

June 15, 2023

Police Training Commission
Attn: DAG Alessandra A. Baldini
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Submitted electronically to PTC@njdcj.org

**Re: Proposal Number PRN 2023-030 regarding Police Training Commission Rules—
Comments of the Policing Project at New York University School of Law**

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I. Introduction

The Policing Project is a non-partisan center at New York University School of Law dedicated to promoting public safety through transparency, equity, and democratic engagement.

This comment draws in particular on the below resources that the Policing Project and its staff members have developed regarding officer screening and decertification:

- Our co-founder, Professor Barry Friedman, served as the Reporter on the American Law Institute’s *Principles of the Law, Policing* project, which developed high-level principles

for all aspects of sound and equitable policing, including officer screening, certification, and decertification (i.e., license revocation).¹

- Drawing on the ALI work, we drafted a model statute on officer screening, discipline, and decertification.² The statute was vetted by an advisory committee consisting of law enforcement officials, academics, police reform experts, and affected community members,³ and informed by the best practices in existing state legislation.

Making use of these resources, the Policing Project has advised and testified before state legislatures on decertification reform.⁴ We have also offered guidance, support, and technical assistance to Police Officer Standards and Training (“POST”) boards across the country on officer screening, discipline, and decertification.

New Jersey took a huge step by enacting P.L. 2022, c. 65 (“the Act”) last year, authorizing the Police Training Commission (the “Commission”) to license officers statewide and suspend or revoke their licenses if they engage in serious misconduct. Before enacting the Act, New Jersey was one of the only states in the country that did not vest a state agency with revocation authority, hamstringing the state when it came to ensuring that officers who pose a danger to the community are stripped of their badge.

As the Commission has recognized in its proposed new rules, the Act vests the Commission with discretion to implement the Act’s various provisions. We applaud the Commission on the thoroughness of its proposed new rules on subjects including grounds for Commission adverse licensure actions, law enforcement unit background investigations, and public transparency & participation in Commission proceedings. While there is much to praise in the regulations, we recommend a number of changes, outlined below, to strengthen the regulations to bring them more in accord with best practices.

II. Grounds for Commission Adverse License Actions

The Act empowers the Commission to suspend or the revoke the license of an officer who satisfies one of the grounds set forth in the Act. *See* N.J. Stat. § 52:17B-71e (eff. Jan. 1, 2024). Some of the grounds are specific (e.g., convicted of a crime in NJ or any other jurisdiction) while some are broader (e.g., “engaged in any unprofessional, unethical, deceptive or deleterious conduct or practice harmful to the public”). The Act does not specify the appropriate or presumed penalty (e.g., license revocation, suspension of a certain length, etc.) for particular grounds.

¹ *See* Principles of Policing §§ 13.02 (*Recruitment and Hiring*), American Law Institute, <https://www.policingprinciples.org/chapter-13/13-02-recruitment-and-hiring/>; 14.13 (*Certification and Decertification of Law-Enforcement Officers*), American Law Institute, <https://www.policingprinciples.org/chapter-14/14-13-certification-and-decertification-of-law-enforcement-officers/>; 14.14 (*National Database of Decertifications*), American Law Institute, <https://www.policingprinciples.org/chapter-14/14-14-national-database-of-decertifications/>.

² *Officer Discipline & Decertification Statute*, Policing Project, <https://www.policingproject.org/officer-discipline>.

³ *Legislative Advisory Committee*, Policing Project, <https://www.policingproject.org/legislative-advisory-committee>.

⁴ *Testimonies and Public Comments*, Policing Project, <https://www.policingproject.org/testimonies-and-public-comments>.

We have the following recommendations for strengthening subchapter 12 of the Commission’s proposed rules:

A. Provide Further Examples of Unprofessional Conduct in the Proposed Rules

The Act expressly invites the Commission to specify what constitutes “unprofessional conduct,” one of the Act’s broader grounds for adverse licensure actions. Namely, the Act defines “unprofessional conduct” as including “any departure from, or failure to conform to, the minimal standards of acceptable and prevailing practice of an officer as prescribed by the commission.” N.J. Stat. § 52:17B-71e(18)(a)(7) (eff. Jan. 1, 2024).

We commend the Commission for taking up the Act’s invitation to specify what constitutes “unprofessional conduct.” *See* proposed N.J.A.C. 13:1-12.1 (specifying, among other grounds, engaging in harassment or intimidation, and accessing a database without authorization). So specifying furthers law enforcement officers’ due process interests by giving them clearer notice of the types of conduct that could result in Commission discipline. It also benefits the public by making clear that the Commission may discipline officers for serious misconduct like harassing a member of the public or using excessive force in violation of the AG’s policy.⁵

Even so, we urge the Commission to add to the rules the following categories of clearly unprofessional officer conduct:

- Intentionally obtaining a confession that the officer knew or reasonably should have known to be false, whether or not used in court;
- Tampering with a witness, victim, or an informant, as defined in 18 U.S.C. § 1512;
- Engaging in racial profiling in violation of Attorney General Law Enforcement Directive No. 2005-1⁶;
- Intentionally depriving, or attempting to deprive, another person or persons of their legal rights; and
- Knowingly detaining a person, against the person’s consent, knowing that the officer lacked the authority of law to effect the detention.

⁵ We recommend that the Commission clarify in proposed N.J.A.C. 13:1-12.1 that it is providing examples of “unprofessional conduct” by either expressly using or referring to that term or its definition in the Act (“any departure from, or failure to conform to, the minimal standards of acceptable and prevailing practice of an officer as prescribed by the commission”). *See* N.J. Stat. § 52:17B-71e(18)(a)(7) (eff. Jan. 1, 2024). The proposed rules currently use the phrase “[e]ngaged in any act or conduct that would undermine public confidence in law enforcement” to introduce the categories of unprofessional conduct, *see* proposed N.J.A.C. 13:1-12.1, which comes from other provisions of the Act focused on inappropriate officer statements, advocacy, and group membership. *See* N.J. Stat. §§ 52:17B-71b(15), (16) (eff. Jan. 1, 2024).

⁶ Attorney General Law Enforcement Directive No. 2005-1, N.J. Office of Attorney General, <https://www.nj.gov/lps/dcj/agguide/directives/racial-profiling/pdfs/law-enforce-dir-2005-1.pdf>

Adding these examples to the rules will give officers more clarity on the type of conduct that could supply grounds for an adverse licensure action and ensure more evenhanded decision-making. It also will give the public greater assurance that the Commission will consistently treat the above examples of clearly unprofessional behavior as serious misconduct worthy of discipline.

B. Specify Additional Grounds That Result in Mandatory License Revocation

The proposed rules specify that proof of criminal and certain other convictions results in mandatory license revocation (at 13:1-12.1(g)). We recommend making clear that the following grounds also result (or presumptively result) in mandatory license revocation:

- Knowingly filing a written police report with a material false statement;
- Committing perjury under [*select federal or N.J. perjury statute*];
- Tampering with a witness, victim, or an informant, as defined in 18 U.S.C. § 1512;
- Using excessive force in a reckless or willful manner in violation of the Attorney General's Use of Force Policy, proximately causing the death of a person;
- Intentionally obtaining a confession that the officer knew or reasonably should have known to be false, whether or not used in court;
- Intentionally creating or using falsified evidence (including false testimony) that the officer knew or reasonably should have known to be false, or intentionally tampering with or destroying evidence or potential evidence with the purpose of creating a false impression, whether or not the evidence was used in court; and
- The officer's license was issued or reactivated as a result of misrepresentation, fraud, or because a government entity or person with a duty to report failed to disclose information that would have disqualified the officer from being certified.

Spelling out additional grounds for which the penalty is license revocation serves officers' due process interests and furthers public safety. This additional guidance would provide officers with better notice of the potential consequences of engaging in the conduct in question. Indeed, the additional guidance also would help ensure that the Commission imposes comparable discipline on officers who engage in comparable misconduct. Lastly, the additional guidance benefits the public by ensuring that officers who put members of the public in danger or otherwise engage in flagrantly unprofessional conduct are stripped of their license.

For these reasons, numerous states expressly spell out in statute or regulation the grounds for discipline for which license revocation is the mandatory or presumed penalty.⁷ The Commission should do the same.

⁷ See, e.g., Fla. Admin. Code Ann. r. 11B-27.005; Mass. Gen. Laws ch. 6E § 10(a); Or. Rev. Stat. Ann. § 181A.640(2).

C. Make Grounds for Adverse Licensure Actions Clearer and More Comprehensive

We suggest making the following amendments to existing grounds for adverse licensure actions in proposed N.J.A.C. 13:1-12.1 to increase clarity and fill potential loopholes:

1. Change “filed a false report” and “testified falsely” to “filed a report containing a material false statement or made a material false statement in testimony.” Without this amendment, the Commission is left to decide how much falsity renders a report or testimony “false.” Adding a “material false statement” requirement resolves this ambiguity.
2. Alter the language of “submitted any false, untrue, or misleading statements on a license renewal application” to include material omissions as well. For example, failing to report an arrest when required to do so as part of a background investigation would be a material omission worthy of Commission discipline.
3. Change “intentionally made any false statement in obtaining or reactivating a license to be a law enforcement officer” to “intentionally made a false statement or an omission, disclosure of which would have disqualified the officer from being licensed or reactivating their license.” As with the second suggestion above, this change would bring material omissions within the scope of the ground; the change also would ensure an officer has their license revoked if they would not have been licensed had the Commission possessed complete and accurate information in the first instance.
4. Clarify what “properly” means in the following ground: “Failing to properly file Federal and New Jersey State tax returns.” As is, the term is ambiguous and it is unclear if “properly” means failure to comply with the relevant tax laws or carries a different meaning.

III. Law Enforcement Unit Background Investigations

We applaud the Commission for the thorough background investigation requirements that law enforcement units must follow before appointing any new officers. *See* proposed N.J.A.C. 13:1-10.3, 13:1-11.4. These measures go a long way in addressing the wandering officer problem, in which officers leave a law enforcement unit following serious misconduct only to be hired by another unit unaware of the misconduct.⁸

Nonetheless, we recommend the following amendments and additions to the proposed rules:

1. Require hiring law enforcement units to report to the Commission any information they uncover during a background investigation that could provide a basis for an adverse licensure action. Such reporting will enable the Commission and licensing committee to

⁸ *See generally* Ben Grunwald & John Rappaport, *The Wandering Officer*, 129 Yale L.J. 1676 (2020).

take appropriate action against officers who engage in conduct that could be a basis for license suspension or revocation.

2. Require hiring units to communicate orally or in writing with (a) each private safety agency that has employed the applicant; and (b) at least one non-law enforcement employer of the applicant, provided that the applicant has worked for at least one such employer. The proposed rules already laudably require hiring units to communicate with each law enforcement unit that has employed the applicant.⁹ But, beyond law enforcement units, an applicant's performance at a private safety agency may well be relevant to an applicant's suitability to serve as a law enforcement officer. Similarly, speaking with at least one non-law enforcement employer could be critical to gauging the applicant's character in a work environment, especially for an applicant with minimal or no law enforcement experience.
3. Require hiring law enforcement units to communicate with each local prosecuting authority where the officer has served to see if the officer is on any impeachment disclosure list. An officer's presence on such a list can be relevant to an officer's candor and truthfulness, qualities that the Commission prioritizes throughout the proposed rules. *See, e.g.*, proposed N.J.A.C. 13:1-12.1(e)(2)(i) (making false testimony a basis for adverse licensure actions).

IV. Initiation of Adverse Licensure Actions

We laud the Commission for setting forth a thorough investigation process that respects officers' due process rights. Among other commendable provisions, subchapter 15 provides the Commission with clear standards for (a) initiating preliminary and further investigations of officer conduct and (b) remedying potential conflicts of interest that an investigating law enforcement unit may have.

The subchapter nonetheless would benefit from two additional provisions.

First, and importantly, we recommend requiring the Commission to pause a further investigation during the pendency of any criminal investigation (or proceeding) of the officer concerning the same underlying conduct. We further recommend requiring the Commission to fully cooperate with, and promptly respond to, requests for information from the prosecutor's office. These provisions would ensure that the Commission is facilitating and not disrupting the investigation or proceeding.

Were the Commission to make this change, it would also need to adjust the provisions governing immediate suspension (*see* proposed N.J.A.C. 13:1-16.2) to ensure that the Commission has time to complete its own adverse licensure process after the criminal process has concluded. Namely, proposed N.J.A.C. 13:1-16.2(a)(1) currently provides that "[w]here the immediate suspension is based upon pending charges that could result in a legal action mandating denial or revocation, the suspension may not extend beyond the disposition of the charges." If the Commission adopts the change we suggest in the previous paragraph, we recommend amending proposed rule 13:1-

⁹ The proposed rules, though, simply state hiring agencies must communicate with "each law enforcement unit." *See* proposed N.J.A.C. 13:1-10.3(a)(4)(v). We recommend clarifying that hiring agencies must communicate with "each law enforcement unit *that has employed the applicant.*"

16.2(a)(1) to permit the immediate suspension to continue until 6 to 8 months after the conclusion or termination of the criminal investigation or proceeding. Because Commission proceedings apply the more permissive “preponderance of the evidence” standard, it is entirely possible that an officer could be acquitted at a criminal trial but still be subject to adverse action by the Commission. The 6-to-8-month period would allow the Commission to complete its own investigation, while ensuring an officer who potentially poses a public safety risk does not serve in the interim.

Second, in proposed rule 13:1-15.1, we recommend authorizing the Commission to set a deadline for law enforcement units to complete further investigations. This would help ensure that further investigations are conducted and concluded in a timely manner.

V. Licensing Committee Composition

The Act establishes a licensing committee responsible for assisting the Commission and making recommendations to the Commission on initial licensure, license renewal, and adverse licensure actions. N.J. Stat. § 52:17B-71a(c), (d) (eff. Jan. 1, 2024). The Act authorizes the Commission to determine the composition and membership of the licensing committee, but requires that the membership include the Attorney General’s designee and at least one public member. *Id.* § 52:17B-71a(d).

In its proposed rules, the Commission specifies the size of the licensing committee (seven members), but offers little detail on membership; the rules simply provide that the five licensing committee members not named in the Act must be members of the Commission. *See* proposed N.J.A.C. 13:1-2.6 (licensing committee “[s]hall be composed of seven members of the Commission,” and include the Attorney General’s designee and at least one public member).

Without offering more detail on membership composition, the licensing committee is at risk of being insufficiently diverse, not adequately representing (a) those with expertise in officer training and accountability, and (b) the New Jersey communities most heavily policed and thus most impacted by police misconduct.

We recommend taking one of two approaches to diversify the licensing committee:

Approach 1: Specify in the rules additional Commission members who must serve on the licensing committee who hold expertise in officer training and discipline and/or represent the communities that are most heavily policed. Existing Commission members that would well serve the licensing committee: the designated representative from the Police Academy Directors Association, the National Organization of Black Law Enforcement Executives, and/or the New Jersey State Association of Chiefs of Police, and an additional public member. As discussed in more detail in Approach 2 below, the Commission should consider requiring the public member have a background in civil rights, social work, or public defense to ensure at least some of those perspectives are represented on the Committee.

Approach 2: Alternatively, diversify the licensing committee by specifying particular members who must serve on the committee who are *not* already serving on the Commission. The Act delegates to the Commission to determine the composition and membership of the licensing committee and does not require that all members be existing Commission members. *See* N.J. Stat. § 52:17B-71a(d) (eff. Jan. 1, 2024). Indeed, given that the licensing committee is not responsible for officer training, it would be sensible to include members on the committee who do not serve on the Commission. If the Commission elects this approach, we strongly recommend increasing the representation of communities being policed most heavily and those who share their interests; the Commission can accomplish this by including on the licensing committee members such as public defenders, civil rights attorneys, social workers, persons with civil oversight or auditing experience over law enforcement agencies, and retired judges.¹⁰

VI. Public Transparency and Participation

We commend the Commission for the various measures in the subchapter 18 of the proposed rules to make the Commission’s work transparent and to enable the public to participate in Commission adverse licensure proceedings. Building legitimacy is crucial for both the Commission and for the police to operate effectively in their communities; trust and legitimacy require that members of the public understand what happens when an officer is accused of misconduct. Releasing data to the public on adverse licensure proceedings, making Commission orders and opinions public, and giving all members of the public an opportunity to participate in Commission adverse licensure proceedings would only bolster the Commission’s legitimacy and the public interest.

Nonetheless, we recommend the following changes to subchapter 18 to ensure the Commission is adhering to best practices when it comes to public transparency and participation:

First, we recommend amending proposed N.J.A.C. 13.1-18.1(a)(2) to require that the Commission publish any written order or opinion, *report*, or *recommendation* issued by the Commission, *the hearing officer*, or *the licensing committee*. The rule currently only requires publication of the final disposition and any associated written order or opinion issued *by the Commission* itself, even though the proposed rules expressly provide for the hearing officer and licensing committee to issue reports and/or vote on recommendations contained in those reports. *See, e.g.*, proposed N.J.A.C. 13.1-16.1. Those reports may contain the most relevant and detailed information regarding the Commission’s decision to impose (or not impose) an adverse licensure action on an officer, and thus should be made public just like the Commission’s written order or opinion.

Second, we suggest amending proposed N.J.A.C. 13:1-18.1(a) to require the Commission to publish certain data regarding the status of all allegations of misconduct that trigger a preliminary review. Currently, the proposed rules only require the Commission to publish data on complaints that result in charges against the officer. Tracking a broader subset of Commission investigations would enable lawmakers and the public to better assess how the Commission responds to various

¹⁰ One approach is to require that at least some of these members be appointed from a list of candidates provided by the relevant professional association (e.g., a civil rights attorney from a list submitted by the civil rights section of the state bar association). *See, e.g.*, Ma. Stat. 6E § 2(a).

categories of misconduct, e.g., whether the Commission is consistently declining to file charges based on certain grounds.

For each report of alleged misconduct received by the Commission that triggers a preliminary review under proposed N.J.A.C. 13.1-15.1, we recommend collecting and publishing the following data points: (a) the source of the report (e.g., employing law enforcement unit, officer self-reported, alleged victim, member of the public¹¹); (b) the misconduct the officer was alleged to have committed, with references to the specific categories of misconduct set forth at proposed N.J.A.C. 13:1-12.1; and (c) whether the Commission initiated further investigation, and if so, whether the licensing committee recommended charges and whether the Commission issued charges against the officer.

VII. Additional Recommendations

In addition to the above recommendations, we have the following three suggestions to ensure the rules cohere with best practices:

1. Establish a process through which members of the public or entities can submit allegations of misconduct directly to the Commission. Doing so increases the likelihood that the Commission learns of conduct that could be a basis for an adverse licensure action even when the law enforcement unit executive does not learn of the conduct or fails to report it to the Commission. Recognizing this fact, a number of states, either by statute or regulation, allow members of the public to report alleged officer misconduct to the state licensing agency.¹²
2. Require each law enforcement executive to certify annually in writing that they and their law enforcement unit are complying with all reporting and background investigation requirements contained in the Act and rules. Currently, the only mechanism for ensuring compliance with the Act and implementing regulations is subjecting law enforcement executives who do not comply to a potential adverse licensure action for repeated or willful violations. Though this mechanism is laudable, we recommend adding a certification requirement so that executives are regularly reminded of their and their unit's obligations under the Act and the rules and given an extra incentive to comply. To ensure the certification requirement has teeth, we recommend subjecting executives to adverse licensure action for knowingly submitting a false certification.
3. Ensure the licensing committee is vested with the authority it needs to accomplish its statutory duties. At a few points, the proposed rules expressly authorize both the Commission *and* the licensing committee to perform specific functions. *See, e.g.*, proposed N.J.A.C. 13:1-10.8(a)–(b) (empowering Commission *and* licensing committee to interview license applicants and requiring application to cooperate with both entities).

¹¹ We suggest using these and comparable general categories; names or other identifying information should not be published.

¹² *See, e.g.*, 50 Ill. Comp. Stat. § 705/6.3(c)(2); Minn. R. 6700.1610(1); Or. Admin. R. 259-008-0310(1); Wash. Stat. § 43.101.145(1).

But at other points, the proposed rules only authorize the Commission to engage in an activity that the Act and regulations otherwise contemplate delegating at least in part to the licensing committee. For example, applicants only have to execute releases allowing *the Commission* to review an applicant's past employment records, making no mention of the licensing committee. *See* proposed N.J.A.C. 13:1-10.2(b)(1).

To avoid any ambiguity, we suggest expressly stating that the Commission *and* licensing committee have shared authority for all responsibilities and releases that fall within the licensing committee's authority under proposed N.J.A.C. 13:1-2.6.

Thank you for the opportunity to comment.

Respectfully submitted,

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