2006

Resolving Civilian-Police Complaints in New York City: Reflections on Mediation in the Real World

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I. HISTORICAL BACKGROUND

A. *Sed Quis Custodiet Ipsos Custodes?*[1]

Civilians have been able to file complaints against officers of the New York City Police Department (NYPD) with the Civilian Complaint Review Board[2] (CCRB) since May 1953.[3] In the early years, the CCRB was a part of the NYPD, complaints were investigated by specially selected police officers, and their investigative findings were reviewed by a board composed of three deputy commissioners,[4] the civilian managers of the NYPD. Findings and recommendations in cases with substantiated misconduct were sent to the police commissioner who had—and still has—the sole power to discipline an officer. Not much changed between 1955 and 1966—the CCRB moved its offices from a police facility to a more neutral site and another deputy commissioner was added to the board.[5]

In 1966, then-Mayor John Lindsay sought to add four civilian members to the CCRB, creating a "mixed" board[6] which did not sit well with police

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[1] JUVENAL, SATIRES VI, at 347–48 ("But who is to guard the guards themselves?").

[2] Some people may be confused by the board's name into thinking civilians were part of it even at the beginning. The name Civilian Complaint Review Board should really be read backwards: it was a board of police executives that reviewed complaints made by civilians.

[3] JULY–DEC. N.Y. CITY CIVILIAN COMPLAINT REV. BD. STATUS REP. 7 (1993).

[4] *Id.* Deputy Commissioners of the NYPD are non-uniformed members of the department. The first deputy commissioner, next in authority to the police commissioner, has always been a former police officer; other deputy commissioners are not former police officers.

[5] *Id.*

[6] *Id.*

representatives. The police unions succeeded in turning the issue into a ballot question and spent much money and effort making their views known to the citizenry. In November 1966, the public voted down any expansion of the board to include civilians.[7]

But times change and by 1987 Mayor Ed Koch was able, with the help of the city council, to add civilian members to the board although that board and the investigative process were still a part of the NYPD. Then came the 1988 Tompkins Square riots.[8] Squatters were living in the park, drug use was obvious, and the merchants and local residents wanted the park cleaned up. The police obliged, but in a most abusive fashion. The city council subsequently took up the issue of making the board independent of the NYPD, passing Local Law 1 of 1993 on December 19, 1992.[9] The mayor approved the law on January 5, 1993,[10] and on July 5 the CCRB was finally an entity in its own right, no longer tethered to the police department it was supposed to oversee.[11]

It was a difficult birth. The police department withdrew all of its officer-managers and investigators, but left the cases they were handling.[12] The

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[7] *Id.*

[8] On August 7, 1988, a riot erupted in Tompkins Square Park, in the heart of the Ninth Precinct. More than fifty people were injured, and dramatic videotapes showed the police, with badge numbers covered, indiscriminately beating civilians. The police were widely condemned: 121 civilian complaints were filed, six officers were indicted on criminal charges, seventeen were charged with departmental misconduct, and the precinct captain was disciplined. Book Note, *The Eyes of the Law*, 103 HARV. L. REV. 1390, 1393 n.13 (1990) (reviewing H. RICHARD UVILLER, TEMPERED ZEAL (1988)).

[9] JULY–DEC. N.Y. CITY CIVILIAN COMPLAINT REV. BD. STATUS REP. app. A, 3 (1993).

[10] *Id.*

[11] *Id.* at 21.

[12] *Id.*

> The CCRB's change-over on July 5th, 1993 . . . has not been without its share of problems. Upon its initiation, the new CCRB inherited a docket of 1,085 cases which were either awaiting review by the Board or still under investigation. The withdrawal of the Police Department's managers, investigators and support staff, comprising about 50% of the agency's total personnel, left the new CCRB with investigatory teams of six members each (reduced from twelve) and with a severe shortage of managerial personnel. . . . [T]he agency is also moving to restore and supplement the office equipment and technology returned to the Police Department at the time of transition.

Id.

unions directed their members not to appear for questioning. It took years to get out from under the backlog caused by the former[13] and a court to correct the latter,[14] but eventually things settled down. The first administration at the CCRB labored under much duress and the growing pains were sharp. By 1996, there was a new administration and a new vision for how the agency should grow.[15]

II. WHAT DOES THE CCRB OFFER?

The CCRB is, essentially, an investigative agency. A complaint is filed—by mail (mail/email), phone (direct/to NYPD/311),[16] or in person (at any precinct/at the CCRB's offices)—and it is assigned to one of eight investigative teams. Each team has a manager, supervisor, and assistant supervisor, along with twelve to thirteen investigators. Managers have prior law enforcement experience, but not with the NYPD.

Team managers assign the case to an investigator who must try to contact the complainant within 24 hours.[17] Clearly, this is not always possible. For one thing, many complainants fail to give accurate information like a phone number and address; some refuse to answer the investigator's calls and letters. For those citizens who want to follow up on their complaint, a formal interview is required, either at the CCRB offices or some other convenient location.[18] If the police officer was identified, that officer is summoned for an interview. If not, the investigator requests police records to try to make an identification.

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[13] MEL P. BARKAN, CHAIRMAN, JAN.–DEC. N.Y. CITY CIVILIAN COMPLAINT REV. BD. SEMIANNUAL STATUS REP., at ix–x (1997) (stating that "the CCRB reduced the total docket by 25%—from 3,325 cases in 1996 to 2,493 in 1997. In addition, it reduced the backlog of cases over a year old by 85.2%—from 1,206 in 1996 to 178 in 1997.").

[14] Caruso v. Civilian Complaint Rev. Bd., 602 N.Y.S.2d 487, (N.Y. Sup. Ct. 1993).

[15] This new vision still holds under the current administration led by Florence L. Finkle as executive director.

[16] *See, e.g.*, Joshua Brustein, *311's Growing Pains*, GOTHAM GAZETTE, July 25, 2005, http://www.gothamgazette.com/article/issueoftheweek/20050725/200/1490. Under Mayor Michael R. Bloomberg, the city implemented the 311 phone number program to handle any call not an emergency that should be handled by dialing the long-available 911. The availability of 311 made it far easier to reach the appropriate city agency that could deal with a caller's problem.

[17] *See, e.g.*, JAN.–DEC. N.Y. CITY CIVILIAN COMPLAINT REV. BD. STATUS REP. 5 (2005), http://www.nyc.gov/html/ccrb/pdf/ccrbann2004.pdf.

[18] Identified witnesses are treated in the same fashion; police witnesses are required to be interviewed at the CCRB. *Id.*

Once all identified parties in the complaint have been interviewed and any pertinent documents have either been submitted or subpoenaed, the investigator drafts a closing report "which includes a summary and analysis of the evidence and recommended dispositions for each allegation raised by the complaint."[19] This report may also include legal analysis involving search and seizure law or opinions of the city's administrative law judges who rule on police misconduct cases. The report, along with the entire case file, is submitted to a three-member panel of the board for their review.[20] Only the board can make a final determination of the dispositions in a case.

Allegations in a case may be disposed of as substantiated (evidence indicates the officer did what the complainant said), exonerated (the officer did it, but was within his or her rights to do so), unfounded (the alleged misconduct did not take place), and unsubstantiated (there is insufficient evidence to apply any of the other findings to the allegation).[21] The standard of proof in CCRB cases is the civil law standard, preponderance of the evidence.[22]

Copies of all cases with at least one substantiated allegation are sent to the police commissioner for his disposition. To get a sense of how frequently this occurs, consider that between 2000 and 2004, for example, annual substantiation rates by case[23] were between 7.8% and 16.3% of all fully investigated cases.[24] In the aggregate, 1,281 cases were substantiated out of 10,898 complaints fully investigated during those five years.[25] For the same time period, slightly over half of the complaints closed (12,624, or 52.2% of

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[19] *Id.* at 6.

[20] Panels are composed of one board member from each designating entity; i.e., one who was originally designated by the mayor, one by the police commissioner, and one by the city council. *See* JAN.–DEC. N.Y. CITY CIVILIAN COMPLAINT REV. BD. STATUS REP. 7–8 (2004), http://www.nyc.gov/html/ccrb/pdf/ccrbann2003.pdf.

[21] *Id.* at 7.

[22] *Id.* at 8.

[23] Disposition rates can be calculated by case or by allegations. For substantiation rates by case, the agency compares the number of complaints containing one or more substantiated allegations to the number of complaints fully investigated during the reporting period. For substantiation rates by allegations, the comparison is between the actual number of substantiated allegations and the total number of allegations fully investigated during the reporting period. Because most complaints contain multiple allegations, the substantiation rate by case is generally higher than the rate by allegation. *See id.* at 25–28.

[24] JAN.–DEC. N.Y. CITY CIVILIAN COMPLAINT REV. BD. STATUS REP. 83 (2005), http://www.nyc.gov/html/ccrb/pdf/ccrbann2004.pdf.

[25] *Id.*

the total 24,168 cases closed) were truncated[26] because the complainant was unavailable,[27] uncooperative,[28] or decided to withdraw the complaint.

The question of satisfaction with the agency's work is frequently raised. There are really two types of satisfaction that must be considered: satisfaction with the process offered by the agency and satisfaction with the outcome. In any investigation, the CCRB should be able to satisfy both the civilian and the police officer in terms of the process: the parties should feel they were treated fairly, respectfully, and in a timely manner. In terms of the outcome of the investigation with its four main possible outcomes, however, at least one party is going to feel great dissatisfaction, and it is certainly possible for that disappointment to be shared by both.

For instance, if the board substantiates an allegation, it is telling the police officer it does not believe their story. If it exonerates the officer or finds the allegation unfounded, the board is telling the civilian that their perception of the incident was faulty or he simply lied—two results that are reasonably sure to engender anger on the part of most complainants. The worst possible outcome for a civilian and police officer is an unsubstantiated disposition. Not only will neither person feel believed, but the officer will have the unsubstantiated disposition counted against them by the department

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[26] *Id.* This 50% truncation rate has existed for many years and has varied little. One reason for it may be the complainant's expectations. In 1988, the Vera Institute of Justice did a study of the CCRB. MICHELE SVIRIDOFF & JEROME E. MCELROY, VERA INSTITUTE OF JUSTICE, PROCESSING COMPLAINTS AGAINST POLICE IN NEW YORK CITY (1989). In researching the factors that influenced variations in levels of complainant satisfaction researchers queried people who had their complaints fully investigated, conciliated (an ex parte process where officers met with a supervising officer to discuss the complaint against them and received re-instruction), and those that withdrew their complaint. *Id.* at 2. They sought to identify the goals civilians had when they filed their complaints and match them with the complainant's level of satisfaction. In looking into civilian objectives for filing complaints, they found that, for the population queried: (1) 19% of those people who withdrew their complaints had serious expectations, wanting the officer to lose his or her job or to be severely punished; (2) 60% had moderate goals, wanting the officer to be reprimanded but not to lose the job; and (3) 21% had mild goals which were met by the mere filing of the complaint. *Id.* at 9. If these breakdowns are applicable for all complainants, it could help explain why so many people fail to follow through on their complaint.

[27] JAN.–DEC. N.Y. CITY CIVILIAN COMPLAINT REV. BD STATUS REP. 6–7 (2004), http://www.nyc.gov/html/ccrb/pdf/ccrbann2004.pdf. 'Unavailable' is a disposition applied when the CCRB investigator cannot locate the complainant based on the contact information the person either gave or failed to give.

[28] *Id.* at 7. Complainants are designated "uncooperative" when the investigator knows the contact information is correct but the person fails to reply to repeated phone calls and letters, or fails to appear for scheduled interviews.

whenever their personnel history is reviewed.[29] This happens when the police officer is up for promotion, transfer, or change of detail.

Investigation is, without question, the agency's prime purpose.[30] To that end, the bulk of resources go toward strengthening the investigative staff. For example, if a clerical employee resigns or is terminated, agency management may try, if at all feasible, to move any money that remains available in that line[31] to the investigative lines, in an attempt to hire more investigators or to continue to pay the ones already hired.

At the same time, the mediation unit receives very little of the agency's resources. It has a small staff: one director and three mediation associates who are former investigators invited to join the unit. Lack of resources is detrimental to the program. Contrary to Mayor Bloomberg's Orwellian mantra in fiscally austere times, you really cannot do more with less.

III. HOW DOES A COMPLAINT FIND ITS WAY TO MEDIATION?

I came to the CCRB at the end of 1996, hired as the director of mediation. In the agency's enabling legislation, there is a provision that states: "[t]he board shall establish a mediation program pursuant to which a complainant may voluntarily choose to resolve a complaint by means of informal conciliation."[32] Before I arrived, the process for mediating complaints had been negotiated between the police department, the city law department, and the CCRB; my task was to implement it.

It is a cumbersome process. Each day, one of the eight investigative teams is on intake duty. All cases that come in that day, in whatever format, are assigned to that team. Team management reviews the complaints and

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[29] Communicated by senior staff members at the CCRB and members of the liaison team from the NYPD's Disciplinary Assessment Unit (now the Department Advocate's Office).

[30] Transcript of Public Session, N.Y. CITY COMPLAINT REV. BD. at 5 (June 14, 2006), *available at* http://nyc.gov/html/ccrb/pdf/cc_2006_06_14.pdf. The executive director reported at the June 2006 board meeting that, as of May 31, the CCRB "had a full-time head count of 175: 137 investigators and 38 non-investigative staff members, including Executive staff members." This means that slightly more than 78% of the agency's employees are investigators.

[31] A "line" is a budgetary term that refers to a position that is funded by the city budget. If someone leaves before the fiscal year is up, the money allocated for the position can be shifted to another position. Thus, should a manager depart, the salary earmarked for the balance of the year may be divided among two or more investigative slots, allowing the agency to increase staff.

[32] New York City Charter, Ch. 18-A § 440(c)(4) (2004).

determines whether a case is eligible for mediation.[33] Cases found to be mediable[34] require the complainant's consent before going further. Investigators are trained to present mediation and investigation objectively to complainants so they can make an informed decision as to what process to select, but also to point out the benefits of mediating in particular cases. They have also been trained to handle civilian objections. For example, a complainant may say she does not want to sit down at the same table with a police officer because she "never wants to see that cop again." An investigator would inform her that should the complaint be substantiated, there is always the possibility of an administrative trial to decide the matter, where the complainant would not only see the officer again, but be cross-examined by the officer's attorney. Declining to mediate is not always an effective means of banishing the offending officer from a complainant's life.

If the complainant agrees to mediate, the case is transferred to the mediation unit. There, staff members review the case for suitability.[35] Names of officers in these cases are reviewed at the NYPD's Department Advocate's Office (DAO)[36] to determine if they are acceptable candidates for mediation.[37] Once an officer is vetted, the case file is sent to the board's

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[33] All investigators are given training in the CCRB's mediation program when they start work at the agency. Refresher training is given periodically.

[34] NEW YORK CITY CIVILIAN COMPLAINT REV. BD., MEDIATION, http://nyc.gov/html/ccrb/html/mediation.html (last visited Oct. 22, 2006). For a case to be mediable there can be no allegation of a personal injury or damage to property for which a legal claim might be made. In addition, specific allegations are considered mediable. These include force allegations of "physical force," abuse of authority, allegations involving threats, all discourtesy (curses, nasty words and gestures), and offensive language allegations (slurs of an ethnic, racial, gender, sexual orientation, religious, or handicap nature).

[35] Victor Voloshin, *Director of Mediation New York City Civilian Complaint Review Board*, Jan.–Mar. 2006 POLICE PRACTICES REVIEW, 8, http://www.parc.info/pubs/pdf/january-marchppr06.pdf. There is a difference between eligibility, which is based on fulfilling the requirements of the guidelines, and suitability, which deals with whether the case has any likelihood of success in mediation. Complaints might fulfill the eligibility requirement—no injury or property damage, with all mediable allegations—yet not be suitable; i.e., the complainant might be an emotionally disturbed person (EDP), or indicate an absolute unwillingness to settle the dispute in any way other that what he demands, or be a chronic complainant who files on the least provocation.

[36] The Department Advocate's Office is the NYPD's legal unit, staffed by police lawyers and officers.

[37] In evaluating an officer for participation in mediation, the officer's entire record would be reviewed. A history of other complaints (non-CCRB), or a poor attendance record, or an on-going investigation of the officer by the department's Internal Affairs Bureau, would preclude approving them for mediation.

own alternative dispute resolution (ADR) committee for their review.[38] If the committee approves the case for mediation, the mediation unit notifies the department to contact the officer to see if the officer would consent to mediate. Only after the officer says yes can the unit begin to schedule a mediation session.

At that point, the mediation associate begins what can be a tedious process of trying to get the complainant, officer, and mediator to agree on a date and time for the mediation. The agency tries to use a co-mediation model, so at least four people have to be in agreement. This can be exasperating for the associate who soon learns that most people are incredibly busy.

Even after a date and time have been agreed to, it is possible that one or the other party may not show up to the mediation session. Acceptable reasons for nonappearance by the officer include being summoned to testify in court (the directive to come to court to testify often is made the day before) or involvement in an arrest earlier in the day.[39] More frustrating, though, is nonappearance because the officer was never notified or just decided not to come, which happens more often than the agency would like. The complainants are also entitled not to appear if they have good reason. Good reasons include the inability to find childcare or a transportation problem, but do not include such excuses as, "It was raining and I didn't want to go out."[40] For police officers who do not have just cause for missing the scheduled mediation, the complainant always has the option of sending the case back for a full investigation. For complainants who do not have just cause for missing the session, the rule is simple: two unjustifiably missed mediations and the case will be closed as "mediation attempted." The officer in such a case gets the same benefits as if the case was successfully mediated.

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[38] As in other panels, the ADR committee has a mayoral designee, a city council designee, and a police department designee. At the time of this writing the mayoral designee is Professor Carol Liebman, director of the mediation clinic at Columbia University School of Law. The police department member is Jules Martin, former chief of the NYPD Housing Police, and the city council designee is Singee Lam, director of international admissions at St. John's University. JAN.–DEC. N.Y. CITY CIVILIAN COMPLAINT REV. BD. STATUS REP., at viii (2006), http://nyc.gov/html/ccrb/pdf/ccrbann2005.pdf.

[39] It was well known at the CCRB that police officers who have made an arrest are required to complete a significant amount of paperwork relative to that arrest that takes them off their post and takes precedence over other commitments, like mediation.

[40] A complainant actually offered this excuse as the reason she was unable to appear for her scheduled mediation.

Assuming the parties and mediators all make it to the session, there are three possible outcomes which are determined by the parties themselves. The first possible outcome is "successfully mediated with a signed resolution agreement." Another disposition is "successfully mediated without a signed resolution agreement." Both of these outcomes mean the parties agreed that they have resolved all of the issues between them, but the latter results in a verbal agreement only. Finally, if any of the issues between the parties have not been resolved, the outcome is "impasse" and the complainant has the choice of either sending it back to investigation or withdrawing the complaint.

IV. WHAT WORKS WELL?

A. *What Works: Altering the Investigative Approach*

One of the most important steps we took was to change the investigative mindset. Investigators have the job of initially offering mediation to civilians. This is hard for them to do because mediation is something they do not know. When investigators begin working at the CCRB, they participate in a three week training program run by the managers and senior staff.[41] Originally, the bulk of that training was on investigative techniques and practices. During the early years of the program, I was given a few hours to talk to these neophytes about the mediation program. This turned out to be insufficient.

In 2002, the new mediation coordinator, Gene Banducci, found himself listening to many, many recorded phone conversations[42] and noticed that investigators never asked complainants what they wanted to see come out of their complaint. They just assumed that the person complaining wanted an investigation and proceeded down that path. As mentioned previously, research suggests that not everyone wants the same result from filing a complaint.[43] Banducci proposed that investigators ask complainants just what they would like to get out of filing the complaint, and wisely, he also

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[41] New York City Civilian Review Complaint Board, Frequently Asked Questions, http://nyc.gov/html/ccrb/html/faq.html (last visited Oct. 21, 2006). New investigators take part in an intensive three-week training course that focuses on the CCRB's jurisdiction and rules, interviewing techniques, methods for acquiring documentary evidence, structure of the police department, and patrol guide procedures.

[42] All interviews and phone conversations are taped as a matter of agency policy, so there is no question about what a person has said.

[43] *See* SVIRIDOFF & MCELROY, *supra* note 26, at 9.

suggested that question be asked *after* the complainants had given their story about the incident. Eventually, we agreed that the best technique for dealing with someone with a mediable complaint was to ask for the story of the complaint first, then provide an objective description of the two processes offered at the CCRB (investigation and mediation), and then wind up by questioning the complainant about what they want to get from filing the complaint.

Complainants can answer that question in many ways. They may want an apology, a chance to tell the officer how they felt, or an opportunity to explain why the officer was mistaken. Other complainants may want the officer to be fired, severely punished, or simply spoken to. Any of these answers give an investigator a starting point to talk about how investigation or mediation would probably be a better choice for them.

B. *What Works: Handling Objections to the Mediation Process*

But something more was needed. It was a good start to ask complainants what they wanted as a result of filing a complaint, because investigators could then use the answer to help the complainants see how mediation would suit their needs better. What the investigators had difficulty with was dealing with complainants' objections. This made sense because the investigative staff simply did not have the background in mediation that would allow them to counter civilians' arguments.

The executive director of the CCRB at the time, Florence L. Finkle, decided that some form of instruction must be developed to help investigators counter civilian demurrals to mediation. She and I jointly wrote a training program which presented the most common challenges civilians made when offered mediation, and provided arguments that might refute or at least blunt those objections. This particular training program was a great help to the mediation program and did increase the number of cases transferred to mediation.

As an example, a civilian might vigorously oppose mediating his complaint if he believes the officer should be severely punished or fired for what the complainant feels was a serious act of misconduct.[44] In such a case, the CCRB's training program would encourage the investigator to take the complainant on a "reality walk." If the civilian takes the position that he wants the officer fired, the training program would suggest that the

[44] Interestingly, I found anecdotally that an initial demand for harsh punishment does not necessarily preclude mediating the complaint. Most complainants were not inextricably locked into a position, at least if we kept talking to them.

investigator commiserate ("I can understand why you would feel this way . . . . ") but point out that between July 1993 and December 2005, for example, only eleven police officers were terminated as a direct result of a substantiated CCRB complaint, although the agency fully investigated 26,021 complaints during that period.[45] In addition, training would recommend that the investigator also explain to the complainant that the agency's substantiation rate (9.7% of all cases fully investigated had one or more substantiated allegations for 2005),[46] while not dispositive, suggests the odds are not good that their complaint will be substantiated from a purely statistical perspective. And that is on top of an approximate 56% truncation rate, so the number of cases in which the agency actually finds misconduct is fairly small.[47]

People change their minds based on the amount of information available to them. There is no reason to think that complainants are any different. While there is no need for an investigator to refer to publicly available information when talking to every complainant, objective statistical data judiciously referenced can help a person make a better informed choice as to what process would best meet their needs.

Sometimes objective statistics are not even necessary. Say, for example, a person objects to mediation because he "never wants to see that cop again." Such a position is quite understandable—the incident that gave rise to the complaint may have made the civilian feel humiliated, like a child or a criminal. The agency's training program recommends that, as mentioned previously, the investigator explain to the complainant that, should the complaint be substantiated, there is a chance that there will be an administrative trial held at police headquarters, where he will have to face the officer again and be questioned by the officer's attorney. The purpose of giving the complainant such information is not to force him into any particular choice. Most complainants are simply not aware of the possible results of filing a complaint, and this new information is often enough to prompt them to reconsider mediation since an investigation does not preclude seeing the officer again.

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[45] E-mail from Marcos Soler of Statistics, N.Y. City Civilian Complaint Rev. Bd., to Raymond W. Patterson, Associate Director of the Saltman Center for Conflict Resolution, William S. Boyd School of Law (June 19, 2006) (on file with author).

[46] JAN. N.Y. CITY CIVILIAN COMPLAINT REV. BD. EXECUTIVE DIRECTOR'S REP. 8 (2006); http://nyc.gov/html/ccrb/pdf/ed_2006_01.pdf.

[47] *Id.* (noting that from January through December 2005, for example, there were 2,678 full investigations out of the 6,518 cases closed that year, with 260 cases having one or more substantiated allegations. Of all the cases closed, 56% were truncated).

While the training program seeks to assist investigators in dealing with civilian objections to mediation, it is not able to handle all such objections. In novel situations, we encouraged—as my successor, Victor Voloshin, still does—that investigators either seek advice from the director of mediation, or have a mediation staff member talk to the complainant directly. The goal of all mediation training at the CCRB has always been—and still is—to help complainants make the most informed choice possible when deciding how to resolve the complaint.

C. *What Works: Persuading the Police*

Given the prior history of relations between the CCRB and the police, it was only natural that the creators of the mediation process tried to find a way to encourage officers to participate in mediation. They did this in two ways. First, participation in the process was made voluntary for all parties, and everyone had to agree to mediate for it to actually occur. Just like civilians, officers always had the right to say no so they could not claim anything was foisted upon them.

The second way involved modifying the officer's CCRB history, but this requires some elaboration. One of the agency's major tasks, besides investigating complaints, is to keep records,[48] and every active police officer has a CCRB history—a computerized document that can be printed or viewed online and that lists certain pedigree information about the officer,[49] the case numbers of all complaints filed against the officer, [50] a brief description of each individual allegation, and the disposition of each allegation. This document is also available to police department management—commanding officers, integrity control officers,[51] DAO staff, and members of the police commissioner's office.

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[48] *See* Debra Livingston, Professor of Law, Columbia Univ., Citizen Review of Police Complaints: Four Critical Dimensions of Value, Address to the Eighth Annual Conference of National Association for Civilian Oversight of Law Enforcement (Nov. 1, 2002) (transcript available at http://www.nacole.org/livingston_12_02.htm). Debra Livingston was a former member of the board at the CCRB.

[49] For example, name, age, race/ethnicity, rank, date appointed, command assignment.

[50] If no complaints were ever filed against an officer, the history may be blank in the complaint area, but this happens infrequently. During a career that usually spans twenty years in the five boroughs of New York City and given the nature of the citizenry, it would be unusual for a police officer not to have a complaint filed against him or her.

[51] A precinct integrity control officer is responsible for making sure the officers in that command follow the law.

An officer's CCRB history is considered part of the officer's central personnel index (CPI), along with other police department documentation, like attendance records and records of other complaints not under the jurisdiction of the CCRB, for example. As such, whenever the officer is up for promotion, change of detail, or review for any reason, the CCRB history is an important and integral part of that review for a number of reasons. For one, the police department has a series of monitoring programs in place for officers it finds to be not upholding the standards of the department. Placement in a monitoring program, where an officer becomes the subject of greater supervision, is considered detrimental to the officer's career. All officers are evaluated monthly according to formulas developed by the department, and some require data from the officer's CCRB history. Board dispositions of substantiated complaints—the officer was found to have committed misconduct by the CCRB—and unsubstantiated complaints—the CCRB could not find enough evidence to say the officer committed misconduct, but could not say the officer did *not* commit misconduct—are counted against an officer in those formulas. For instance, one monitoring formula I was aware of looked for officers with six or more substantiated or unsubstantiated complaints in the last five years. Those officers that match the requirements are placed in the monitoring program, where they remain for at least a year and often longer.[52]

When the original mediation process was drafted, the NYPD and CCRB agreed that in successfully mediated cases, the agency would "mask" the description of the allegations on the computer so that police department staff would not be able to see them. Thus, for a complaint that was mediated successfully, the entry on the officer's history would just show the complaint number and a disposition of "mediated."[53]

The most important "carrot" held out to persuade police officers to consider mediation was Operations Order 24, issued under then-Police Commissioner Howard Safir.[54] The key provision in this order was § 14 which stated that dispositions of mediations would not be counted against

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[52] Telephone Interview with Lt. Timothy I. Murphy, DAO liaison, N.Y. City Civilian Complaint Bd. (June 19, 2006).

[53] While the allegations would be masked for a successfully mediated complaint, the CCRB still maintained them in its database for statistical purposes. Data is never discarded.

[54] NEW YORK POLICE DEP'T OPERATIONS ORDER NO. 24 (1998) (The original operations order was issued on April 9, 1998. It has since been revised and renamed Operations Order 13).

officers whenever their personnel files were being reviewed.[55] That meant, for example, that an officer with five complaints on her CCRB history, who successfully mediated the sixth complaint against her, still had only five complaints with respect to the monitoring formulas. This was a tremendous incentive for police officers to consider mediating complaints, and the CCRB noticed that more police officers began to agree to mediation after the operations order was issued.[56]

It was frankly difficult for the mediation unit staff to understand why officers would turn down the opportunity to mediate. If they were successful, the allegations in the complaint would be masked and the complaint would not be counted against them. In addition, everything said in the mediation session was confidential, they would have a chance to be heard, and they might even learn something. And if the mediation was not successful, the case would either return to investigations or be withdrawn. Of course, it made sense for an officer to decline to mediate if the officer had proof positive that the complaint was spurious. But if they did commit the misconduct alleged, the officer would have a much better chance of surviving it unscathed by mediating.

D. *What Works: Flexible Scheduling*

One thing the mediation staff learned quickly was just how difficult it was to get people together at the CCRB at the same time. Officers might not be able to make the mediation sessions because they arrested someone the night before and were stuck doing the paperwork,[57] were injured in the line of duty, were on sick leave, or were notified the day before to testify in court.

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[55] *Id.* at 2 ("14. Any complaint that is mediated will be so noted on a uniformed member of the service's CCRB complaint history and all allegations (force, abuse of authority, discourtesy, offensive language, etc.) will be deleted from the CCRB complaint history. In addition, a civilian complaint which is mediated, will not be considered in the event that a uniformed member of the service's personnel record is reviewed.").

[56] JAN.–DEC. N.Y. CITY CIVILIAN COMPLAINT REV. BD. STATUS REP. 23 (2005), http://nyc.gov/html/ccrb/pdf/ccrbann2005.pdf (noting that officers accept mediation with greater frequency than complainants. In 2004, for example, 69% of the officers offered mediation accepted it); N.Y. CITY CIVILIAN COMPLAINT REV. BD. ANALYSIS OF MEDIATION PROGRAM 2004 COMPLAINTS [AS OF 11/30/05] (2005). That same year, 47% of those complainants offered mediation accepted.

[57] Staff can get an officer's shift changed so that he may attend the mediation. Thus, an officer working the 4–12 shift last night might be reassigned to the day tour today to be able to attend mediation. It is in such a scenario that an arrest the night before might cause the officer to fail to appear at the CCRB the next day.

Civilians had even more reasons: they were leaving the country for two months, they were pregnant, the babysitter did not show up, they forgot the date, they just started a new job and had no time off, they were hospitalized, their elderly parent was hospitalized, or their young child was sick. Through all of those excuses, the staff persevered and kept trying to find a mutually acceptable time to meet because the amicable resolution of the complaint was their major goal.

Such thinking is somewhat heretical at the CCRB. The agency is judged, and judges its employees, on timeliness. If it takes, on average, nine and a half months to complete an investigation,[58] management might press the investigators to do it in eight months, while not neglecting fairness and quality. The focus on timeliness goes back to the CCRB's early days as an independent agency. In its very first status report for July through December 1993, a section on performance evaluation stated:

> The Board contends that the measure of the CCRB's accomplishments should be its effectiveness and efficiency in resolving any submitted complaint. . . . The second proposed indicator, "efficiency," refers to the length of time required for the conclusion of a full investigation. Although not mandated by the enabling legislation, the Board's objective is to complete a full investigation of a case within 90 days and to decide the case within 30 days thereafter. Clearly, the more expeditious the process the more satisfying it will be for the civilian complainant and the subject officer. In these matters, justice delayed may indeed be justice denied.[59]

Cases that were five months old or older from the date of filing were considered part of a backlog, and the size of the backlog was to trouble the CCRB to the present day.

It was an ambitious goal, and the board hewed to it in the next six-month status report, even in the face of evidence strongly suggesting the goal was unattainable, declaring, "Although investigations are now taking approximately eight months to complete, the goal of completion of an investigation within 90 days with another 30 days for review and disposition by the Board remains reasonable."[60] But by the publication of the third status report, the truth became clear to agency management:

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[58] JAN.–JUNE N.Y. CITY CIVILIAN COMPLAINT REV. BD. STATUS REP. 13 (2005), http://nyc.gov/html/ccrb/pdf/ccrbsemi2005.pdf.

[59] JULY–DEC. N.Y. CITY CIVILIAN COMPLAINT REV. BD. STATUS REP. 23–24 (1993).

[60] JAN. –JUNE N.Y. CITY CIVILIAN COMPLAINT REV. BD. STATUS REP. 24 (1994).

> As recently as the previous Status Report . . . this four-month closure parameter was characterized as a "reasonable" goal. Yet, from the beginning of the new CCRB's operations, the 120-day objective has rarely been met. . . . The "90 + 30" objective is now not realistic given the CCRB's present operational circumstances. The framers of the enabling legislation, although cognizant of the 90-day objective, chose not to impose such a restriction on the agency. The original board believed "90 + 30" to be a reasonable and workable objective. . . . However, espousing 90 days for completion of an investigation when it may take three to four weeks to obtain the necessary paperwork from the Police Department and another two to three weeks to schedule an officer for an investigatory interview, or when there are multiple subject officers or witnesses, creates false expectations and has the potential to undermine the credibility of the agency. It also should be noted that the "90 + 30" objective was not realistic under the prior CCRB-CCIB [Civilian Complaint Investigation Bureau]. More often than not, final disposition on cases was not achieved until many months after the 90-day period.[61]

While the July–December 1994 status report went on to say that the CCRB should not be satisfied with complaints that take seven to nine months to investigate and should try to improve timeliness,[62] there was clearly an acknowledgement that four months was an unreasonable time period to allow for investigations on average.[63] Unfortunately, the definition of backlogged cases as being those five months old or older is still operational at the CCRB,[64] and the agency continues to be criticized for it, both by detractors and its own board members.

Since investigations were consistently judged on their timeliness, it was only natural that mediations would be judged on timeliness too. But trying to maintain a complainant's interest in going forward with mediation requires different skills than investigating. Mediation associates need to develop a rapport with the complainant and then maintain it, because the approval process does take some time and obstacles to scheduling can arise repeatedly.

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[61] JULY–DEC. N.Y. CITY CIVILIAN COMPLAINT REV. BD. STATUS REP. 7–8 (1994).

[62] *Id.* at 9.

[63] I observed board members still demanding that investigations be completed in ninety days as late as 2002. I am reminded of A.H. Weiler's statement in a privately circulated memorandum of the New York Times: "Nothing is impossible for the man who doesn't have to do it himself."

[64] JAN.–DEC. N.Y. CITY CIVILIAN COMPLAINT REV. BD. STATUS REP. 217 (2001) http://nyc.gov/html/ccrb/pdf/ccrbann2001.pdf (defining of Operational Backlog. The agency has never revised this definition, but has stopped referring to it in its public reports).

Associates must work to keep up the civilian's interest in going forward, since so much effort and resources are expended just getting the case to the point of scheduling. This led to staff keeping cases open when agency management believed, in the interest of timeliness, they should have been closed. But the persistence of the mediation associates often paid off handsomely in successfully mediated complaints and parties pleased with the process.[65] Still, the time to complete a mediation increased because many cases were kept open for months, leading to criticism by upper management. As long as efficiency is held in more regard than complainant/officer satisfaction, this will be a source of irritation for those running the mediation program and agency management alike.

E. *What Works: The Session Itself*

The most powerful, positive aspect of the mediation program is the actual session. For the complainant, it represents a chance to constructively confront the police officer whose alleged behavior led to the complaint. And for the officer, a mediation session offers a forum for speaking freely and honestly, without fear of reprisal by department management.

Over and over again, we were able to see the positive results of a successful mediation. Even in those cases mediators were unsure would settle, certain behaviors occurred repeatedly. The most common act was a hand extended across the table, often coupled with the words, "No hard feelings." Neither civilian nor officer had a monopoly on this action, but it was clear to the mediators that it represented an affirmative development.

Other actions included opening the door for a party's former adversary at a session's end. While in civilized society this might be considered only polite behavior, within the milieu of a CCRB complaint this can only be considered as a sea change in a person's behavior. Civilian and police officer enter the mediation room as adversaries, and this is clearly evident in their body language—tense muscles, set facial expression, and sometimes the clenching of the fist. For one of them to decide to return to mannered behavior clearly indicates that a re-evaluation of the other has taken place.

Of course, sometimes the positive actions resulting from a mediation surprise even the mediation staff. Two or three times, at least, after a successful mediation, the officer volunteered to drive the complainant home. While to a civilian this seems gracious and natural—the officer's command is usually in the complainant's neighborhood—it is against the rules of the

[65] In one instance, a complainant and police officer mediated a complaint over a year after the case was transferred to mediation, but the result was a resounding success.

Patrol Guide,[66] the compendium of rules and regulations governing what a police officer can and cannot do, especially if the ride will be in the officer's patrol car. Nonetheless, it never became an issue.[67]

Finally, we found over time that some complainants—usually those who were articulate, reflective, and thoughtful—were satisfied with "agreeing to disagree." These civilians were able to make their case to the officer, even though the officer may not have agreed with them, and were satisfied with that result. Both parties were able to leave the mediation session with positive feelings about their interaction.

V. WHAT DOESN'T WORK AND WHAT MIGHT MAKE IT BETTER?

A. *Follow-up Training*

Much effort is expended giving investigators training on how to handle potentially mediable cases. A full day is allotted during their initial training program to introducing them to the mediation process in place at the CCRB. Special training sessions on how to handle objections to mediation by complainants have been held frequently. And the mediation staff, from the director to the associates, has always maintained an open door policy when the investigative staff has questions. But I, and my successor, still found serious problems with the way investigators presented mediation to complainants.

One obvious reason for these problems is simply the sheer amount of information about mediation that investigators need to know to be able to present it intelligently to complainants. Most people innately understand the concept of an investigation: its focus is a past incident that requires an investigator to ask a complainant questions to develop the facts and determine the credibility of both the witnesses and evidence unearthed in the process. Mediation, on the other hand, is far less concerned with facts, and focuses not on the past but on the future, with the central figure mediator making no determinations on anything at all. For investigators, mediation seemed like the opposite of investigation and for them to speak knowledgeably and comfortably about the process to a civilian was like writing a term paper in script with their nondominant hand—awkward and

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[66] *See* NEW YORK CITY POLICE DEP'T, NEW YORK CITY PATROL GUIDE 202–22 (2000).

[67] Once, at the end of a successful mediation, the officer asked the complainant out for coffee. The CCRB preferred to believe that this action was completely innocuous and simply represented the officer's good feeling for the results of the mediation.

trying. When you couple the seemingly contradictory nature of the instruction on mediation we asked them to absorb in their training with the speed we asked them to do it, it is no wonder that many gave less than stellar presentations in the beginning.[68]

A second reason for the problems involved team management. It was always clear to me that, while the handouts I prepared on the mediation process would be helpful for investigators presenting mediation to a potential participant, it would be surprising for any investigator to get it right from the beginning. They needed follow-up training, and that follow-up training had to come from the management team.

Team managers, supervisors, and assistant supervisors all received the basic training in mediation and had experience with cases deemed to be mediable. They knew, or should have known, the basics of the mediation process and how to handle complainant objections. They should have given follow-up training to their investigators, which would consist of listening to investigators' taped phone conversations with civilians and giving feedback on what was done correctly, along with what needed improvement.

Unfortunately, that was not the way it happened at the CCRB. In that real world, the director of mediation would gather all of the cases recently transferred to the mediation unit and listen to every taped conversation an investigator had with a complainant. The goals were to determine whether: investigation and mediation had been presented correctly and objectively to the civilian; the investigator had dealt with any objections appropriately; the complainant made an informed decision. Where there was an egregious error, the director would consult first with the team manager or supervisor and then bring in the offending investigator, along with those managers, to let them all hear what was done poorly. Suggestions for improvement were always supplied.

This practice was ineffective for a number of reasons. To begin with, it required the director of mediation to spend a significant portion of the day listening to tapes. The amount of time depended on the number of cases in the unit's "in box" and the number of conversations the investigator taped.[69] In addition to listening, the director needed to document the offending parts

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[68] To compound the difficulties, new investigators were often given potentially mediable cases to cut their teeth on. Management felt these were "easier" cases that could be handled by neophytes, something the mediation staff never agreed with.

[69] While investigators were directed to cue the tapes to that section where they presented the processes and handled any objections, they rarely complied. This required the director to listen to much extraneous conversation, searching for the presentation he needed to evaluate. It was not unusual to find two or three cassettes in a case file. It was also not unusual to spend half the work day listening to the tapes.

of the phone conversation, either by writing down the faulty parts of the presentation[70] or by noting its place on the tape counter. And personalized, targeted training had to be provided to the investigator in the subsequent meeting. Unfortunately, poor presentations were not a rarity.

Some investigators reacted poorly to critiquing, and this seemed to be correlated with the length of time they had been at the agency: the more experienced investigators usually took the most umbrage. This was true even when I went out of my way to explain that the critique was only meant to improve their presentation.

Isaac Newton posited that every action has an equal and opposite reaction.[71] We experienced something analogous: those investigators who reacted poorly to the critique subsequently sent fewer cases to mediation or stopped sending any at all, perhaps because they did not want to be reprimanded again. This damaged the program because we learned early on that roughly one in ten cases transferred to the mediation unit from investigations actually resulted in a mediation. It was clear that in order to mediate as many appropriate cases as possible, we needed to have a large number of cases referred to the unit. That is because cases can and do fall off the mediation docket as they make their way through the approval process.[72]

Agency management strongly encouraged investigators to offer mediation whenever the complaint met the guidelines of the program.[73] If investigators decreased the number or stopped sending cases to the mediation unit, the number of cases mediated each year would also decline—a result that was clearly the opposite of the agency's goal of mediating as many appropriate cases as possible.[74] But there was no way to prove investigators

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[70] This required repeated replaying of the tape to get the verbatim transcript, another time-consuming task.

[71] *See* Wikipedia, Newton's Laws of Motion, http://en.wikipedia.org/wiki/Newton's_laws_of_motion (last visited Oct. 20, 2006).

[72] *See infra* pp. 27–32.

[73] One way this was accomplished was by updating the agency's computer tracking system with fields that appeared automatically if the case met mediation guidelines and required investigators to note whether they offered mediation to the civilian or not.

[74] *See generally* NYCLU: A SEVENTH ANNIVERSARY OVERVIEW OF THE CIVILIAN COMPLAINT REV. BD (July 5, 1993–July 5, 2000), http://www.nyclu.org/ccrb7.html (last visited Oct. 27, 2006). Some critics, notably the New York Civil Liberties Union, have complained that the CCRB was depriving complainants of their right to an investigation by offering mediation. This has never been the agency's policy, given that the mediation process has always been voluntary for all parties. Board members, who make the final disposition in every complaint, have articulated their awareness that any disposition they make in a case will be unsatisfactory to one or more of the parties (and sometimes both),

were purposely choosing to send fewer cases or not to send any at all, short of reviewing every complaint that came into the agency, noting those that seemed mediable on initial reading,[75] and following up to see what investigators did with the recommendation—a Herculean task by any standards and impossible given the limited resources of the mediation unit.

Ideally, team management would be reviewing all taped conversations their investigators had with complainants in potential mediations. Poor presentations would be corrected by individualized training at the team level. In more serious cases, where the investigator's presentation was more than just poor, more specialized instruction by the mediation unit staff would be warranted. But this is not the real world, and the director of mediation still reviews all tapes to see if the investigators have done a decent job.

B. *Staffing Policies for the Mediation Unit*

When I first came to the CCRB to implement the mediation program, I was given a staff consisting of a clerical person who kept paper records and three former investigators who made the calls to complainants. These investigators, however, had been assigned to the mediation unit because they were found to be incompetent to investigate complaints and were one step away from termination if they remained on an investigative team. The mediation unit accepted them because there were no other staff members available. They were more of a millstone around the neck of the program than a life preserver, and it was indicative of the mindset of the CCRB management at the time that these employees were considered sufficient for the needs of the mediation program.

Over the course of my tenure, the agency was finally able to terminate two of those investigators, while one was transferred back to investigations with limited responsibilities. For a while thereafter, the mediation program was staffed solely by me and the clerical assistant. Finally, in August 2001, I was able to hire a mediation coordinator who had a master's degree in conflict resolution. This made eminent sense: if you need to answer questions about mediation, you should have a background in the field. But agency management decided against hiring any more employees with mediation

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whereas mediation offers both the complainant and police officer the chance for greater satisfaction. For that reason they are supportive of the mediation process and encourage the investigators to offer mediation in all cases that meet the guidelines for the program, not as a way to reduce the docket but as a process that affords greater satisfaction to all concerned.

[75] The initial complaint is often missing key information and sometimes is not even an accurate description of the incident.

skills and training. They preferred to transfer investigators to the unit who already knew the way the agency functioned; these new mediation associates learned mediation theory at one of the two annual trainings run by the Columbia Law School mediation clinic.

It was a disappointment not to be able to hire mediators for positions in the unit. Process knowledge and experience, and the confidence they give a practitioner, could have clarified many issues complainants had about mediation. No disrespect is meant toward the investigators who transferred to the unit. They took the training and did as well as they could. But because they had never actually mediated a case, they had no practical familiarity with the process, tended to stay a limited period of time, and then moved on to better jobs when they could, which always left the mediation unit back at square one.

For a short period of time, the unit was staffed by the director, the mediation coordinator, an experienced investigator, and a clerical who was studying for a master's degree in public administration (the latter two were trained in mediation but had no practical experience as mediators). This arrangement turned out to be highly symbiotic because the investigator was sharp, knowledgeable, articulate, and motivated. She was able to assist the other staff members when investigatory questions arose, and the mediation coordinator, with his theoretical and practical background in the field, was able to help her and the clerical with questions about the process. The clerical's great skill was the ability to engage most complainants in an almost maternal fashion.

That experience leads me to suggest that the mediation unit as currently constituted would work best when composed of trained, experienced mediators and veteran investigators, in fairly equal proportions. If the unit is staffed solely by former investigators, they will lack a depth of understanding about the mediation process. Likewise, a unit composed solely of mediators with no investigative experience will know all about the process but very little about investigations or the culture of the police. A balanced combination of investigators and mediators appears to produce the optimum staffing quality required to run the mediation program most efficiently.

C. *The Approval Gauntlet*

Earlier it was stated that a number of approvals had to be secured before a mediation associate could even begin to schedule a mediation.[76] After first getting the complainant's consent, a case must be approved by the mediation

[76] *See supra* note 69.

unit, the NYPD Department Advocate's Office Management Analysis Section,[77] and the CCRB's ADR committee before seeking the police officer's consent.[78] This approval process was agreed to by the agency and the police department prior to my arrival.

It is reasonable for the mediation unit to have input into whether a case is mediable or not. There may be issues of a complainant's competency or intractability that would make mediation a pointless exercise, and experienced mediation staff members would be in the best position to identify those issues. But the other required authorizations not only delay the scheduling of the mediation, but can depend on factors that could be kindly referred to as arbitrary and capricious.

It can be argued that the aim of getting the approval of the police department and the ADR committee was to ensure that only suitable cases got to mediation. But the addition of so many other hands in the approval process not infrequently led to decisions that did not seem in the best interest of the disputing parties. The police department and board see things from different vantage points, and this led to cases that seemed eminently mediable being ejected from the unit during this approval process.

During the early years of the program, for example, the police department never bothered to inform us why they found a particular officer unacceptable for mediation. We assumed it was due to other complaints filed against the officer that were outside the jurisdiction of the CCRB, like corruption.[79] Over time, we were able to learn that, while other complaints might take an officer out of consideration for mediation,[80] the department also considered an officer's attendance record, sick leave frequency, and the nature of the allegations in the CCRB case.

To understand why attendance and sick leave records might remove an officer from consideration, it is necessary to understand that the police department has a completely different philosophy about mediation than the

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[77] The Management Analysis Section was formerly called the Disciplinary Assessment Unit and was a separate unit from the Department Advocate's Office.

[78] JAN.–DEC. N.Y. CITY CIVILIAN COMPLAINT REV. BD. STATUS REP. 8 (2003), http://nyc.gov/html/ccrb/pdf/ccrbann2003.pdf.

[79] The NYPD's Internal Affairs Bureau has jurisdiction over allegations of corruption.

[80] For example, one female officer was found unacceptable in a case the mediation unit thought was simply perfect for mediation. Conversations with the Disciplinary Assessment Unit revealed that the officer had two prior complaints against her for drawing her service revolver on her boyfriend. The mediation unit agreed with the department in that case that putting the officer in a small room with the complainant and mediator would not be reasonable.

CCRB. While the agency believes all parties who are willing to mediate should be given the opportunity to do so, for the department, mediation is a perquisite that should be available only to police officers in good standing.[81] An officer who takes an inordinate number of days off and is not considered in good standing will not be found an acceptable candidate for mediation. The CCRB always deferred to the police department's decision in such matters, and such cases would be promptly returned to investigation. This was true even in cases where it was fairly clear the disposition would be "unsubstantiated."[82] The problem, of course, is with the term "good standing," which has a decidedly elastic nature.

That the department also considers the nature of the allegations in a case is more egregious. The original mediation agreement between the CCRB and NYPD set forth the allegations that were to be considered mediable.[83] Under Police Commissioner Raymond W. Kelly, we found the department rejecting cases where a black or Hispanic slur was alleged. On further investigation, we were told that the commissioner did not want such allegations mediated. Rather, he wanted them investigated, with the possibility of punishment, because he would not abide officers making such slurs. This was a unilateral change in the original agreement which the board was not willing to pursue as an issue. As it turned out, there were not that many allegations of black and Hispanic slurs in cases transferred to mediation each year, which led the ADR committee to defer to the police commissioner.

Approval by the ADR committee had its own problems. These issues involved decisions on whether a particular officer should be allowed to mediate and, again, it came down to philosophies. For example, in the early years of the program, the city council designee, Charles M. Greinsky, who stated he was "a community mediator and arbitrator for more than 25 years,"[84] routinely refused to approve complaints involving "probationary

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[81] JAN.–DEC. N.Y. CITY CIVILIAN COMPLAINT REV. BD. STATUS REP. 7 (2002), http://nyc.gov/html/ccrb/pdf/ccrbann2002.pdf (noting that officers with lengthy records cannot participate).

[82] *Id.* at 10. Cases are closed as unsubstantiated when "the weight of available evidence is insufficient to substantiate, exonerate or unfound the allegation." Both complainants and subject officers experience dissatisfaction with this disposition, since neither one has been found more credible.

[83] *Id.* at 4. Those allegations included use of force (where no injury or property damage was alleged), abuse of authority allegations that were threat or intimidations, all discourtesy allegations (cursing, rude gestures, nasty words) and all offensive language allegations (slurs of an ethnic, religious, racial, gender, sexual orientation, or physically challenged nature).

[84] *Id.* at xi.

officers"—those on the force for a year or less. He reasoned that if the new officer got a complaint in the first year on the job, something was intrinsically wrong with the officer, so he should be reprimanded sharply and punished to correct the defect. Of course, a compelling argument could be made that such an officer would be perfect for mediation, where some retraining could take place and the chance to improve was available. Surprisingly, given his background as a mediator, Greinsky was never moved by the counterargument, and cases were usually dropped from mediation and returned to investigations because of his strong feeling about not allowing probationary officers with complaints to mediate.

For the mediation staff, Greinsky's argument made no sense, but it did point out how susceptible the process was to personality and whim. It was especially maddening to have a mediator stop cases from going to mediation, but it was the way it worked in the real world. And it did not end with Mr. Greinsky. All three board members who sat on the ADR committee would reject cases from time to time, although not frequently. One of them would usually argue that, based on patterns in the officer's CCRB history, an investigation was preferable because if the allegations were true, punishment was more desirable than resolution with the complainant. This thinking could be said to turn the committee members into a form of judge and jury in the case, making assumptions without the benefit of hearing the officer's testimony or viewing any other evidence.[85] Again, it was difficult for the mediation unit to accept their decisions, since there was never any guarantee that a case would receive a particular disposition. The mediation staff always felt it was best to allow the officer and civilian to meet to try to work out their issues, because the possibility of gaining satisfaction from the result was reasonably high.

After dealing with the mediation approval process for eight years, my recommendation would be to discard the departmental and ADR committee endorsements. Most cases are approved by both entities, and is it really that important to return a small number of cases to investigations to seek punishment of officers for what are, in the end, truly minor complaints? These two approvals take a good amount of time to obtain, too. The department is supposed to respond on a subject officer's acceptability in a timely manner,[86] but does not always comply with this requirement. And the ADR committee meets once a month. If there is an issue, the case is put over

[85] Cases transferred to mediation contain only the complainant's story of the case and usually nothing more in terms of evidence or rebuttals.

[86] Telephone Interview with Lt. Timothy I. Murphy, CCRB Liaison, NYPD Department Advocate's Office (Sept. 7, 2006).

to the next meeting time. It is not exceptional for the committee to hold a case open for two months or more waiting for more information, like copies of the other complaints on an officer's record. Such a delay often cools the ardor of the civilian wanting to mediate (at this stage the police officer does not even know about the process). I do not think the loss of these two approvals would impact the mediation of any given complaint to a measurable degree. On the contrary, if the officer agrees, the mediation could take place much closer in time to the incident, which could increase the satisfaction level for all concerned.

D. *Communicating with the Officer*

One final thought on what does not work and how to fix it: the department officially prohibits CCRB investigators and mediation staff from contacting police officers directly.[87] Everything is supposed to be done through the liaison officer of the Management Analysis Section or the NYPD's Appearance Control staff, a separate unit in each of New York City's five boroughs that is supposed to notify police officers when they must appear to testify in court, for a CCRB interview, and for mediation. Appearance Control is notoriously unreliable for notifying officers. Even calling the command directly to leave a message is not a trustworthy technique.[88]

Investigators frequently ignore the department's prohibition, calling precincts directly to speak to the integrity control officer or the subject officers themselves. Mediation staff took to circumventing the rule in 2002. They would leave messages asking for a return call from the officer and requesting that the officer leave his cell phone number if the officer did not get to speak to a mediation staff member directly. Once we had the cell phone number, we could talk to the officer directly, eliminating the bureaucratic obstacle of Appearance Control.

The simplest solution would be for the NYPD to remove the prohibition and allow mediation associates to contact officers directly. We could never understand the reason for the prohibition in the first place. Our calls were simply meant to give officers information about a process that could be highly beneficial to them, answer their questions, and calm their fears. With

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[87] There is no official record of the NYPD's position, but it is common knowledge within the CCRB.

[88] It is not unusual for other officers at the command to erase or remove a notice to the subject officer as a prank.

this easy change in the rules, the NYPD could improve the efficiency of the mediation program dramatically.

VI. The Effect of Stakeholder Expectations

Besides the civilian who makes the complaint and the officer who agrees to mediate, there are four major stakeholders with a significant interest in the mediation program: the NYPD, the agency's board, its administration, and the New York Civil Liberties Union (NYCLU).[89] The assumptions, beliefs, and presuppositions of these four entities have the power to enhance or weaken the mediation process offered at the CCRB, and an examination of their positive and negative expectations will show the extent to which that takes place.

A. *The NYPD*

One positive expectation held by police department management is that mediated complaints represent a better way of resolving civilian complaints against police officers than investigation. This makes good sense from the police perspective. An investigation leads to a disposition, an entry on the officer's history, and the possibility of an administrative trial. Not only does an investigation and its aftermath take an officer away from his work, but it diminishes his morale and affects his ability to be promoted, change details, and sometimes to even keep his job. If the officer successfully mediates his complaint, there are no such negative results. And this expectation is very good for the program, because as long as the department maintains this belief, mediating complaints can continue. It is absolutely dependent on the support of police management, beginning with the commissioner.

Another positive belief that police managers hold is that officers may learn from the experience. The mediation staff believes this fervently too, and has seen it happen. For example, officers often speak in what they feel is a business tone when talking to civilians, but civilians can find the tone harsh or arrogant. Over my time at the CCRB, the agency received a good number of complaints about "the way the officer talked to me." While officers may think their tone was professional, civilians are more than willing to explain how abusive it sounds to a listener, and hopefully the officers will learn from this experience. This belief in the instructive power of mediation also

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[89] *See* About The NYCLU, http://www.nyclu.org/about.html (last visited Oct. 21, 2006). The New York Civil Liberties Union was founded in 1951 as the New York affiliate of the American Civil Liberties Union.

supports the continuance of the mediation program. Anything that helps the officer learn how to be better is a plus from the police vantage point.

There is a final pragmatic, positive expectation. If officers mediate successfully, there will be no need to discipline them or to utilize the police resources dedicated to regulating the rank and file. That represents a cost saving that is greatly desirable.[90] And from the CCRB perspective, it is another factor that keeps the department supportive of the mediation program.

But every yin has its yang. Two expectations can be considered to weaken the program, and both have been discussed earlier. The less serious one concerns the department's decision to reject officers as unacceptable in complaints involving allegations of black or Hispanic slurs.[91] While this decreases the number of complaints the CCRB can consider mediating, the number of complaints actually affected by this decision has been small. Still, the unilateral decision of the department does take some cases out of the mediation program. As was mentioned earlier, a larger pool of potentially mediable cases at the beginning of the approval process leads to more cases actually being mediated, so anything that diminishes the initial number of cases would be a detriment to the program.[92]

From the CCRB perspective, the departmental expectation with more serious consequences concerns how the NYPD views mediation.[93] A belief that only officers in good standing should be offered mediation directly affects the number of complaints that can be mediated. It also stands in opposition to the CCRB's philosophy that mediation is a beneficial process for resolving all complaints that fall within the guidelines, not simply a "perk" for officers who behave well. And once again, a diminished, initial pool of potentially mediable cases inevitably leads to fewer complaints reaching the mediation table where the issues can be resolved. This result goes against the purported interest of the NYPD in mediating, rather than investigating, civilian complaints against officers, and it remains difficult to see why this departmental expectation is still in place.

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[90] If a case is investigated, a panel of board members must review it and make the final disposition. They get paid $250 for each six hour time period they work. If the case is substantiated, the NYPD's Department Advocate's Office must review it and determine the punishment, if any. If there is a trial, the parties need attorneys and the DAO must supply an ALJ. All of this costs money, which is not spent if the case is mediated.

[91] *See supra* Part V.C and accompanying notes.

[92] *Id.*

[93] *See supra* Part V.D and accompanying notes.

B. *The Board*

The actual CCRB has thirteen members and probably as many viewpoints on issues affecting the agency. This is only natural for a board whose members are selected by governmental entities not always in harmony with each other. Yet there has emerged a consensus of sorts on the mediation program, albeit with some board members more fervent than others about the board's expectations.

No mediation program could run at the CCRB without the board's support, and an important expectation voiced on more than one occasion by board members is that complainants and police officers are often better served by mediation than investigation. The closer the board members are to the mediation program, the more likely they are to ardently believe that statement, and the ADR committee members were the firmest in this conviction.

Board members read hundreds of cases a month, and they are quite aware that not only is it difficult to prove an allegation against a police officer,[94] but many times neither complainant nor officer is more credible or has the facts that meet the preponderance of evidence standard for the board to find in their favor.[95] This causes great dissatisfaction for the civilian and, where neither party has the evidence or credibility to prevail, for the officer, too. They do not feel they were heard or believed. The board members realize that if these same civilians and officers were able to mediate the complaint, the chance for satisfaction would be much higher, the outcome could be more positive, and the parties would have more respect for the process that gave them that satisfaction.

To varying degrees, board members also believe that the satisfaction levels of mediation participants are higher than for those who participate in an investigation. Satisfaction comes in two flavors at the CCRB: satisfaction with the process and satisfaction with the substance or result.[96] Process satisfaction is dependent on how well the complainant or police officer was treated by the CCRB staff and includes such factors as the timeliness of the process, its fairness, the quality of communications from the

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[94] In many CCRB complaints only one civilian and one police officer are involved. In the absence of any hard evidence, these cases often become he said-she said scenarios.

[95] JAN.–JUNE N.Y. CITY CIVILIAN COMPLIANT REV. BD. STATUS REP. 14 (2005). Allegations such as these are usually disposed of as unsubstantiated. In the latest CCRB status report (as of July 2006) for January to June 2005, 25% of all fully investigated allegations were found to be unsubstantiated.

[96] *See supra* Part II.

investigator/mediation associate to the complainant, and the degree to which the person's special needs were accommodated.[97] Both investigators and mediation associates strive to give parties the most satisfaction possible when it comes to process.

As for satisfaction with the substance—the results of the process—only the mediation staff can say that this is their goal. Participants in mediation should always feel they were heard, and hopefully were able to resolve the issues between them. Investigators are hampered because they simply cannot say their goal is to satisfy the complainant or the officer with respect to the result. And for complainants, the only satisfactory result is a substantiated allegation. Thus, it often happens that complainants are highly dissatisfied with the substantive results of an investigation.[98] For the mediation process, with its over 90% success rate for those cases that make it to the table,[99] substantive satisfaction is high—not 100%, but high all the same.

These two positive expectations on the board's part enhance the mediation program because they engender support for the process and encourage the investigative staff to send all cases that fit the guidelines to mediation. They also increase the morale of the mediation unit staff because of the board's publicly stated program approval.[100]

But there is a negative expectation, too, that acts to weaken the mediation program. This belief comes directly from one of the board's positive expectations: if civilians and officers are often better served by mediation than investigation, then it must follow that more cases should be mediated.

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[97] The CCRB's offices are located at the southern end of Manhattan, and while there are many subway lines with stops in the area, along with bus routes, for some complainants it is a difficult journey. The agency allows investigators to hold their interviews outside its offices if that is more convenient for complainants, and pays for car services to bring and return mediation participants who have a long trip. In addition, the city of New York has residents who speak all languages. The agency uses AT&T's translation services on phone calls and has a contract for interpretation services for interviews if necessary. Periodically, a list of the investigative staff and the languages they are fluent in is published, so that their services may also be used for translation purposes.

[98] JAN.–DEC. N.Y. CITY CIVILIAN COMPLIANT REV. BD. STATUS REP. 83 (2004). Between 2000 and 2004, for example, an annual average of about 12% of all cases (averaging 256 cases per year) fully investigated by the CCRB contained one or more substantiated allegations.

[99] *Id.* at 23. There were 113 successful mediations in 2004 and 5 that went to impasse, resulting in a 96% success rate for those cases that made it to the mediation table.

[100] *See* TRANSCRIPT OF THE PUBLIC MEETING OF THE CIVILIAN COMPLAINT REV. BD. 10–12 (Jan. 11, 2006), http://nyc.gov/html/ccrb/pdf/cc_2006_01_11.pdf.

This statement, which seems logical on first glance, would be a truism if complaints could be funneled to mediation at will, with no other considerations. The argument is simple: if it's better to mediate, well then, let's just send more cases to mediation. But the statement fails to take into account that the process is voluntary on the part of the complainant *and* the officer, so even cases that look perfect for mediation and theoretically should reach a satisfactory settlement will not necessarily get to the mediation table. And the expectation ignores the approval process, where otherwise ideal cases for mediation are also removed from the system.

Nevertheless, the expectation is there, and if the number of cases going to mediation does not increase, pressure is brought on agency management to get those numbers up. But here's the rub—I stated before that one of the side effects of the current protocol of critiquing investigators who make poor presentations is that they start sending fewer or no cases to mediation.[101] This intentional act is harmful and should be dealt with on an individual basis with the particular investigator. The investigators who make a good faith effort to present mediation well and encourage complainants to choose mediation where appropriate, and yet have complainants decline to participate, also wind up sending fewer cases to mediation, but through no fault of their own. The board's expectation, however, pushes agency management to address both scenarios with the same directives—either more training for the investigative staff or sharp reprimands to team management. This has a deleterious effect on the investigators trying to do the right thing because the fault does not lie with them, but with the hardened positional stance of the complainant. When all is said and done, if someone does not want to change their mind, no amount of cajoling or gullying can make that person see it differently. Sending investigators, who are following the guidelines and attempting to counter objections as the agency instructed, for more training makes them feel their work was unacceptable, leads to lower morale, and lessens motivation.

C. *The CCRB Administration*

It is not surprising that the expectations of the agency's management closely parallel those of the board. The executive staff must answer to a board that, at least for my tenure at the CCRB, has not been averse to micromanaging. This can cause much tension at the highest levels of the agency because the board may have the last word as a matter of law but

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[101] *See supra* Part V.A.

certainly may not get it right.[102] Because everything flows downhill in an organization, tense management spreads that ill feeling to the rest of the staff, making the work environment very uncomfortable. In my early years at the agency, the friction between some members of the board and agency management was palpable, and the monthly board meetings had all the appeal of surgery without anesthesia.[103]

The problem can probably be traced to the original set-up of the independent CCRB. In other city agencies, the agency commissioner sits on the agency board (if there is one) as the chair. At the CCRB, the executive director reports to the board. That gives the executive director far less power than other city commissioners, including no voting rights. Ideally, the executive director should be the chair of the CCRB with a vote and more ability to influence what the board does. But because the executive director must answer to the board, any expectations the board has tended to become the agency's expectations, too, simply for survival reasons.

Clearly, the agency administration believes as the board does that parties are better served by mediation than investigation, especially in those cases that would probably be closed as unsubstantiated. It would not be in the agency's interest to provide a service to the public or the police that consistently disappoints them.[104] With a 7% substantiation rate for

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[102] For example, in the last half of the 1990s the board members decided that they should be called commissioners. When the then-deputy executive director for administration researched the issue and informed them that protocol held they could not do that, since none of them had received commissions from the city, they simply ignored her. The truth is they are simply board members, but their nameplates, prominent at every public meeting, to this day say "Commissioner."

[103] The board has changed a number of times since I started in December 1996, and although some of the old lions are still there, its relationship with agency management has mellowed somewhat. This is not to say that board members are no longer capable of making outrageous demands or demonstrating an appalling lack of understanding of agency matters—they can and they do.

[104] CCRB administration has tried on many occasions to explain to the public that they cannot guarantee that complaints will be substantiated. What the agency *can* offer is an investigation that is thorough, fair and timely. Objectively, that is all the CCRB can give the public, but that public is often scornful of anything short of a finding in its favor. While the agency can be proud of offering well-executed investigations, negative public response is never pleasant to hear. Mediation, with its win-win goal and high success rate, offers the possibility of more positive public regard for the agency, although the actual number of mediated cases is still quite small compared to the number of investigations.

allegations fully investigated during the first half of 2005,[105] a 36% exoneration rate,[106] and a 19% unfounded rate,[107] we can comfortably assume that many civilians were disappointed with the investigative process. The 25% unsubstantiated rate for the same time period suggests that many officers were probably unsatisfied, too.[108] Management's positive expectation, strongly supported by the agency's own data, enhances the mediation program by making it a desirable alternative to investigation.

As stated earlier, though, the board maintains the expectation that if mediation serves the parties better than investigation, then more cases should be mediated, and this becomes the agency's expectation, too.[109] Unfortunately, that leads to a corollary negative expectation on the part of agency management: if the number of cases mediated does not increase, the investigative and mediation staffs are not performing satisfactorily.

There is no question the possibility exists that a particular investigator or mediation associate may err or blunder in a given situation, but such failures are not the sole cause of cases not going to mediation. Complainants (who agreed to mediation in only 46% of all eligible cases in 2005)[110] may be unpersuaded by even the best presentation. The department and the ADR committee may find reasons to reject a case and the subject officer may believe she can prove she did not commit misconduct. None of these reasons is the fault of the investigator.

Agency administration needs to learn that the mediation process may be self-limiting in the sense that not everyone is going to want to participate in it, and that is okay. The voluntary nature of the program means a complainant or officer can decline to mediate for any reason, including whim, with the same result—the case does not go to mediation. Thus, management should encourage mediation in all appropriate circumstances, train staff to present the process clearly and well, but accept gracefully if the case fails to go to mediation for reasons outside the investigator's control.

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[105] JAN.–JUNE N.Y. CITY CIVILIAN COMPLIANT REV. BD. STATUS REP. 14 (2005), http://nyc.gov/html/ccrb/pdf/ccrbsemi2005.pdf.

[106] *Id.* A disposition of exonerated means the board found the officer did what the complainant said, but was justified in doing so. *Id.* at 8.

[107] *Id.* at 14. An unfounded disposition means the board believed the allegation never occurred. *Id.* at 8.

[108] *Id.* at 14.

[109] *See supra* Part VI.B.

[110] N.Y. CITY CIVILIAN COMPLAINT REV. BD. ANALYSIS OF MEDIATION PROGRAM 2005 COMPLAINTS [AS OF 01/06/06] (2005).

D. *The New York Civil Liberties Union*

While I was at the CCRB, the NYCLU was the most important and consistent critic of the agency. Its executive director at the time, Norman Siegel, regularly harangued the board at its public meetings regarding the agency's alleged deficiencies and failures. Month after month in the late 1990s, Mr. Siegel would take the floor and castigate board members and the executive director, playing directly to the media who followed him like sharks to chum.

The NYCLU, and Mr. Siegel in particular, played a large role in events leading up to the passage of the law making the CCRB independent from the police department.[111] To hear Mr. Siegel tell the story, one would think his testimony alone persuaded the city council to pass the legislation; but of course he was only one of many witnesses who felt strongly that oversight of the police should be in civilian hands.[112]

I cannot think of any positive expectations the NYCLU had that affected the mediation program. This was no doubt due to the philosophical differences between the CCRB and the NYCLU. It was clear that Siegel and the NYCLU saw the CCRB as an advocate for civilians complaining about the police. Mr. Siegel habitually complained about the agency's low substantiation rate, relating it to poor investigations. It was obvious that the only way the CCRB could pass muster for the NYCLU was to increase the substantiation rate—i.e., find more officers guilty of misconduct.

But the CCRB is a quasi-adjudicative body. Its task is to thoroughly investigate complaints fairly and in a timely manner, not to take sides, and to make a determination as to whether an officer is guilty of misconduct. Dispositions are based on the merits of the case, not on an agreed-upon goal. The agency has never sought to increase its substantiation rate, an objective that goes against any idea of fairness. The NYCLU is famous for taking on causes that to some seem outrageous but fit its mission to protect human rights well. Nevertheless, it is impossible to imagine the NYCLU, and Mr. Siegel in particular, going into a criminal court anywhere in the country and reprimanding the judge because her conviction rate was too low. Yet that was essentially what he did every time he castigated the CCRB for its low substantiation rate.

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[111] *See, e.g.*, Testimony of the New York Civil Liberties Union Before New York City Council Committee on Public Safety About the Civilian Complaint Review Board, Mar. 21, 2006, http://www.nyclu.org/ccrb_tstmnyr_032106.html.

[112] *See* James C. McKinley, Jr., *Deep Divisions on Policing the Police*, NY TIMES, Oct. 3, 1992, § 1 at 27.

The NYCLU did have two negative expectations that seemed to ignore any of the good results mediation was able to achieve in a case. The first was the presumption that the CCRB was denying justice to those people who mediate their complaints—"justice" in this sense means finding in the complainant's favor. Considering that the average substantiation rate for all fully investigated allegations for the five-year period between 2000 and 2004 was just 8%,[113] justice was denied 92% of the time.[114] Less than 2% of all cases closed during those years were mediated.[115]

It is difficult to see how the mediation process denied justice, since the odds of prevailing were and remain small. The NYCLU, though, clung to this belief even though civilians who do not mediate are likely to reap little satisfaction from the process. To deny the positive results of mediation makes the NYCLU look shortsighted and small-minded, unless you recognize that this position is the only possible one it could take according to the group's basic premise that the CCRB should be an advocate for complainants.

Finally, the NYCLU maintains the negative belief that the rights of complainants who mediate are being ignored. This is simply not true since the CCRB specifically exempts from consideration for mediation those complaints where a civilian alleges personal injury, property damage, or both. The agency is quite aware that most complainants are *pro se*, and the agency does not want to put them in the position of waiving any claim of damages they may be entitled to.[116] All cases found mediable contain allegations that would not be subject to suit.[117] Contrary to the NYCLU's contention, no rights are bargained away in the mediation process, and the agency cannot be accused of ignoring such entitlements.

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[113] JAN.–DEC. N.Y. CITY CIVILIAN COMPLIANT REV. BD. STATUS REP. 84 (2004), http://nyc.gov/html/ccrb/pdf/ccrbann2004.pdf.

[114] *Id.* at 83–84. From 2000 through 2004 the CCRB closed 24,168 complaints, fully investigating 10,898 cases that contained 38,090 allegations. A complaint can have more than one allegation. There were 3,066 substantiated allegations.

[115] *Id.* at 83. During the same period 352 cases were mediated, representing 1.5% of all closed cases.

[116] The standard resolution agreement, developed for the program by the New York City Law Department, contains a waiver and release for any future claims arising from the incident that led to the complaint. The waiver and release applies to all parties in the complaint, the NYPD, and the City of New York.

[117] For example, some past complaints that were mediated contained the simple allegation that the officer was rude to the civilian. Such an allegation, which often involves the officer telling the civilian to "shut up," could be stinging and painful for the complainant but not actionable, in the legal sense.

These negative expectations on the part of the NYCLU, however, diminish the mediation program. They affect the morale of the investigative and mediation staffs who hear NYCLU representatives disparage the program at public board meetings. More significantly, although this cannot be decisively proven, NYCLU clients—who are encouraged to file complaints with the agency—cannot help but be affected by their attorney's disapproving view of the CCRB's mediation program. It is highly likely that such clients will decline the opportunity to mediate, losing the chance to resolve their complaint satisfactorily.

VII. CONCLUSIONS

On paper, the CCRB's mediation program appears to be an attractive alternative to the investigative process offered to complainants, offering the possibility of a higher level of satisfaction for both the civilian and the police officer. According to the scheme devised by the agency and the NYPD, cases that meet mediation guidelines should move smoothly from investigations through the approval process, coming to a scheduled mediation in a timely manner. Complaints containing some factor making them inappropriate for mediation should be able to be identified during that approval process, thus ensuring that the cases that actually make it to the mediation table have a very good chance of resolving successfully.

In reality, like all systems devised by human minds, the mediation process does have some features that work extremely well, but has other components that do not. In addition, the expectations of the entities with a stake in the mediation process have the abilities to enhance or weaken the program. Like a chemical reaction in equilibrium, the degree to which the mediation process appears to be working well[118] or poorly[119] is influenced by any changes that occur to the reactants—the parties, management and staff of the CCRB, and the board itself—and the environment where it takes place, which in this case would be the stakeholders' expectations.

Left to itself, a chemical reaction in equilibrium will produce some product, but not as much as, say, the shareholders in a chemical company would like. The goal of the chemist attending to that reaction is to manipulate

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[118] Positive indicators include a large number of cases transferred from investigations, a small number of complaints rejected during the approval process, and a resulting higher number of successfully mediated complaints each year.

[119] Negative indicators would include a drop in the number of cases transferred from investigations, a larger number of complaints rejected during the approval process, and a decreasing number of successfully mediated complaints from year to year.

the reactants and environment so as to obtain as much product as possible. This analogy is an apt one for the CCRB's mediation program. With no intervention, the process will lead to a number of mediations, but not as many as the CCRB would like. If team managers did more follow-up mediation training with their investigators, agency management staffed the mediation unit with more mediators, the approval process was streamlined, and the NYPD let mediation associates contact officers directly, more successful mediations would be possible. The number should increase even more if the positive expectations of the process stakeholders' were emphasized and the negative expectations limited.

But like any system in equilibrium, it is not possible to get all product, just an increase when conditions are right. The CCRB will never be able to get all the cases it thinks are mediable to a successful mediation outcome. There are just too many factors to control, so the agency should concentrate on optimizing those features it can.