

ITEM:



Memorandum

TO: CITY COUNCIL

FROM: Mayor Sam Liccardo
Vice-Mayor Jones
Councilmember Lan Diep
Councilmember Carrasco

SUBJECT: SEE BELOW

DATE: July 30, 2020

APPROVED:

DATE: 07/30/2020

SUBJECT: ACTIONS RELATED TO POLICE REFORM, REIMAGINING POLICE, AND STRENGTHENING THE INVESTIGATIVE AUTHORITY OF THE OFFICE OF THE INDEPENDENT POLICE AUDITOR

RECOMMENDATION:

1. Direct the Independent Police Auditor (IPA) and City Manager to provide Council with specific recommendations for how the IPA would take over investigations of police misconduct from SJPD's internal affairs that would incorporate the following elements:
 - 1) Reallocating resources to introduce investigatory capacity within the IPA by the conclusion of negotiations;
 - 2) Enabling the IPA to make factual findings based on its investigations of misconduct allegations; and
 - 3) Enabling the IPA to continue to report concerns between her factual findings and the Department's disciplinary decisions to the Council and public.

2. Direct the City Attorney, IPA, and City Manager to provide Council with specific recommendations to reform the officer disciplinary appeal process—particularly after a termination decision—to either:
 - 1) Identify and implement an alternative to binding arbitration for disciplinary appeals, and/or
 - 2) Reform the arbitration process to enable greater accountability and transparency, in:
 - a. Arbitrator selection;

- b. Limitation of the arbitrator’s scope of review, such as by requiring deference to the factual findings of the IPA;
 - c. Public disclosure of arbitration decisions;
 - d. Appeal of arbitration decisions to a court of competent jurisdiction; and/or
 - e. Other worthwhile reforms made apparent through discussions with the community and in negotiation with the POA;
3. Direct the IPA to evaluate and provide recommendations for expansion of the duties and responsibilities of the current IPA advisory committee, to include review of some of the IPA work, providing additional insight to the Office of the Independent Police Auditor and allowing for greater transparency. Explore models such as the City of Anaheim Police Review Board, City of Davis’ Police Accountability Commission, and others.
4. Return to Council in Closed Session to direct City negotiators to commence labor negotiations, to the extent required by the Meyers-Milias Brown Act and related provisions of state law, with the POA and any other relevant bargaining units.
5. Return to Council to discuss how to commence community processes—informed by experts, consultants, and research—to:
 - a. publicly review use of force policy in the Duty Manual, and explore potential reforms, and
 - b. reimagine public safety response, such as by supplanting SJPd response to many non-criminal matters with civilian response.
6. Return to the Rules Committee to add to the City Auditor’s workplan an audit of San Jose Police Department expenditures and workload, expanding the scope of the existing staffing audit to incorporate an analysis of the 1.2 million calls for police service, police budgetary allocations, and progress toward civilianization.
7. To enable Council to evaluate how and whether to mandate expedited public disclosure of body-worn camera footage of incidents of substantial public concern, such as major protests or controversial uses of force:
 - a. Return to Council in closed session to receive assessment from the City Attorney of the requirements of POBAR and other state legal restrictions on release of evidence, and of any legal risks to the City and City taxpayers;
 - b. Return to Council in open session to discuss resources required to rapidly reproduce video that complies with legal requirements, i.e., privacy mandates to obscure faces and identities of people other than the police officers involved in the incident.

Identify any obstacles created by state law that inhibit our ability to implement straightforward changes to enable greater accountability, and return to Council to determine where the City should take a clear position for legislative advocacy.

Discussion:

Over a month ago, in response to community protests and civil unrest after the murder of George Floyd, we proposed a series of reforms to improve police accountability. Several of those proposed reforms are already scheduled for Council consideration in August, including the expansion of IPA authority and a ban on the deployment of rubber bullets. Others will require considerably more work, both because of the procedural constraints of existing legal requirements, and because of the need to engage with multiple stakeholders and the community.

Now that Council has returned to session, we have an opportunity to roll up our sleeves and commence this work. The first two reforms that could have the greatest impact on police accountability in San Jose—and by example, nationally—relate to the creation of an independent body for investigation for police misconduct, and the reform of the disciplinary appeals process.

1. Beyond Internal Affairs: Independent Investigation of Police Misconduct

It seems unlikely that the American public will ever feel confident in a system of accountability which allows only the police to police themselves. In San Jose, the Independent Police Auditor (IPA) has the authority to review cases investigated by SJPD's Internal Affairs, but not the ability to investigate those cases—nor even “audit” them, contrary to the implication of the office's title.

The Department's Internal Affairs unit, rather, has sole authority over all investigations, reporting solely to the Chief of Police. Like most police departments, officers rotate in and out of Internal Affairs every two years, and unenthusiastically regard it as a necessary assignment on their path to promotion. The internal affairs model has lasted for decades in most cities, but several—such as Albuquerque, Washington D.C., Portland, and San Diego—have since largely abandoned it to adopt for external, independent investigations of police misconduct. The County of San Diego also has a review board that can conduct investigative hearings and make findings.

Indeed, the very notion that we continue to treat allegations of excessive use of force and other police misconduct as “internal” affairs offends American sensibilities about the transparency of our democratic institutions. So, we should move beyond the “internal affairs” model, and we have several options for doing so. Most logically, we could endow the IPA with investigatory authority and staff. Conversations with District Attorney Jeff Rosen have opened the door to considering a hybrid model, where the DA could take on investigations with any likelihood of criminal charges and leave all civil matters for the IPA. Regardless of the precise model, it must be driven and staffed by trained, independent professionals with a clear understanding of police work. Ample examples exist of the failures of police commissions, which in many cities appear too easily swayed either by cozy relationships with the police departments, or by the political sentiment of the day. In response to the community's demands for more transparency, it is worth exploring expansion of the role of the current Independent Police Auditor Advisory Committee. For San Jose, it is proposed to consider a structured, advisory model that would provide input to the Office of the IPA with recommendations on policy, procedures, or training, and staffed by community members with no ties to law enforcement. Such an expansion could potentially improve the community's trust with policing, allowing more impact through a broader forum where concerns may be voiced more freely. Such models have been recently formed in the cities of Anaheim and Davis and should be further explored.

In any case, where investigation reveals a need for discipline or termination, the completed investigation would be referred to the Chief of Police to assess and impose discipline.

Transparency would be boosted by IPA reports to the City Council of any variances between the Chief's and IPA's assessment of the matter, as is currently the case.

Pursuant to the California Supreme Court's [Seal Beach](#) decision and the Meyers-Milias-Brown Act, it appears that we must negotiate such changes with the San Jose POA. Second, we need to find the resources to conduct such investigations. Budgetary constraints may argue for initially limiting investigatory authority to more serious allegations of misconduct—such as uses of force resulting in serious injury, or racially discriminatory misconduct—and leaving more routine matters to Internal Affairs until the IPA investigations unit can be fully staffed. Some savings could emerge by reassigning IA investigators to other SJPD units.

2. Make Arbitration of Officer Firing and Disciplinary Decisions Transparent and Accountable

As the saying goes, nobody hates a bad cop more than a good cop. Most U.S. big-city police departments, like San Jose, have police contracts that have long enabled unaccountable arbitrators to issue binding decisions that can reverse the well-reasoned decisions of the Chief of Police and City Manager to fire or discipline officers. One such instance—our Chief's 2016 termination of an officer who used his Twitter account to insensitively mock and menace advocates of the “Black Lives Matter” movement—resulted in a reinstatement of the same officer by the arbitrator.

This case is instructive. Our officers' union—the San Jose Police Officers' Association (POA) declined to offer that offer any defense, due to the nature of the conduct. Yet the arbitrator still reinstated the officer after firing, and the Department had no right to appeal the arbitrator's decision, because the contract made his decision binding. The arbitrator was not accountable to any judge, nor any public agency, nor the public. We have no insight as to the reasoning of the arbitrator's decision, because it remains out of the reach even of a Public Records Act request.

The very process of arbitrator selection inherently produces a biased pool of decision-makers. Although it utilizes a “striking” process similar to jury selection—in which each side can “strike” disfavored candidates—arbitrators are not like jurors. Unlike jurors, prospective arbitrators repeatedly undergo the same selection process, so they learn over time what kinds of behavior will likely result in a “strike.” More importantly, unlike most jurors, arbitrators actually seek to be selected, and to some extent, depend financially on it. Many believe that this affects their decision-making as arbitrators, insofar as they have incentives to “consistently compromise on punishment to increase their probability of being selected in future cases.” See Stephen Ruskin, “Police Disciplinary Appeals,” 167 *University of Pennsylvania Law Review* 545, 576. As a result, the chiefs of police of nearly every major city complain about the impact of binding arbitration on their ability to fire bad cops, and to assess discipline.

The result: other officers see that a colleague who commits shameful conduct can continue to wear the same badge and receive the same salary. Although this has happened only rarely in recent years in San Jose—and [more frequently elsewhere](#)—a small infection has the effect of a contagion. The process demoralizes the many good officers who serve with honor and high standards, and enables the few who do not. Public perception of police accountability suffers.

By no means does San Jose suffer uniquely from this defect. [Studies show troubling and consistent patterns of reducing and overturning of officer discipline in Chicago, Denver, Houston, Oakland, San Antonio, and several other cities, and media accounts provide ample anecdotal evidence.](#) In a [2017 comprehensive analysis by the Washington Post](#), 451 of the

1,881 police officers fired by 37 large American law enforcement agencies were ordered rehired by an arbitrator. Why this substantial pattern of reversal? [Scholars point to the procedural elements of the arbitration process that have a significant effect on the outcomes.](#)

We should ask what effect the challenges of the current disciplinary appeals process might have on upstream decision-making by police chiefs. For example, [virtually every large-city U.S. police department has Brady lists of officers](#)—individuals who cannot make arrests, investigate cases, or testify in court because of prior reports of wrongdoing that undermine their credibility as a witness, and subject them to impeachment on the stand—yet continue to serve.

We can do better. Every police officer deserves due process for any disciplinary decision, and state law mandates as much. Yet the rules around the arbitration process have inherent defects that can undermine much of the good work that SJPD has done to improve officer conduct and accountability. If we cannot find a better process than arbitration, we must negotiate a means to make every arbitrators' decision more transparent and accountable. Many reforms have been discussed nationally, including improving the arbitrator selection process, lifting the veil of secrecy over the content of arbitration decisions, limiting the scope of the arbitrator's review of prior factual findings, and allowing the City a right of appeal to a state court. Any would offer improvement, and all appear worth exploration.

Brown Act

The signers of this memorandum have not had, and will not have, any private conversation with any other member of the City Council, or that member's staff, concerning any action discussed in the memorandum, and that each signer's staff members have not had, and have been instructed not to have, any such conversation with any other member of the City Council or that member's staff.