termination.

Option 3: Request the City Attorney to prepare and present the required resolution(s) to place a measure on the November 5, 2024 General Election Ballot to amend Charter Section 1070 to grant the Chief of Police the power to terminate a peace officer for cause *prior to an alternative appeals process*, outside of the current BOR model.

Note that a full discussion of causes for termination is included on pages 5-6 of this report.

C. Relative to incorporating binding arbitration as a component of the discipline process in termination cases, where appropriate.

Option 1: Take no action on adding a new arbitration component to the discipline process

Option 2: Request the City Attorney to include *binding arbitration* in the disciplinary appeals process to be set forth in any ballot resolution(s) requested by Council to modify Charter Section 1070.

Option 3: Request the City Attorney to include *non-binding arbitration* in the disciplinary appeals process to be set forth in any ballot resolution(s) requested by Council to modify Charter Section 1070.

2. That the Council instruct the City Administrative Officer to initiate discussions with the City's labor partners upon action by the Council.

DISCUSSION

Background on the BOR Process and Charter Section 1070

Charter Section 1070 outlines the Disciplinary Procedures for the Police Department, which includes the Board of Rights (BOR) Process for the LAPD. Charter Section 1070(h) establishes the composition of the BOR. Currently, a BOR shall be comprised of two officers with the rank of Captain or above and an individual who is not a member of the Department (a “civilian member” or civilian Hearing Examiner). However, as a result of the adoption of Charter Amendment C by the voters in 2017, the Council may adopt an ordinance allowing for all-civilian Board of Rights panels.

On May 10, 2019, Council adopted Ordinance No. 186100 to implement the provisions of Charter Amendment C and allow for a sworn officer accused of misconduct to choose to have a BOR consisting of three civilians. This Ordinance included the provision, adopted by the voters, that the Ordinance would be in effect for a minimum of two years and at the end of that two-year period the LAPD would submit a report to Council evaluating the effectiveness of the ordinance. In November 2022, the Board of Police Commissioners submitted its report which found that all-civilian BOR panels were more lenient than those comprised of two sworn and one civilian hearing examiner (see C.F. No. 22-1590).

There are two types of BOR hearings. The first is a “Directed Board,” where the Chief of Police (Chief) has concluded that an officer has committed serious misconduct and should be terminated from employment. The Chief must “direct” the officer to a BOR hearing, with a recommendation that the officer be removed from employment. The accused officer remains an employee of the Department until the hearing is concluded. If the BOR finds that an accused officer is guilty of misconduct, they then enter a penalty phase, where they determine what penalty is appropriate. The Chief may remove an officer only if the BOR has found an individual officer guilty and recommends termination of their employment. In this case, the Chief is able to impose a lesser penalty than the BOR recommends, but not a harsher one.

The second type of BOR hearing is an “Opted Board.” Charter Section 1070(b) allows for the Chief to demote an individual or impose a suspension of up to 22 days, but also allows for an officer who has been notified of such a forthcoming demotion or suspension to request a hearing before a BOR to contest the charges. Opted hearings are conducted in the same manner as a directed hearing, with the BOR panel having the authority to determine the appropriate punishment, if any.

Historically, the Department has used sworn officers as Advocates, who argue the case for discipline or dismissal in front of the BOR. Accused officers are often represented by attorneys provided by their labor union. However, the City provided funding and position authorities in the 2023-24 Adopted Budget for City Attorneys to represent the Department in BOR hearings alongside the sworn Advocate. This change has recently been implemented.

Alternative Models for Board of Rights

Composition

As noted above, Charter Section 1070(h) establishes the composition of BOR panels with two sworn and one civilian member. However, Council has adopted an ordinance which allows accused officers facing a BOR hearing to choose a panel with three civilians. If Council wishes to change the composition of BOR panels, it may rescind Ordinance No. 186100 and revert to panels consisting of two sworn and one civilian member.

Council could also choose to change the composition of BOR panels by placing a Charter Amendment on the ballot. In that case, Council could choose to create panels consisting of one sworn and two civilians, or increase the overall number of panel members. This Office has not evaluated the potential outcomes of such a change, but a major complaint of the LAPD is the lack of policing experts on the panels. Increasing sworn representation while maintaining a majority of civilians on the panel may resolve some of those issues. However, it has been noted that civilians in general are more lenient on sworn personnel than other sworn officers, and changing the overall composition of panels while maintaining a civilian majority may result in the same decisions with more split votes.

If Council wishes to amend the composition of BOR panels to change the number of members on a panel or the overall composition of panels, it may wish to include language in the Charter Amendment to allow the Council to amend the composition of BOR panels in the future via ordinance. This would ensure that the City has flexibility to change the makeup of panels in the future without requiring another ballot measure

Other Models

Instead of maintaining the existing disciplinary process, the Council may wish to consider changing the model of the BOR to mirror that of a Civil Service Commission, where decisions that have been enacted can be appealed *post-termination*. This would allow the Chief to implement any discipline that he or she feels is justified, while retaining the BOR as an appeals body. This would bring the BOR process more into line with the disciplinary processes in the majority of jurisdictions in California, almost all of which allow a Chief or Sheriff to discipline sworn personnel while maintaining an appeals process, as required by the Peace Officers Procedural Bill of Rights, through arbitration or the civil service model.

Alternatively, the Council could seek to abolish the entire Board of Rights process, and enact a new process where the Chief could discipline or fire an officer, while providing appeals process through some sort of arbitration model, as discussed below.

There would be a number of potential benefits to amending the BOR process in this manner. First, it would give the Chief of Police the same powers as any other General Manager in the City, all of which (except for the Fire Chief) are able to terminate employees for cause. Second, it would ensure that problem officers can be removed quickly from the department, reducing legal risk and increasing public accountability. Finally, it would ensure that sworn officers subject to termination are provided a fair appeal process in a manner similar to nearly every other police department in the state. While there may be concerns that giving a Chief the power to terminate employees will result in abuses, it should be noted that even in departments where this is the norm it is not a simple process, and employees are provided ample notice of discipline and access to an appeals process.

If the Council wishes to pursue any of these options, a Charter Amendment will need to be placed before the voters.

Authority of the Chief to Terminate Officers Prior to a BOR Hearing

Current Authority of the Chief

Presently, Charter Section 1070 does not permit the Chief to terminate a peace officer for misconduct prior to a BOR proceeding. Rather, the Chief must direct such officer to a BOR for a good cause finding of guilt. This is the “Directed Board” described above. Then, only after the BOR makes a finding of guilt, and only if the BOR recommends termination can the Chief actually terminate the officer. Currently, Charter Section 1070 does not permit the Chief to increase the severity of the penalty recommended by the BOR. For instance, if the BOR makes a finding of guilt but recommends a penalty lesser than termination, Charter Section 1070(p) prohibits the Chief from terminating the officer.

The only disciplinary action that the Chief can take prior to a BOR is to temporarily relieve an officer from duty with no loss of pay, suspend an officer with loss of pay for up to 22 days, and/or demote an officer with or without a suspension or temporary relief from duty. [Charter Section 1070(b).] However, any such suspension and/or demotion is subject to pre-disciplinary procedures, and the officer may elect to have a BOR hearing to challenge the discipline, through an “Opted Board,” as described above. If an officer elects an “Opted Board” the suspension and/or demotion is automatically stayed pending a hearing and decision by the BOR. [Charter Section 1070(b).] The suspension and/or demotion for an “Opted Board” can only be imposed after a guilty finding by the BOR and if the BOR agrees with the original discipline.

In order for the Chief to terminate an officer for misconduct prior to a BOR, an amendment of Charter Section 1070 would be required. Such a Charter amendment would provide the officer with a post-termination appeal at a BOR. This is consistent with the manner in which other City employees appeal termination with the Civil Service Commission. Current provisions under Charter Section 1070 could still apply in matters involving suspensions (of up to 22 days) and/or demotions in rank.

Officer Termination & State Decertification

In other jurisdictions throughout the State of California, Police Chiefs and Sheriffs generally have the authority to terminate officers for serious misconduct, and terminated police officers then have the right to appeal the termination after such penalty is imposed. Termination is typically reserved for the most serious and egregious misconduct, such as dishonesty in filing a police report, abuse of authority, sexual assault, and excessive use of force.

Chiefs of Police have broad discretion to determine when the circumstances warrant termination of an officer, including serious misconduct, egregious neglect of duties, and/or conduct that warrants progressive discipline (e.g., when an officer has repeatedly committed misconduct or neglected his/her duties) where continued employment would cause harm to the public service.

In 2021, the California legislature passed SB 2 (Bradford), which took effect on January 1, 2022. SB 2 established a statewide decertification process to revoke a peace officer’s certification in cases of serious misconduct to ensure that terminated officers would not be able to simply move from one police agency to another. Decertification has an even greater public impact than termination, as it disqualifies a peace officer from serving as peace officer throughout the state, not just from a particular police

department. The types of misconduct for which an officer can be decertified by the State Commission on Peace Officer Standards and Training include the following:

1. Dishonesty relating to the reporting, investigation, or prosecution of a crime, or relating to the reporting of, or investigation of misconduct by, a peace officer.
2. Abuse of power, including, but not limited to, intimidating witnesses, knowingly obtaining a false confession, and knowingly making a false arrest.
3. Physical abuse, including, but not limited to, the excessive or unreasonable use of force.
4. Sexual assault as described in subdivision (b) of Penal Code §832.7, and shall extend to acts committed amongst members of any law enforcement agency.
5. Demonstrating bias on the basis of actual or perceived race, national origin, religion, gender identity or expression, housing status, sexual orientation, mental or physical disability, or other protected status in violation of law or department policy or inconsistent with a peace officer's obligation to carry out their duties in a fair and unbiased manner.
6. Acts that violate the law and are sufficiently egregious or repeated as to be inconsistent with a peace officer's obligation to uphold the law or respect the rights of members of the public.
7. Participation in a law enforcement gang.
8. Failure to cooperate with an investigation into potential police misconduct.
9. Failure to intercede when present and observing another officer using force that is clearly beyond that which is necessary, as determined by an objectively reasonable officer under the circumstances.

The types of misconduct described in SB 2 can serve as a starting point on reasonable grounds for termination, but as noted above, these categories are not the only valid reasons a Chief may have for terminating the employment of an officer. A Chief, like any other General Manager, may wish to terminate an employee who does not meet the standards of the department, but whose actions do not rise to the level of requiring decertification as a peace officer. Some types of issues that could result in termination but not in decertification could include issues like chronic absenteeism, instances of sexual or racial harassment, or repeated lower-level violations that have not been corrected that have resulted in disciplinary action such as counseling, demotion or suspension.

Binding Arbitration

The Council directed this Office to examine the possible inclusion of arbitration into the disciplinary process. Arbitration is defined as the binding or non-binding process where an arbitrator, rather than a judge or jury, applies the law to the facts of the case and makes a decision. In binding arbitration, the parties agree to waive their right to a trial and agree to accept the arbitrator's decision as final.

It should be noted that there have been efforts over recent years in other jurisdictions to move away from binding arbitration in police disciplinary matters. This is a result of serious concerns with the outcomes in arbitrated police disciplinary matters and a perceived lack of public accountability in the binding arbitration process.

Academic studies have found that arbitral reversal of officer discipline appears routine. Across 37 US law enforcement agencies, "451 of the 1,881 police officers fired by these agencies between 2006 and

2017 were ultimately ordered rehired on appeal, normally by arbitrators.”¹ Other data on particular police departments have found that arbitrators reduced or overturned officer discipline, as much as 85 percent of the time.²

Police agencies typically reserve termination for the most serious and egregious misconduct, such as dishonesty in filing a police report, abuse of authority, sexual assault, and excessive use of force. However, there are a number of examples of officers fired for gross misconduct, including sexual assault and physical assault on handcuffed suspects, being reinstated as police officers as a result of binding arbitration.³ When discharged officers are reinstated to work, that exposes the affected police departments and the communities they serve to additional risk, including legal liability and the possibility that an officer who has been terminated in the past for their actions toward the public and then reinstated will act in the same manner again.

A major reason why the binding arbitration process has been criticized as a means of reviewing police disciplinary actions is that the entire process is hidden from the public. Private arbitrators are not held publicly accountable for their decisions by an electorate. This can lead to decisions “favoring rogue cops [which] reflect the arbitrators’ personal view that . . . instances of abuse are anomalies.”⁴ Some arbitrators have also justified officer reinstatement on technical and procedural grounds.⁵ Further, binding arbitration decisions are generally not subject to judicial review even if the arbitrator reached an erroneous decision or used faulty reasoning.⁶

As an alternative to binding arbitration, some jurisdictions have implemented a non-binding arbitration model, where the final decision on whether to accept the outcome of arbitration rests with a City Manager or other official that is more accountable to the public. A similar model could be adopted in the City, with the Board of Police Commissioners, Council, or Mayor having the final decision following non-binding advisory arbitral rulings. In non-binding arbitration, the parties may still appeal the decision to the courts, ensuring that decisions made in error are appealable.

¹ See Stephen Rushin, *Police Disciplinary Appeals*, 167 U. Penn. L. Rev. 3 (2019), at pp. 579-81 (reporting on frequency of disciplinary appeals resulting in rehiring of terminated officers).

² See generally Stephen Rushin, *Police Arbitration*, 74 Vanderbilt L. Rev. 1023 (2021) (reporting that in 624 arbitration awards from police departments nationwide, arbitrators reduced or overturned officer discipline in 52% of cases, and in cases involving recommended termination, arbitrators ordered officers to be rehired 46% of the time); Kelly et al., “Fired/Rehired”, Washington Post (Aug. 3, 2017) (reporting reinstatement rates of 44% for Washington, D.C., 62% for Philadelphia, and 70% for San Antonio); Beth Burger, *Fired Police Often Have Edge in Arbitration Cases*, The Columbus Dispatch (June 3, 2018) (reporting a 74% arbitration win rate for officers in Columbus Ohio); Jennifer Smith Richards and Jodi S. Cohen, *Chicago Police Win Big When Appealing Discipline*, Chicago Tribune and Pro Publica (Dec. 14, 2017) (reporting arbitral reversals of discipline in 85% of cases in Chicago); Ben Larson, *The Illusion of the Public Policy Exception: Arbitration, Law Enforcement Discipline, and the Need to Reform Minnesota’s Approach to the Public Policy Exception*, 48 Mitchell Hamline Law Review 1, Art. 9, at p. 361 (2022) (noting that arbitrators who reinstated officers had acknowledged officer misconduct 67% of the time).

³ See Kelly et al., *supra*, “Fired/Rehired”.

⁴ See Stephen A. Plass, *Police Arbitration and the Public Interest*, Harvard BlackLetter L. J. (2021), at p. 50 (pointing out systemic problems with arbitration in police discipline cases).

⁵ *Id.* at n. 74 and pp. 51-52.

⁶ See *Moncharsh v. Heily & Blase* (1992), 3 Cal.4th.

Implementation Timeline

If Council wishes to return to a BOR consisting of two sworn members and one civilian, the Council can vote to repeal Ordinance No. 186100 at any time. No further action would be required.

If Council wishes to make more substantial changes to the Police Disciplinary Process, a Charter Amendment would be required. In order to make the General Election in November 2024, Council would need to request the City Attorney to prepare resolutions placing a measure on the ballot by June 18, 2024, and adopt the resolutions by July 3, 2024.

The CAO's Office has advised that any proposed change to police disciplinary process will require the City to discuss the proposed changes with the City's labor partners. There is no timeline for this process, but the Council should instruct the CAO to initiate that process at the same time it requests any ballot resolutions, in order to provide time for this process.


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