



Maryland Chiefs of Police Association

Maryland Sheriffs' Association



MEMORANDUM

TO: The Honorable Vanessa Atterbeary, Chair and Members of the Workgroup to Address Police Reform and Accountability

FROM: Chief John Nesky, President, Maryland Chiefs of Police Association
Chief David Morris, Co-Chair, MCPA, Joint Legislative Committee
Sheriff Jeff Gahler, President, Maryland Sheriffs' Association
Sheriff Darren Popkin, Co-Chair, MSA, Joint Legislative Committee
Andrea Mansfield, Representative, MCPA-MSA Joint Legislative Committee

DATE: August 27, 2020

RE: **Comments to the Workgroup to Address Police Reform and Accountability**

The Maryland Chiefs of Police Association (MCPA) and Maryland Sheriffs' Association (MSA) is comprised of executive level law enforcement leadership who have the honor, privilege and responsibility of leading the 16,000 men and women across the State who serve as troopers, police officers, and deputy sheriffs. MCPA and MSA thank you for the opportunity to speak today and look forward to being a part of the workgroup's discussion.

All of us, including every member of law enforcement, were appalled by the recent actions involving George Floyd and agree actions such as that should not occur anywhere, and MCPA and MSA will work to ensure it does not happen here in Maryland. The issues being discussed by this workgroup are extremely important for everyone involved, citizens of Maryland and law enforcement, and we need to ensure we get it right.

MCPA and MSA have participated in prior workgroup discussions on police accountability and offered several recommendations concerning the Law Enforcement Officer's Bill of Rights (LEOBR). During these discussions, some recommendations were accepted, while more substantive ones were not.

Just last session, MCPA and MSA worked with Chairman Clippinger, members of the Judiciary Committee and other members on legislation to authorize the release of personnel and investigative records for complaints involving the discharge of a firearm, use of force resulting in serious bodily injury, and sustained investigatory findings of complaints involving an officer's integrity, sexual assault, and discrimination relating to the reporting, investigation, or prosecution of a crime.

MCPA and MSA believe these LEOBR recommendations and the legislation from last session, HB 1221 as introduced, would have successfully addressed matters of accountability and transparency.

Policing is in a period of transition. Law enforcement agencies are finding it hard to recruit and good people are leaving the profession. Seattle's Police Chief recently resigned because the City Council took budget actions without even consulting her. Anne Arundel County's police chief recently resigned because he felt he could no longer effectively lead his agency, refusing to bend to political pressure that endangers officers and the community they serve.

Our law enforcement officers are good people, getting up and going to work every day, trying to make a difference, protecting their communities, and hoping to come home safely to their families. These men and women deserve our support.

There is misconduct in every profession and those of us in leadership need to ensure we can deal with these acts appropriately. MCPA and MSA ask that you be conscientious in your work and take these matters into consideration as you develop recommendations.

Law Enforcement Officers Bill of Rights

MCPA and MSA support the LEOBR. Below are the recommendations proposed in previous discussions.

1. Composition of Hearing Board and Final Authority - Maintain the Police Chiefs' and Sheriffs' responsibility and accountability for law enforcement disciplinary actions by retaining uniform statewide procedures for the Chiefs'/Sheriffs' creation of a disciplinary administrative hearing board, and their final authority to impose disciplinary sanctions. May require clarifications to *Md. Code, Public Safety Article, §3-107(c) (1), §3-107(c) (4) and §3-108(c)*.

2. Officers convicted of serious misdemeanors - Serious Maryland misdemeanor criminal charges carry punishments ranging from over one year to more than 20 years incarceration. (See the attached exhibit of serious misdemeanors). Police Chiefs and Sheriffs need additional authority to terminate an officer without a hearing if the officer is convicted (including probation before judgment) of a serious misdemeanor. Need to amend *Md. Code, Public Safety Article, §3-107(a)(2) and (3)*.

3. Investigative subpoena authority - Currently law enforcement agencies do not have authority to issue subpoenas for business or other records to facilitate an internal affairs administrative investigation. Many state, county, and municipal agencies, (State Commission on Human Rights, county and municipal civil rights commissions, in civil discrimination investigations; Attorney General in consumer affairs investigations; State Board of Physicians; Attorney Grievance Commission) have such investigative subpoena authority. In connection with a disciplinary investigation, the police chief, sheriff or designated assistant chief, should have the authority to issue subpoenas to compel the production of books, papers, records, documents, or physical property relevant or necessary in an internal affairs administrative investigation. Need to amend *Md. Code, Public Safety Article, §3-104*.

4. Reciprocal disclosure of evidence and witness names - Under current LEOBR provisions, in advance of an administrative disciplinary hearing board, a law enforcement agency is obligated to provide extensive disclosure of evidence and witness names to a charged officer. To increase fairness in the administrative process, a reciprocal disclosure obligation should require a charged officer to disclose in advance of a hearing the names of witnesses to be called and copies of all physical and documentary evidence to be introduced at the hearing. Need to amend/add to *Md. Code, Public Safety Article, §3-104(3)*.

5. Summary punishment sanctions - Although the LEOBR provides for simplified processing of minor disciplinary matters when the facts are not in dispute, the range of sanctions has not kept up with inflation. Sanctions for summary punishment cases should be increased to a \$1,000 fine and/or 5 days suspension without pay in order to encourage resolution of disciplinary matters that do not involve the most serious sanctions. Need to amend/add to *Md. Code, Public Safety Article, §3-111(b) (2)*.

6. The authority to challenge an internal affairs investigation or other agency actions prior to the conclusion of an administrative disciplinary hearing board should be eliminated - Currently, extensive delays can arise in a disciplinary investigation when a charged officer files in the circuit court a Petition to Show Cause (and related appeals) under the LEOBR, prior to an administrative hearing. This extraordinary remedy is generally not available in any other administrative, civil or criminal litigation process. Challenges to the procedure should be litigated at the administrative hearing itself and resolved, if necessary by way of the currently authorized appeal to the circuit court of a final decision in a disciplinary case. LEOBR show cause proceedings should be eliminated. Repeal *Md. Code, Public Safety Article, §3-105*.

Use of Force

Police use of force is subject to the reasonableness requirement of the Fourth Amendment. In *Graham v. Connor*, the Supreme Court held that determining the "reasonableness" of a seizure "requires a careful balancing of the nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing governmental interests at stake...[and noted] "Because the test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application," the test's **"proper application requires careful attention to the facts and circumstances of each particular case."** (emphasis added)

The Court then explained that, "As in other Fourth Amendment contexts... the "reasonableness" inquiry in an excessive force case is an objective one: the question is whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation." The Court also cautioned "The "reasonableness" of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight," but, rather, at the moment that force was used.

The Court stated that, “The test for reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application.” Allowance must be made for the fact that ‘...**police officers are often forced to make split-second judgments – in circumstances that are tense, uncertain and rapidly evolving**’ – about the amount of force ... in a particular situation.” (emphasis added)

Understanding the concerns expressed regarding the improper use of force by law enforcement officers and as a result of HB 1016 from the 2016 Session, the Maryland Police Training and Standards Commission (MPTSC) has established best practices for use of force. These best practices include a “sanctity of life” and a “duty to intervene” statement; specify that officers may use the force that is objectively reasonable and appears to be necessary under the circumstances; emphasize de-escalation; recommend documentation of use of force incidents; recommend the development of an early warning system to monitor incidents involving force; and recommend implicit bias training, to name a few of the practices.

MCPA and MSA are concerned that placing use of force requirements in statute could impose rigid guidelines that prove to be detrimental to policing and the community at large. The MPTSC was created to provide consistent standards across law enforcement and is composed of representatives from law enforcement, the General Assembly, and the public. This is the correct body for these conversations and to create uniform standards and requirements to be implemented by law enforcement.

Body Cameras

MCPA and MSA support body camera programs in law enforcement agencies. Agencies using body cameras have found them to be very effective as they clearly document actions of an officer and the citizens with whom they interact, and in many cases have exonerated officers of wrongdoing.

While some agencies have been able to clearly demonstrate the need for body cameras and have been allocated funding in local budgets for their purchase, other agencies have not. The concern is that they are expensive and would be an unfunded mandate if funds are not provided in some manner for their purchase.

Independent Investigatory Body

Under current operational practices, law enforcement agencies may seek the assistance of outside agencies to investigate officer involved shootings. Many smaller agencies routinely seek the assistance of the Maryland State Police or other large policing agencies. This discretion allows an agency to determine the most effective approach for these investigations and to discuss matters of process, both administrative and criminal, as appropriate with the investigative agency.

In those jurisdictions where the law enforcement agency is managed by an elected sheriff, the electorate has granted the authority and accountability to the sheriff to handle these complex investigations. Likewise, Chiefs of Police are appointed by their County Executive, Mayor, or other elected official and are held directly responsible for the manner in which these investigations are conducted. Any independent investigative approach must preserve the

accountability of the Chief or Sheriff and not limit their authority. Further, investigators must have experience in conducting complex criminal investigations.

School Resource Officers (SROs)

MCPA and MSA are very supportive of having school resource officers in schools. Law enforcement agencies have found these programs to be successful in developing good relationships between students and law enforcement. As required by “The Safe to Learn Act of 2018,” the Maryland Center for School Safety worked in consultation with local school systems to develop a specialized curriculum to be used in training SROs and school security employees. This curriculum has been submitted and approved by the Maryland Police Training and Standards Commission and lesson plans have been developed. This model curriculum, a 40-hour, 5-day, mandatory curriculum for all SROs and school security staff, outlines the SROs multi-faceted role. Further, individual MOUs between the school systems and law enforcement agencies in each jurisdiction outline the specific responsibilities of an SRO. A few responsibilities are outlined below.

- Work with school staff in enhancing safety within their assigned schools and serve as a liaison between his/her agency and MCPS officials for school and police-related concerns and incidents.
- Meet regularly with parents, teachers, principals, other school administrators and students to discuss issues of concern.
- Serve as a point of contact to deliver law enforcement programs such as crime prevention, conflict resolution and mediation, drug and alcohol awareness, anti-bullying, violence prevention, gang awareness, and community outreach.

These responsibilities provide value within the school systems and should be continued.

Disclosure of Personnel and Investigative Records Under the PIA

Under current law, all public employees’ personnel files and investigative records are not open for public view under the Maryland Public Information Act. Last session, MCPA and MSA supported legislation (HB 1221) making an exception to this rule for law enforcement in very specific circumstances. This bill would have allowed the release of an investigative file in situations involving the following complaints:

1. the alleged misconduct involves the discharge of a firearm at a person by a law enforcement officer;
2. the alleged misconduct involves the use of force by a law enforcement officer resulting in death or serious bodily injury; or
3. a sustained investigatory finding was made by a law enforcement agency that a law enforcement officer
 - a. committed a sexual assault involving member of the public;
 - b. engaged in dishonesty, committed perjury, made false statements, filed false reports, or destroyed, falsified, or concealed evidence directly relating to the reporting, investigation, or prosecution of a crime; or
 - c. engaged in prohibited discrimination directly relating to the reporting, investigation, or prosecution of a crime.

It is important to emphasize that in both complaints involving the discharge of a firearm and use of force resulting in death or serious bodily injury, information pertaining to both sustained and non or not-sustained complaints will be released. Other complaints relating to an officer's integrity as specified above will only be released if they are sustained. This is extremely important as Chiefs and Sheriffs strive to protect the reputation and honor of the men and women who protect our communities every day.

The process outlined in HB 1221 provided for the release of information at the completion of an internal investigation. This is the point in time in which it is determined that an allegation did not occur (unfounded), it did occur but there was no wrongdoing (exonerated), evidence is insufficient to substantiate officer misconduct (non or not-sustained), or the evidence indicates that an allegation did occur (sustained). Releasing information with any other finding except sustained could damage an officer's career and reputation. Further the secondary dissemination could put the officer and his or her family at risk. It would be very easy for information to be distorted and inaccurate conclusions drawn with ramifications lasting for years.

Examples of Maryland Misdemeanor Crimes with Imprisonment for 18 months to 20 years (or more) in the Md. Code, Criminal Law Article

<u>Code Section</u>	<u>Max Jail Time</u>	<u>Title</u>
3-701	1.5	Extortion under \$1,000
3-809	2	Revenge porn.
9-204	3	Bribery of person in athletic contest
7-302	3	Unauthorized access to computers
6-206	3	Breaking and entering motor vehicle
6-205	3	Burglary - 4th degree
4-102	3	Deadly weapons on school property
4-101	3	Dangerous weapons
3-807	3	Misuse of laser pointer - aiming at aircraft
3-804	3	Misuse of telephone facilities and equipment
3-708	3	Threat against State or local official
3-609	3	Duty to report death of minor
3-608	3	Duty to report missing child
3-314	3	Sexual conduct - correctional employee and inmate
3-211	3	Life threatening Injury by MV under influence of alcohol
2-210	3	Manslaughter by vehicle - Cr. Negligence
5-601	4	Possessing or administering CDS
9-305	5	Intimidating or corrupting juror
9-303	5	Retaliation for testimony
9-302	5	Inducing false testimony or avoidance of subpoena
8-606.1	5	Forging signature of judge, court officer, or court employee
6-106	5	Burning with intent to defraud
4-110	5	Restricted firearm ammunition
4-106	5	Bulletproof body armor - wearing prohibited
3-802	5	Stalking
3-605	5	Abuse or neglect - vulnerable adult 2nd degree
3-603	5	Sale of a minor
3-602.1	5	Neglect of a minor
3-204	5	Reckless Endangerment
6-107	10	Threat of arson
4-405	10	Use of machine gun for aggressive purpose
3-1001	10	Threat of mass violence
3-704	10	Extortion by false accusation
3-322	10	Unnatural or perverted sexual practice

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	3-215	10	Ingesting bodily fluid - without consent or by force
	3-205	10	Prison Employee - Contact with bodily Fluid
	3-203	10	Second Degree Assault
	4-204	20	Use of handgun in crime of violence
	1-202	Underlying Offense	Conspiracy - Limitation on Punishment
	1-201	Underlying Offense	Limitation on Punishment for attempt