Dear Chairman Clippinger and Members of the Judiciary Committee

I am writing to correct and apologize for an error I made when I testified on Tuesday, Februrary 27 on HB 188, particularly to Del. Muñoz, who was questioning me on the point of error in the hearing. The error arose because in preparing my testimony, I reviewed and referenced the Maryland Police Accountability Act (MPAA of 2021), the key background law for the bill (and the law that the bill amends), but forgot that there was previously an amendment to that act in 2022 that was tangentially relevant to one point I was making. I should have referenced the codified statute, rather than the original legislation, and regret my error, and the confusion it caused. That said, my error does not undermine any of the points I was making, as discussed in greater detail below.

In discussing the needed amendments to the bill, related to the statute of limitations (SOL; requiring charges to be brought within a year and day) that the bill imposes for cases that don't go to Administrative Charging Committees (ACCs), I said that if an SOL was implemented, there needed to be tolling provisions for certain types of cases, to ensure that misconduct cases can be reviewed on the merits, and not just dismissed based on arbitrary deadlines that cannot be met for legitimate and important reasons. This is certainly true, and critical, and HB 188 as drafted does not contain ANY tolling provisions. HB 188 needs to be amended to include both the tolling provisions for criminal cases that is contained in SB 608, plus the additional tolling provisions and amendments to sb 608 noted below.

In the Senate version of the bill, SB 608, there is a tolling provision for cases that are the subject of a criminal investigation, and that provision is critical. In my testimony, I said that the tolling provisions needed to be applicable not only to cases that do not go to the ACC, but ALSO to cases that do not. That is also certainly true, and also critical. There is no reason to treat cases that involve the public worse than cases that do not. I also pointed out that the SB 608, as drafted, did NOT apply the tolling provisions to non-ACC cases, though my understanding from the Senate hearing is that that was not the sponsor's intent, and the failure to do so was a drafting error. To correct that error, Md. Code, Pub. Safety § 3-113(c) would need to be amended as well, at the beginning of the sentence, to say "EXCEPT AS PROVIDED IN SUBSECTION (E) OF THIS SECTION,".

I also pointed out that both HB 188 and SB 608 set the beginning of the statute of limitations (leaving aside the tolling provision) at the wrong point. They both start the clock for the statute of limitations at the date of the incident. In this respect, both are worse than even the language in the now repealed Law Enforcement Officers Bill of Rights (LEOBR), and would mean that an officer couldn't be subject to discipline if the misconduct was discovered more than one year after it occurred, which is an intolerable result. If there is to be a statute of limitations for administrative discipline, the clock should not start to run until the misconduct comes to the attention of the appropriate law enforcement agency official, which is what even the LEOBR said. To fix this problem, on p.2, lines 5-6, strike "OF THE INCIDENT THAT LED TO THE INVESTIGATION" and substitute **"THE ACT THAT GIVES RISE TO THE CHARGES COMES TO THE ATTENTION OF THE APPROPRIATE AGENCY OFFICIAL."** This makes the tolling language the same as it was under the LEOBR, and ensures that the statute of limitations begins to run only when the appropriate agency official becomes aware of the potential misconduct, which can sometimes happen long after the actual misconduct occurs.

I also pointed out that there should be a tolling provision for disciplinary charges that arise from information discovered during a civil lawsuit, in addition to the tolling provision for criminal investigations and cases. Civil suits can often reveal significant misconduct by officers or supervisors through the discovery process (which is more far reaching than Maryland's public records laws). But

such litigation virtually always takes more than one year, meaning that any misconduct revealed often cannot result in administrative action due to the statute of limitations. To fix this, after line 6 (and assuming the criminal investigation tolling provisions are added in a new subsection (e)), insert new text as follows: "(F) NOTWITHSTANDING THE PROVISIONS OF SUBSECTIONS (C) AND (D) OF THIS SECTION, IF THE ALLEGED MISCONDUCT IS RELATED TO ACTIVITY THAT WAS OR IS THE SUBJECT OF A CIVIL SUIT, AN ADMINISTRATIVE CHARGING COMMITTEE OR LAW ENFORCEMENT AGENCY SHALL FILE ANY ADMINISTRATIVE CHARGES WITHIN 1 YEAR AND 1 DAY FROM THE DATE OF JUDGMENT IN THE CIVIL SUIT." This would toll the statute of limitations until the conclusion of the civil suit, so that misconduct that is revealed (or adjudicated) through the discovery and litigation process of the suit can be appropriately dealt with administratively.

My error occurred when I also referenced a need for a separate provision exempting excessive force cases from the statute of limitations, as existed in the LEOBR. What I forgot, during the discussion of this point in the hearing, is that in 2022 the legislature slightly changed which cases would go to the ACC, though that fact does not undermine my point in any way. In the MPAA of 2021, the statute said in Pub. Safety § 3-104(d) that the ACCs would review "complaint[s] made by a member of the public against a police officer." In other words, in the MPAA originally set the dividing line between which complaints went to the ACC and which did not based on who filed the complaint. In 2022, however, the legislature changed the provision say that the ACC would handle all cases that "involve a member of the public." This is the provision that Del. Muñoz was referencing, and that I had forgotten about. I agree that because that change, all use of force cases should go to the ACC. But whether they go to the ACC or not, not all use of force cases will necessarily be potentially criminal, and the latter is the critical point for purposes of whether the statute of limitations is potentially suspended (as long as ACC and non-ACC cases are treated the same, as they should be). For example, an officer could be charged with violating a department's use of force rules for failing to intervene to stop another officer from using excessive force. Whether or not that case would go to the ACC because it involves a member of the public or not has no bearing on whether the case is potentially criminal. And if it is not potentially criminal, and not all such cases necessarily would be, then the new tolling provision for potentially criminal cases that is present in SB 608, but not HB 188, would have no applicability. Whether it goes to the ACC or not is irrelevant to that determination. And even the LEOBR had a provision entirely exempting excessive force cases from the statute of limitations applicable to disciplinary actions, formerly codified in Pub. Safety § 3-106(b), which said that the "[t]he 1-year limitation of subsection (a) of this section does not apply to charges that relate to criminal activity or excessive force." The MPAA should have the same provision in a new subsection (g) that would put in place the same protection for excessive force cases. That would read "THE 1-YEAR AND A DAY LIMITATION OF SUBSECTIONS (C) AND (D) OF THIS SECTION DOES NOT APPLY TO CHARGES THAT RELATE TO EXCESSIVE FORCE."

David

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David Rocah | Senior Staff Attorney | ACLU of Maryland
3600 Clipper Mill Rd., #350 | Baltimore, MD 21211
T/410-889-8550, x.111 | F/410-366-7838
www.aclu-md.org | Twitter | Facebook | Instagram | Podcast