

# Police Misconduct and Civil Rights Law Report

Vol. 5, No. 5

September–October 1996

## DEMOCRACY VS. COLLECTIVE BARGAINING: COUNTERING POLICE UNION ATTACKS ON CITIZEN REVIEW

by Lynne Wilson

*The author is an attorney in private practice in Seattle, WA who has litigated police misconduct cases and is on the Steering Committee of the National Coalition on Police Accountability.*

*This whole [Police Advisory] Commission is a felony in progress.*

—Richard Costello, President, Lodge No. 5  
(Philadelphia) of the Fraternal Order of Police

### I. Introduction

In the wake of Rodney King and now the Mark Fuhrman tapes, citizen oversight mechanisms for complaints about police abuse and racism have increased dramatically around the country. In 1980, only thirteen U.S. cities boasted some form of citizen review of police. By 1995, driven by increased political pressures for accountability from minority communities, that number grew to almost seventy nationwide, an increase of 230 percent in just ten years. In addition to the explosion in numbers, most of the recently created citizen review boards (CRBs) possess increased independence from police departments with more rights to hold public hearings and more subpoena powers over witnesses and records than their predecessors. See generally Walker & Wright, *Citizen Review of the Police, 1994: A National Survey* (Police Executive Research Forum, Jan. 1995), and, e.g., City of Syracuse, New York, Local Law No. 11 Establishing a Citizen Review Board (1993).

As citizen oversight mechanisms escalate in numbers and in powers, police unions around the country have countered with increasing numbers of ever more sophisticated legal attacks. This phenomenon is occurring even

as many money-tight municipalities have slashed the budgets of successful review boards, such as San Diego County's, or, in the case of Washington, D.C., have simply dismantled the Civilian Complaint Review Board (one of the oldest in the country) after a federal court held the District of Columbia liable for ignoring funding requests, thus creating chronic delays. *Cox v. District of Columbia*, 821 F. Supp. 1 (D.D.C. 1993), *aff'd*, 40 F.3d 475 (D.C. Cir. 1994)(maintenance of patently inadequate system of investigation of excessive force complaints constituted custom or practice of deliberate indifference to rights of citizens for purposes of 1983 action).

In spite of funding setbacks, the growth in citizen review processes continues as smaller cities such as Utica, New York, organize to implement review procedures. The positive results of these procedures have now been documented in a study of seventeen agencies which found that community oversight agencies sustain complaints more frequently and, more important, receive five times as many excessive force allegations as do internal affairs bureaus. Eileen Luna, "Accountability to the Community on the Use of Deadly Force," *Policing By Consent* (newsletter of the National Coalition on Police Accountability), Dec. 1994, at 4–5.

Also in this issue . . .

Recent Cases ..... 58

**Police Misconduct and Civil Rights Law Report**

is published by Clark Boardman Callaghan, 375 Hudson Street, New York, NY 10014. ISSN 0738-0623

This publication is designed to provide accurate and authoritative information in regard to the subject matter covered. It is sold with the understanding that the publisher is not engaged in rendering legal, accounting, or other professional service. If legal advice or other expert assistance is required, the services of a competent person should be sought.—From a Declaration of Principles jointly adopted by a Committee of the American Bar Association and a Committee of Publishers.

It is precisely because of this growth in numbers, powers and effectiveness that police unions have stepped up legal attacks in those communities where citizen review procedures are new and state law is as yet untested. These legal tactics fall into the following four arenas:

- (1) Direct legal challenges in state and federal courts over a particular board's legal authority;
- (2) Direct legal challenges over a board's subpoena powers and power to compel police disciplinary records;
- (3) A corresponding refusal based on assertion of a fifth amendment privilege by union-represented officers to testify when subpoenaed; and
- (4) Challenging, before a state public employees relations commission, a review board's existence as an unfair labor practice based on the local government's refusal to submit the issue to mandatory collective bargaining negotiations.

Experienced police misconduct and civil rights attorneys who have no difficulty litigating either an excessive force or a *Monell* policy/practice case may suddenly find themselves involved in a legal morass of complex labor and municipal law issues, particularly if practicing in a state where these issues have not been litigated and if representing a client with a case before a newly created review board. This article will address the current state of the law with regard to the four issues consistently raised by police unions apparently threatened by citizen review. The implications of citizen review mechanisms for "failure to discipline" cases are not dealt with here, having been thoroughly covered in an earlier series of articles in *PMCLLR*. See Flint Taylor, "Proof in Police Failure to Discipline Cases: A Survey," 3 *PMCLLR* 25-33, 37-47 (1990).

## II. Two Cities Under Siege: Philadelphia and Spokane

Two examples of recently formed CRBs illustrate each of these four varieties of police union attacks. In Philadelphia, the local Fraternal Order of Police (FOP) has used nearly every strategy available to stymie the recently created Police Advisory Commission (PAC), a body of fifteen citizens with first-class citizen review powers. In mid-1995, PAC investigators began questioning officers about the 1994 in-custody death of Moises DeJesus, a young Latino who suffered from head wounds prior to his death. The FOP President originally declared that officers would refuse to comply with subpoenas and then followed with a lawsuit against the PAC, the Mayor and the Police Commissioner when the latter ordered the officers to testify. The FOP filed a second suit in state court to shut down the PAC for lack of legal authority and, in addition, lobbied for state-wide legislation that would prohibit citizen questioning of officers.

Ultimately, the legislative effort met with defeat after aggressive grass-roots opposition and the union was forced to withdraw its initial lawsuit after PAC attorneys removed it to federal court. For three weeks, the PAC conducted a public hearing on DeJesus' death, taking extensive evidence and testimony from the numerous officers involved, eye-witnesses and crucial testimony from three forensic pathologists. All three pathologists disputed officer testimony that the 240-pound DeJesus caused his own head injuries by diving through the back window of a patrol car, and testified instead that DeJesus was hit with an instrument consistent with a nightstick or flashlight. *In re Moises DeJesus*, Phila. PAC No. 94-0015 (Dec. 19, 1995).

On December 19, 1995, the PAC entered a detailed ruling in which it (1) found that excessive force had been used on Moises DeJesus, and (2) recommended discipline for six of the officers. Significantly, the Philadelphia PAC made a finding that the officers "covered up" for each other during testimony. It made an additional finding that "the officers at the scene were untruthful in reporting what they observed, both in their sworn testimony before the hearing panel and in their compelled statements to Internal Affairs." *In re Moises DeJesus*, Phila. PAC No. 94-0015 (Dec. 19, 1996), at 18 (special finding re code of silence and lack of candor).

Within days, the Fraternal Order of Police filed a third lawsuit in Pennsylvania state court against the City of Philadelphia, Mayor Edward Rendell and Police Commissioner Richard Neal. This time, the FOP insulated itself from possible removal to federal court by alleging only state law claims, including technical violations of the City Charter and the Pennsylvania State Constitution as well as common law torts such as defamation. *Lodge No. 5 of the Fraternal Order of Police & Richard Costello v. City of Philadelphia*, Court of Common Pleas of Philadelphia County Cause No. 2787 (filed Dec. 27, 1995). With the FOP lawsuit pending against him, Commissioner Neal rejected the PAC's findings as to excessive force but upheld its findings as to the officers' lack of truthfulness, suspending eight officers involved at the scene for ten days each. *In re Moises DeJesus*, Police Commissioner Response to PAC No. 94-0015 (Apr. 29, 1996).

In Spokane, Washington, on the other side of the country, another CRB was going down to defeat. In the summer of 1992, counsel for the Spokane Police Guild contacted the Spokane City Attorney to demand that the City engage in collective bargaining with the union regarding a citizen review procedure then under consideration by the Spokane City Council. The City Council subsequently enacted the CRB without bargaining with the Guild. In September 1992, the Guild along with the Lieutenants and Captains Association filed complaints with the Washington Public Employees Relations Board (PERB), al-

leging unfair labor practices on the part of the City.

In April 1995, after two and a half years of failed mediation efforts during which the CRB addressed a mere two cases, a Washington PERB Examiner ruled that "disclosure of internal investigation files [to the CRB] where no misconduct has been found is invasive of an employee's privacy rights and inherently constitutes a working condition." *Spokane Police Guild et al. v. City of Spokane*, Wash. PERB Cases 10001-U-92-2285 & 2286 (Consolidated Findings of Fact, Conclusions of Law and Order) (Apr. 24, 1995), at 9. The PERB Examiner also ruled that because "public access to unproven charges substantially does not lie at the core of entrepreneurial control," the disciplinary process changes at issue constituted a mandatory collective bargaining subject. *Id.*

The Examiner ordered the City to dismantle the CRB and to bargain with the Guild over any replacement body. The City agreed to do so rather than to fight the Guild in appeals through the state court system, and the result was a revised CRB that includes police union representatives and has no subpoena power, no access to records and hearings that are closed to the public.

Because the CRB itself was not a party to the administrative proceeding, neither it nor any individual Spokane citizens had standing to appeal the PERB decision (*see infra* for further discussion of this problem). In addition, because collective bargaining is by state law a closed process, none of the citizen activists who lobbied for the creation of the CRB were alerted to either the ruling or the subsequent negotiations between the City and the Guild until after the revised version was already in place.

Predictably, police unions in other cities are now attempting to dismantle review boards by filing PERB challenges and claiming that because citizen review impacts the disciplinary process and thus a "working condition," local governments that do not agree to collective bargaining over the issue are committing an unfair labor practice. In Syracuse, New York, for example, the Citizen Review Board awaits a ruling from the New York Public Employee Relations Board on a Police Benevolent Association challenge to its existence which is modelled on Spokane. Nancy Rhodes, "Splitting the Difference: The Citizen Review Board and Its Lawyers," *Syracuse Peace Council Newsletter* 4 (Aug. 1995).

### III. Union Challenges to Legal Authority

The Syracuse CRB, like most of the recently created review boards, was established by local ordinance. When the move toward citizen review of the police began in the 1960s with the Black Panther and anti-war movements, review procedures were established by executive order. In New York City and in Philadelphia, for example, liberal mayors created civilian review procedures after their city councils refused to act, procedures that were

then abolished by referendum in 1966, and by executive order in 1967, respectively. (Philadelphia's was recreated by executive order in 1993. Phila. Exec. Order No. 8-93 (final version signed Dec. 21, 1994).) According to one expert, the creation of review boards by ordinance or other legislation (i.e., initiative) strengthens a board's legal authority because it "represents a judgment about the need for civilian review by a majority of the elected representatives in a particular city." Samuel Walker, *Civilian Review of the Police: A National Survey of the 50 Largest Cities, 1991* 4 (Univ. of Neb. Apr. 1991).

State courts in New York, New Jersey and California have addressed legal authority challenges brought by police officers or their unions to citizen oversight mechanisms. In *Cassese v. Lindsay*, 272 N.Y.S.2d 324 (N.Y. Sup. 1966), the New York Supreme Court upheld the New York City Police Commissioner's powers to create a civilian complaint review board. Patrol officers sought an injunction prohibiting the Mayor, through the Commissioner, from implementing an order creating the board.

The *Cassese* court held that the Commissioner's decision-making and investigatory powers, derived from the New York City Charter, had not been unlawfully delegated to the review board because its advisory recommendations were not binding on the Commissioner and

## ***Police Misconduct and Civil Rights Law Report***

---

is prepared under the auspices of the  
National Lawyers Guild Civil Liberties Committee

### **Editorial Board**

Chip Berlet, Marc S. Blesoff, Russell C. Green,  
Charles Hoffman, Mary Rita Luecke, Marena McPherson,  
Mathew J. Piers, Peter Schmiedel, G. Flint Taylor,  
David Thomas, John Wylie, Clifford Zimmerman

### **Issue and Recent Cases Co-Editors**

Peter Schmiedel, G. Flint Taylor, Clifford Zimmerman

### **PUBLISHER'S STAFF**

Mitchell Bard, *Legal Editor*  
Ingrid Multhopp, *Manuscript Editor*  
William Croxton, *Electronic Composition*  
Mara Griffin, *Production Editor*

---

Published bimonthly by  
Clark Boardman Callaghan  
Editorial Offices: 375 Hudson Street,  
New York, New York 10014  
Tel.: 212-929-7500 Fax: 212-924-0460  
Customer Service: 155 Pfingsten Road,  
Deerfield, Illinois 60015  
Tel.: 800-323-1336 Fax: 708-948-9340

---

Subscription: \$170 for six issues  
Copyright 1996 Clark Boardman Callaghan,  
a division of Thomson Information Services, Inc.  
ISSN 0738-0623

the decision regarding whether to impose discipline in a particular case remained with him. 272 N.Y.S.2d at 332. The court stated that it would refrain from intervening in police administration as such interference “would constitute an unwarranted intrusion by the court upon the right of the agency chief to control and administer his department.” *Id.* See also *National Union of Police Officers Local 502-M, AFL-CIO v. Board of Comm’rs*, 92 Mich. App. 76, 286 N.W.2d 242 (Mich. App. 1979) (executive police power, including power to discipline, vested exclusively in the sheriff); *Rockland County Patrolmen’s Benevolent Ass’n, Inc. v. Town of Clarkston*, 539 N.Y.S.2d 993 (App. Div. 1989) (police chief’s statutory authority in the area of police discipline created by statute and is not subject to collective bargaining).

In California, the Berkeley Police Association filed a taxpayer suit challenging the validity of an ordinance establishing a police review commission and seeking an injunction. *Brown v. City of Berkeley*, 57 Cal. App. 3d 223, 129 Cal. Rptr. 1 (Cal. App. 1976). As in the New York case, the plaintiffs challenged the review commission’s interference with the city manager’s administrative powers granted by the City Charter. Based on a direct conflict between the ordinance and the Berkeley City Charter, the *Brown* court struck down portions of the ordinance giving the review board the authority to recommend to the city manager or the police department specific disciplinary action for individual police officers.

Because Berkeley’s City Charter explicitly gave authority to “discipline . . . all subordinate officers and employees of the City” to the city manager, that provision of the ordinance “would usurp the powers and functions of the City Manager.” Thus, the *Brown* court struck out that provision from the ordinance but, in doing so, upheld the Commission’s authority to “properly hear and investigate complaints against specific police department officers and employees. . . .” 129 Cal. Rptr. at 6.

Language in a city charter was also directly at issue in a declaratory judgment action brought by the city of Newark, New Jersey, in which the city asked the court to determine the validity of an initiative that would establish a police review board. *City of Newark v. Benjamin*, 364 A.2d 563 (N.J. Super. Ch. Div. 1976). The proposed initiative would have created a “Civilian Complaint Review Board” with nineteen members elected by city voters and with powers overlapping those of the city council, including the power to issue subpoenas.

In holding the proposed initiative invalid, the *Benjamin* court looked to the state statute creating municipalities, the Faulkner Act, which provided for only one elected governing body for each municipality in New Jersey. The statute made “no provision for any other governing body, or for dilution or fractionalization of the powers of the governing body.” 364 A.2d at 570. Because the proposed

Review Board would create a second elected body with investigatory powers already possessed by the city council, the initiative was in direct conflict with the state statute and was thus invalid as an “impermissible infringement upon the authority conferred upon the municipality by the Faulkner Act.” *Id.*

#### IV. Union Attacks on Subpoena Power

In the New Jersey case cited above, the subpoena power of the proposed board was also declared invalid because the municipality lacked statutory or constitutional authority to “create the power of subpoena.” *Id.* at 571. Significantly, however, the court also held that the power to subpoena witnesses, “especially in the case of police officer witnesses,” was crucial to the functioning of such a review board. *Id.* One cannot expect, said the *Benjamin* court, “a police officer charged with misconduct to appear before the board without subpoena. Hearings before the board without such witnesses, in all likelihood would render the board only an instrument for public relations.” *Id.* at 571–72.

More recently, the subpoena power of the San Diego County “Citizens Law Enforcement Review Board” was upheld in *Dibb v. County of San Diego*, 36 Cal. Rptr. 2d 55, 8 Cal. 4th 1200 (Cal. 1994). In *Dibb*, the California Supreme Court initially determined that a state statute empowered the county board of supervisors to supervise the conduct of all county officers and thus the board could create a citizens commission to report on alleged police misconduct. 8 Cal. 4th at 1208–09.

Although the taxpayer plaintiff (a police union representative) alleged that the county had no statutory authority to grant the board subpoena power, the *Dibb* court disagreed. It stated that because the state constitution gave the county authority to create a civilian review board and because the appointed members were thus county officers, the board members’ subpoena power was legitimately derived from the county charter. *Id.* at 1217. In so holding, the California court reiterated the statement regarding the indispensability of subpoenas for CRBs from the *Benjamin* case cited above, noting that half of the CRBs in existence in 1991 possessed subpoena power and that “the power to issue subpoenas is reasonably necessary to the full accomplishment of the legitimate goals of the legislation.” *Id.* See also *Barry v. Garcia*, 573 So. 2d 932 (Fla. Dist. Ct. App. 1991) (CRB’s subpoena power must be derived from voters’ amendment of city charter); *Vance v. Ananich*, 378 N.W.2d 616 (Mich. App. 1985) (upholding municipal ombudsman’s power to issue subpoenas); *Citizens’ Aide/Ombudsman v. Grossheim*, 498 N.W.2d 405 (Iowa 1993) (upholding subpoena authority of aide to investigate complaints regarding correctional agencies); *Kelly v. Dinkins*, 590 N.Y.S.2d 166 (N.Y. 1992) (upholding subpoena power of mayor’s commission to investigate police corruption).

## V. Officer Assertions of the Fifth Amendment

Once the subpoena power of a particular board has withstood a union challenge, a second-tier strategy is simply to refuse to comply with the subpoena or to plead the fifth amendment privilege to the questions asked. In the Philadelphia PAC's *Moises DeJesus* case mentioned above, the state court rejected the officers' assertion of the Fifth Amendment after the police commissioner had ordered them to testify and cooperate with the PAC or face discharge. Relying on the U.S. Supreme Court case of *Garrity v. New Jersey*, 385 U.S. 493 (1967), the Pennsylvania court held: "Because this testimony is the result of a threat of loss of their jobs, the testimony provided by the plaintiffs cannot be used against them in any subsequent criminal proceeding in which they are defendants." *Young et al. v. Mayor Edward G. Rendell et al.*, Phila. County Court of Common Pleas Civil Action No. 2869 (Sept. Term 1995) (stipulated Order 10/24/95 of Hon. Russell M. Nigro).

In *Garrity*, the Supreme Court addressed the question of police officers' assertion of the fifth amendment privilege in the context of a state attorney general's special investigation into alleged fixing of traffic tickets. 385 U.S. at 493. The New Jersey Supreme Court had granted the attorney general broad powers of inquiry and investigation. Each officer had been warned prior to questioning that a refusal to answer would result in discharge based on a New Jersey statute. *Id.* at 495. The officers answered the questions and were subsequently convicted, based on their answers, of conspiracy to obstruct the administration of traffic laws. The officers appealed their convictions, arguing that the statements were coerced because they would have lost their jobs if they had refused to answer. *Id.*

In a 5-4 decision, with a majority opinion by Justice William O. Douglas, the Court reversed the convictions, holding that the statements were coerced rather than voluntary as the threat of discharge deprived the officers of their "free choice to admit, to deny or to refuse to answer." *Id.* at 496. The Court stated that "the protection of the individual under the Fourteenth Amendment against coerced statements prohibits use in subsequent criminal proceedings of statements obtained under threat of removal from office, and that it extends to all, whether they are policemen or other members of our body politic." *Id.* at 500.

*Garrity* has been upheld numerous times since 1967 and remains good law. As the Court said in a 1977 case, as long as the questioning procedure does not offend constitutional principles, "[p]ublic employees may constitutionally be discharged for refusing to answer potentially incriminating questions concerning their official duties if they have not been required to surrender their constitutional immunity [against self-incrimination]." *Lefkowitz v. Cunningham*, 431 U.S. 801, 806 (1977). See

also *Sanitation Men v. Sanitation Comm'r*, 392 U.S. 280, 284 (1968); *Gardner v. Broderick*, 392 U.S. 273, 278 (1968).

In the context of a citizen review board investigation into allegations of misconduct, once a police executive orders, either directly or through department regulation, that the officer testify, the officer has no choice but to do so or face possible discharge, since *Garrity* protects the officer from criminal prosecution based on the statements made. Wherever a police union has challenged the requirement to make statements to an internal department investigator or else face discharge, state courts have held that the statements were made against the officers' free will and being thus compelled could not be used against the officers in a subsequent proceeding. See, e.g., *Moffett v. City of Portland*, 400 A.2d 340 (Me. 1979); *Seattle Police Officers' Guild v. City of Seattle*, 494 P.2d 485 (1972) (police officer may be discharged as a penalty for asserting the privilege against self-incrimination and refusing to answer questions during an internal administrative investigation of alleged misconduct when the questions directed to the officer are specifically and narrowly related to past performance of official duties and he has been advised that the answers could not be used against him in a later criminal proceeding).

## VI. Citizen Review as a Matter of Basic Public Policy Is Not a Collective Bargaining Issue

Why police unions continue to raise citizen review as a collective bargaining issue is a mystery in light of the strong case law holding that it should never be at issue during collective bargaining negotiations. The Spokane PERB ruling in Washington state (discussed more fully *infra*) appears to be an aberration: Nearly every commentator and most state courts (with a few exceptions) addressing this issue have stated that a local government's political decision of whether or not to implement citizen review of the police is a public policy issue that, for a number of reasons including the integrity of the democratic process, the collective bargaining process is unequipped to handle. Attorneys who represent clients with a stake in the outcome of these labor battles (i.e., with a case to be heard by a CRB under siege) must vigorously attempt to intervene in the administrative proceedings and in any subsequent court appeals so that the law remains solid on this issue.

The fundamental difficulty of shifting the policy question of citizen review into the collective bargaining arena is that the labor negotiations process is a closed one and involves only the employer (the government negotiators) and the employee representatives (the union). The very citizens whose civil rights are at issue are completely left out. Furthermore, because the basic considerations in labor negotiations are financial, nonfinancial issues such as police accountability tend to be squeezed to the bottom of the priority list.

One legal commentator on this issue describes the usual scenario this way:

A policemen's organization may demand at collective bargaining that the [citizen review] board be abolished; the city managers may agree because the board causes more problems than it is worth in public relations. The public . . . has a right to participate in the decision-making on this issue. . . . [T]he general public interest, as opposed to the public's economic interest, will be overlooked if a decision on this issue is reached at closed bargaining sessions.

Michael Jenkins, "Collective Bargaining for Public Employees: An Overview of Illinois' New Act," 4 S. Ill. U.L.J. 483, 507 (1983). Says another:

Those who favor a public review board are those who fear that policemen will act abusively or unlawfully and that their superiors will not take appropriate action. The interests of this group are not represented at the bargaining table. Collective bargaining thus does not provide an appropriate political process for full discussion of the issue or for weighing and reconciling the competing interests. . . . [T]he conclusion [is] that this subject should be nonbargainable. . . .

Clyde W. Summers, "Public Employee Bargaining: A Political Perspective," 83 Yale L.J. 1156, 1196-97 (1974). See also Clyde W. Summers, "Bargaining in the Government's Business: Principles and Politics," 18 U. Toledo L. Rev. 265-68 (1987) (" . . . in the public sector the collective agreement is not a private decision, but a governmental decision; it is not so much a contract as a legislative act. . . . [T]he ultimate employer is not the mayor or the council but the voters.")

Although stated in a variety of ways, the key problem is that the collective bargaining forum is one that is bilateral and that prohibits citizen access to democratic decision-making. By law in most, if not all, states collective bargaining sessions are exempt from open meeting legislation and citizens are not entitled to receive copies of collective bargaining proposals under state freedom of information legislation. See, e.g., Mont. Code Ann. § 2-3-203(3)(1978)(closed meetings) and Mont. Code Ann. § 2-6-101&102(1978)(not a "public" writing). Citizen review of police is a prime example of an issue where the public employer's position "may be at odds with the public interest," and:

If public policy is to represent the public interest, the forum in which it is determined must ensure, or at least permit, public participation. . . . [W]hen fundamental public policy is formulated in a forum which excludes public participation, the process is contrary to the most rudimentary democratic principles. . . . Certainly the public employer is the representative of the public, but

democratic decision making envisions more than elections. It involves a continuing dialogue between the public and the representatives concerning the formulation of fundamental public policy.

William L. Corbett, "Determining the Scope of Public Sector Collective Bargaining: A New Look via a Balancing Formula," 40 Mont. L. Rev. 231, 261-62 (1979).

#### A. Basics of Relevant Public Sector Collective Bargaining Law

The National Labor Relations Act excludes from coverage public employers and public employees. 29 U.S.C.A. § 152(2). This means that public employees such as police officers have no federal statutory guarantee to organize or to bargain collectively, and there has historically been no federal forum or process for such employees to produce an agreement to which a public employer might be held. Wollett et al., *Collective Bargaining in Public Employment 2* (West Publishing 1993 ed.). Although more recently the U.S. Supreme Court held the federal Fair Labor Standards Act provisions governing overtime and compensatory time applied to all state and local employers, the lack of general federal jurisdiction governing wages, working hours or conditions of state and local employment prohibits public employee unions from litigating unfair labor practice complaints in federal forums. *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985).

Since 1959, however, state legislatures have passed statutes granting public employees collective bargaining rights. Today, forty of the fifty states have statutes authorizing public sector bargaining, if only to require a public employer to "meet and confer." Many of these statutes are modelled on the federal NLRA but many have also limited "the dimensions of public sector bargaining on the theory that public employers require greater protection than do private employers." Edwards et al., *Labor Relations Law in the Public Sector* 6-8 (1991). Forty percent of the 650,000 police officers in the U.S. are organized into some type of union or association such as a Police Benevolent Association or the Fraternal Order of Police. *Id.* at 14, 32 (in 1989, FOP membership was 203,000 nationwide).

Unfortunately, the model of private sector collective bargaining does not fit well into most public sector disputes. Private sector bargaining involves two parties, management and union, both of whom have equal authority to reach a final agreement. That is not true in the public sector where the "bottom line in public sector collective bargaining is political," and the public "employer" is merely a stand-in for voters and does not have unilateral authority to assume ultimate responsibility for many of the terms of the agreements. Wollett, *Collective Bargaining, supra*, at 2, 17. Most of the time in the public

sector, it may not be legally possible to send someone to the bargaining table with final authority due to constitutional restrictions on legislative policy-making. "In the public sector, agreement at the bargaining table may be only an intermediate, not a final, step in the decisionmaking process." Clyde W. Summers, "Public Sector Bargaining: Problems of Governmental Decisionmaking," 44 U. Cin. L. Rev. 669, 672 (1975).

In addition, public employee unions do not have the same "veto" power in strikes that private employee unions enjoy. Wollett, *Collective Bargaining, supra*, at 10 (public employee strikes are outlawed or severely curtailed in all but thirteen states). However, what they have in its place is a significantly enhanced ability to lobby state legislatures to get "end runs" passed through legislatures on issues (such as citizen review of police behavior) that were lost at the bargaining table. *Id.* at 18 (thirty such bills in New York in 1978 involved subjects that were excluded from the collective bargaining process). Finally, public sector unions have great powers to select, through the elective process as well as through campaign contributions, who the public managers are. *Id.* at 188 ("There is nothing in private sector bargaining even remotely comparable to the potential power of public employees to participate in the selection of public management.").

Even though public sector bargaining is fundamentally different from that in the private sector, courts continue to look to federal interpretations of the NLRA as the basis for rulings in the public sector, mostly because there exists a developed body of law. In 1958, the U.S. Supreme Court affirmed and adopted the approach of the National Labor Relations Board and the federal circuit courts of appeal in classifying subjects of bargaining as either: (1) *mandatory* (labor and management must bargain and a refusal to do so is an unfair labor practice); (2) *permissive* (labor and management may bargain); or (3) *illegal or prohibited* (subjects over which labor and management cannot bargain). *NLRB v. Wooster Div. of Borg-Warner Corp.*, 356 U.S. 342 (1958). In the public sector, there is considerable controversy concerning whether the *Borg-Warner* analysis should apply: The main reason for excluding a topic from bargaining in the public sector is that the "demand involves a significant policy question which should not be determined in the isolation of the bargaining process in which other vital public interests are not directly represented." Wollett, *Collective Bargaining, supra*, at 143. By contrast, in the private sector, recent Supreme Court cases illustrate that the main concern for private employers is what burdens are being placed on a particular employer's needs for efficiency and flexibility. *See, e.g., First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981) (private employer does not have to bargain with a union regarding terminating a customer contract).

### B. Who Are the Inherent Managers over Police Discipline?

When a Public Employees Relations Board simply relies on concepts drawn from private collective bargaining law the result is a ruling such as the one in Spokane, where the Commissioner never addressed (because it was not raised) the lack of representation of Spokane citizens in the collective bargaining process. Rather, the PERB analysis simply looked at whether or not the review board process changed the city's past practice of keeping citizen complaint files confidential, even though the review board could ultimately only recommend changes in discipline. The PERB Commissioner ruled that the board's ability (1) to disclose publicly information that was previously kept confidential and (2) to hold public hearings in cases where there may have been no misconduct, inherently constituted changed working conditions, and further that "public access to unproven charges substantially does not lie at the core of entrepreneurial control." *Spokane Police Guild v. City of Spokane*, Wash. PERB Cases 10001-U-92-2285 & 2286, Dec. No. 6065, at 8-9 (1995).

Many state public employee relations acts designate that disciplinary or grievance procedures (such as a citizen review board could be construed) are "inherent managerial prerogatives" and thus not a subject for bargaining under any circumstances. *See, e.g.,* Minn. Stat. Ann. § 179A.06 (West. Supp. 1991); Ohio Rev. Code Ann. § 4117.08(c) (Anderson 1991). However, many states, including Washington, do not make that distinction, or else in addition require that the public employer bargain collectively with the union with regard to policy matters affecting "wages, hours and working conditions." *See, e.g.,* Ill. Rev. Stat. ch. 48, § 1604 (1989). In the absence of other language, many state courts (especially those simply relying on federal NLRA interpretations) have held that public employers have a positive duty to bargain collectively over questions of discipline as a "condition of employment." *See* Annot., "Bargainable or Negotiable Issues in State Public Employment Labor Relations," 84 A.L.R.3d 242, 293 (disciplinary actions against or dismissals of individual employees).

In order to resolve the conflict between an "inherent managerial prerogative" (an illegal bargaining subject) and an issue affecting an employee's "working condition" (a mandatory bargaining subject), most state courts that have addressed the citizen review board question have employed the balancing approach. Modern state courts now require, when deciding whether an issue is mandatory or illegal, that a PERB balance the extent to which the subject is a personnel matter against the extent to which the subject is a management prerogative. *See, e.g., International Ass'n of Fire Fighters, Local Union 1052 v. PERB*, 778 P.2d 32 (Wash. 1989).

The problem, exemplified in the Spokane PERB de-

cision, is that balancing often gives no guidance on where to draw the line as to what is impermissible and makes no reference as to whether the exclusion of citizens from the process should be considered. Where balancing tests do not require consideration of these interests, decisions such as the Spokane and the Michigan cases (*infra*) are the result. Where courts and PERBs do require that the balancing take into consideration other interests, the outcome is almost always in favor of allowing a public employer to implement public policy decisions without bargaining with the affected union, even if the issue does affect a "condition of employment" such as confidential complaint files. The New York PERB, for example, held that a proposal requiring that students participate on a faculty evaluation committee was not a subject of mandatory bargaining. *Board of Higher Educ. of New York City*, 7 PERB Para. 3028 (N.Y. 1974). In so ruling, the New York PERB noted that policy questions about a university's responsibilities:

often involve issues of social concern to many groups within the community other than the public employer's administrative apparatus and its employees. It would be a perversion of collective negotiations to impose it as a technique for resolving such dispute and thus disenfranchising other interested groups.

*Id.*

In addition, a strict balancing test in the context of citizen review of police may or may not take into consideration the unique functions and structures of police departments. One recent Massachusetts court applied a test that acknowledged that even some managerial decisions affecting a working condition can be exempt from mandatory bargaining if they are designed to preserve the integrity of employees. *Local 346, Int'l Bd. of Police Officers v. Labor Relations Comm'n*, 462 N.E.2d 96 (Mass. 1984). In deciding that a police department could unilaterally require polygraph examinations of officers suspected of criminal activity, the Massachusetts Supreme Judicial Court stated:

Few institutions depend as heavily on integrity and credibility for the effective performance of their duties as do police departments. We have little hesitation in concluding that, when the functions of a police department are disrupted by allegations of criminal conduct by police officers, the police department's decision to subject officers reasonably suspected of criminal activities to lie detector tests furthers law enforcement objectives that override the employee's interest in negotiation.

*Id.* at 103. Other courts have looked at issues such as drug testing and force strength levels in police departments and determined that these issues are not subjects for mandatory bargaining. *Police Bargaining Unit of the Borough of Montoursville Police Dep't v. Borough of*

*Montoursville*, 634 A.2d 830 (Pa. 1993) (force strength levels); *Fraternal Order of Police, Miami Lodge 20 v. City of Miami*, 609 So. 2d 31 (Fla. 1992) (drug testing is within the managerial prerogative).

In a Michigan case dealing with disciplinary procedures, a police union filed an unfair labor practice charge with the Michigan Employment Relations Commission claiming that the city refused to bargain over disciplinary and residency requirements. *Pontiac Police Officers Ass'n v. City of Pontiac*, 246 N.W.2d 831 (Mich. 1976). The Michigan court held, based on federal case precedent interpreting statutory language modeled on the NLRA, that a civilian review process over disciplinary procedures concerns "other terms and conditions of employment" and is thus a mandatory subject of collective bargaining. *Id.* at 834 ("The Federal cases have uniformly held that *grievance procedure and arbitration . . .* fall within 'other terms and conditions of employment' and are mandatory subjects of collective bargaining"). The court rejected the city's policy arguments that the public is directly affected by police misconduct and that trial boards "give citizens confidence in the propriety of the acts of their police department," concluding that a legislative redefinition would be required to rule otherwise. *Id.* at 836. See also *Detroit Police Officers Ass'n v. City of Detroit*, 214 N.W.2d 803 (Mich. 1974) (upholding PERB ruling that residency requirements for Detroit officers was a mandatory subject for collective bargaining); *City of Reno v. Reno Police Protective Ass'n*, 653 P.2d 156 (Nev. 1982) (statute mandating city negotiations with union over disciplinary procedures prevailed over conflicting city charter provision).

By contrast, a California appeals court ruled in 1978 that the city of Berkeley was not required to bargain with a police union over a proposal that a civilian review commission member be allowed to review internal complaint files and to attend department hearings. *Berkeley Police Ass'n v. City of Berkeley*, 143 Cal. Rptr. 255, 76 Cal. App. 3d 931 (1978). The authority of the Berkeley commission was previously upheld in *Brown v. City of Berkeley*, 57 Cal. App. 3d 223, 129 Cal. Rptr. 1 (Cal. App. 1976) (discussed in section III, *supra*). Relying on language specific to California's public sector labor law, the California court stated that the city's "scope of representation" excluded consideration of any activity "provided by law or executive order" and the civilian review procedure was such an activity. 143 Cal. Rptr. at 260.

In so ruling, the court specifically held that the union was challenging the policies of its own police chief which had been issued by an "executive order." The court concluded that the policies at issue "clearly constitute management level decisions which are not properly within the scope of union representation and collective bargaining." Finally, the court stated that the managerial decision exception as enunciated in federal case law was par-

ticularly appropriate when applied to “public entities where both employers and employees are servants of the people. . . . To require public officials to meet and confer with their employees regarding fundamental policy decisions such as those here presented would place an intolerable burden upon fair and efficient administration of state and local government.” *Id.*, citing *NLRB v. Transmarine Navigation Corp.* 380 F.2d 933, 939 (9th Cir. 1967)(“Decisions . . . as to the basic direction of a corporate enterprise is not included in the scope of mandatory collective bargaining”). See also *San Jose Peace Officers Ass’n v. City of San Jose*, 144 Cal. Rptr. 638, 78 Cal. App. 3d 395 (1978) (city not required to bargain over use of firearms policy as policy was not within its scope of representation).

By contrast, another California court used a balancing approach to hold that police officers have a bargainable right to have union advisors to assist them in preparing written reports in response to a shooting incident. *Long Beach Police Officers Ass’n v. City of Long Beach*, 203 Cal. Rptr. 494, 156 Cal. App. 3d 943 (1984). The court recognized that while choice of deadly force policy is not a matter subject to collective bargaining, “the practice in question is directed at an act of force which has already occurred . . . [when] public safety is no longer at issue.” 203 Cal. Rptr. at 503–04. Although the city argued that the department and the public had a right to know the true circumstances of the incident “without the possible taint from the advice of others,” the court balanced these rights against the officers’ rights to hold that “the practice is one involving a working condition and not a matter reserved to management.” *Id.* at 504–05.

In the most recent state supreme court ruling concerning citizen review as a bargaining issue, the Ohio Supreme Court addressed the legality of a proposed charter amendment that would establish a police review board in Cleveland with powers to investigate and to recommend disciplinary action on a finding of misconduct. *Jurcisin v. Cuyahoga County Bd. of Elections*, 519 N.E.2d 347 (Ohio 1988). The *Jurcisin* court focused on the timing of the review procedure in relation to the appeal rights of the affected officer: If the citizen board recommended discipline of a particular officer, that officer had the same right to file a grievance under the collective bargaining agreement as an officer whose discipline was imposed directly by the Public Safety Director. Therefore, ruled the court, the review board did not deprive officers of any rights they possessed under the collective bargaining agreement and the city was not attempting to simply disregard its agreement. *Id.* at 354. See also *District of Columbia Metro. Police Dep’t v. Perry*, 638 A.2d 1138 (D.C. App. 1994) (Civilian Complaint Review Board did not supersede provisions of the Comprehensive Merit Personnel Act relating to disciplinary proceedings).

Significantly, the *Jurcisin* court held that the “case

involves the proper exercise of management powers by the city charter and recognized in the collective bargaining agreements [which] expressly recognize that the city retains exclusive and sole responsibility for the organizational structure of the police department, the supervision and direction of employees of the department, and the discipline of members of the department.” *Id.* Further, in upholding the city’s managerial right to create a review board by charter amendment, the court agreed with the *Berkeley Police* holding and many of the commentators quoted above that citizens interests must be factored in:

[A] public review board that serves as a forum for allegations regarding police misconduct in the performance of their duties provides a procedure for those who are not represented at the bargaining table to raise issues with respect to police conduct. Collective bargaining does not necessarily provide an appropriate process for the full consideration of the issues raised in a complaint by a citizen against a police officer.

*Id.*

At least one state court of appeals has held that all aspects of the discipline of police officers are an “essential inherent managerial prerogative” of the local government that cannot be delegated away during bargaining negotiations to a private third party such as a union. *State v. Local 195, IFPTE*, 430 A.2d 966 (N.J. 1981). See also *City of Jersey City v. Jersey City Police Officers’ Benevolent Ass’n*, 430 A.2d 961 (N.J. 1981). In so ruling, the *Local 195* court relied on statutory language but also invoked basic principles of democracy:

The very foundation of representative democracy would be endangered if decisions on significant matters of governmental policy were left to the process of collective bargaining, where citizen participation is precluded. This Court would be most reluctant to sanction collective agreement on matters which are essentially managerial in nature, because *the true managers are the people. Our democratic system demands that governmental bodies retain their accountability to the citizenry*

*Local 195*, 430 A.2d at 969, quoting *Ridgefield Park Educ. Ass’n v. Ridgefield Park Bd. of Educ.*, 393 A.2d 278, 287 (N.J. 1978) (emphasis added).

## VII. Conclusion

Citizen review is a democratic experiment that is growing and undergoing transformations as it does so. It is not a panacea for the systemic racism and abuse that permeate many urban police departments. But it does enhance trust, as evidenced by final outcome of *In re Moises DeJesus*, and is worth fighting for simply on that basis, even if financing cutbacks make that fight difficult. Recent studies show significantly higher complaint rates

and higher sustained findings in excessive force cases, which in fact is the very reason why police unions are devoting considerable resources to fighting the legal battles described above.

In the New Jersey case mentioned above, the court of appeals held that citizens have a substantive due process right that prohibits a government's delegation of its policy-making power "to private groups where a serious potential for self-serving action [or detriment to the public good generally] is created thereby." *Local 195*, 430 A.2d at 969. Especially in those cities such as Philadelphia where the CRB has independent investigators, subpoena power and powers to hold public hearings, this substantive due process right is derived from the first amendment right of Petition, a right that clearly cannot be delegated to a third party such as a labor union. Correspondingly, police unions have no first amendment right to collective bargaining over any issue. *Fraternal Order of Police v. Ocean City*, 916 F.2d 919 (4th Cir. 1990). It seems clear that if these important questions surrounding citizen review and collective bargaining were adequately raised in a federal court, citizens' rights to petition would prevail. So far, however, they have not been litigated. It is incumbent on those of us who care about these issues to raise them.

## RECENT CASES

In *Cooper v. Casey*, 97 F.3d 914 (7th Cir. 1996), two prisoners who were housed in the disciplinary wing of an Illinois maximum security prison brought a 42 U.S.C. § 1983 action in which they alleged that they were maced and beaten by guards who then refused to provide them with medical assistance for their injuries. After a five-day jury trial, both plaintiffs prevailed on their claims and were awarded \$5,000 each in compensatory damages and \$60,000 each in punitive damages. Subsequently, plaintiffs' counsel, who were experienced anti-trust lawyers from a large Chicago law firm, were awarded attorneys fees in the total amount of \$163,000, with the lead attorney receiving an hourly rate of \$320 per hour. On appeal to the Seventh Circuit, the defendants made "no serious effort to show that there was insufficient evidence of excessive force to support the jury's verdict," but did "challenge vigorously the finding of deliberate indifference to the plaintiff's need for medical attention." 97 F.3d at —. In so doing, they argued that plaintiffs' "injuries were too slight to create a constitutional entitlement to medical treatment" and that there was "no evidence that the defendants knew the plaintiffs had been injured." *Id.*

In rejecting these arguments the Seventh Circuit first recognized that in order to sustain a constitutional deprivation the "illness or injury for which assistance is sought must be sufficiently serious or painful to make the re-

fusal of assistance uncivilized." 97 F.3d at —. While the refusal of treatment for "minor aches and pains," "tiny scratches" or "mild headaches" does not rise to a constitutional violation, the fact that the condition "does not produce 'objective symptoms' does not entitle the medical staff to ignore it," since "in some cases nonverifiable complaints are the only symptoms of a serious medical condition." *Id.* In the instant case the controlling issue was "whether the plaintiffs were in sufficient pain to entitle them to pain medication within 48 hours." *Id.* This was an issue properly left to the jury because to require objective injury "would confer immunity from claims of deliberate indifference on sadistic guards, since it is possible to inflict substantial and prolonged pain without having any 'objective' traces on the body of the victim." *Id.* Turning to the evidence in the record, the court noted that the doctor who ultimately treated the plaintiffs prescribed a painkiller, rather than simply dispensing over-the-counter medication, and found that the jury's determination that the plaintiffs' injuries were sufficiently serious to trigger a constitutional deprivation should not be disturbed.

Similarly, the court further found that the "defendants knew that the plaintiffs needed pain medication—a prerequisite to liability for deliberate indifference to a prisoner's medical needs [under] *Farmer v. Brennan*, 114 S. Ct. 1970, 1979–80 (1994)." 97 F.3d at —. The court noted that the plaintiffs had cried out for help after the beating, that the defendants were stationed in the area, and, most significantly, pronounced that:

when guards use excessive force on prisoners, the requirements for proving deliberate indifference to the medical needs of the beaten prisoners ought to be relaxed somewhat. Beating a person in violation of the Constitution should impose on the assailant a duty of prompt attention to any medical need to which the beating might give rise, by analogy to the duty in ordinary tort law to provide assistance to a person whom one has injured, even if without fault. E.g., *Vahlsing v. Commercial Union Ins. Co.*, 928 F.2d 486, 491 (1st Cir. 1991); Restatement (Second) of Torts § 322 (1965). And here it was not without fault.

97 F.3d at —.

The court further held that the district court's refusal to permit the defendants to bring out before the jury that the plaintiffs were confined in the disciplinary wing of the prison was not an abuse of discretion, and that its seeming bias against the defendants was a product of the strength of the plaintiffs' case and the "inadequacy" of the state's lawyer, *Id.* It also strongly affirmed the jury's award of punitive damages and rejected the defendants' argument that the award of punitive damages was excessive because it was twelve times the compensatory award:

[I]f the plaintiffs' testimony was believed, the defendants made a wanton and cowardly attack and then de-