

POSITION PAPER

Standard of Review for Citizen Review Committee: Examining Replacing the Current "Reasonable Person" Standard with "Preponderance of the Evidence"

compiled by Portland Copwatch

April 2011

INTRODUCTION

In Portland's current system of police oversight, there are many complex layers of individuals and collective bodies which review various complaints and incidents of possible officer misconduct. This paper seeks to examine the specific question of whether it is appropriate to change the review standard for the Citizen Review Committee (CRC), a nine-member civilian board nominated by the elected City Auditor and confirmed by City Council, from the "reasonable person" standard to the "preponderance of evidence" standard.

The "reasonable person" standard currently in use for CRC appeals has proved problematic and confusing over the years. In her 2008 review of Portland's police review system, Eileen Luna-Firebaugh pointed out that other oversight agencies use "preponderance of the evidence." Some have argued that CRC is an appellate body, so "reasonable person" is the appropriate standard. CRC, however, has the authority to hear new evidence at a hearing, send cases back for additional investigation, and challenge Police Bureau findings based on the additional information.

We will first examine background on how the current system works, citing what specific reports and officials have said about the standard of review. Then we will analyze the standard in terms of courtroom analogies, civilian oversight--including other oversight bodies, and the history of the use of the "reasonable person" standard by CRC.

BACKGROUND: HOW THE SYSTEM WORKS

Because the focus of our work here is the CRC, we will track how a case ordinarily works its way through the system to that body. However, it is important to also examine how other incidents are reviewed to give an overall picture. Note that throughout, we assume the Bureau's Internal Affairs Division (IAD) is conducting the investigation since the Independent Police Review Division (IPR), though empowered to conduct investigations since 2001, has never done one. For the purposes of this discussion, it is actually irrelevant whether IPR or IAD conducts the investigation.

--> Incident occurs

An incident between a Portland Police Bureau (PPB or Bureau) officer and civilian occurs in which the civilian feels the officer has acted out of Bureau policy.

--> Complaint filed

The civilian can then file a complaint about the incident with the nine member staff at the IPR.

--> Intake process

The IPR intake investigator will gather background information (such as, was the officer in question even on duty that day, names of witnesses and officers, etc.) and present the case file to the IPR Director or her designee for assignment.

--> Case handling

The IPR Director can then dismiss the complaint (if there is no misconduct even if the allegations were true, for example), offer mediation (where the officer and civilian talk through the incident with a professional mediator present, and no possibility of discipline for the officer), handle it as a non-disciplinary complaint (if the alleged conduct would not normally result in discipline even if it did violate policy, also known as "Service Complaint" and "Service Improvement Opportunity") or turn the case over to the IAD for investigation.

--> Investigation

Currently, IAD investigates about one of every 10 complaints that come into IPR. They will interview the involved officer(s) and, if necessary, re-interview the complainant and any civilian witnesses if the IPR intake investigation was not thorough enough. They hand the completed investigation over to the officer's supervisor for a finding.

--> Findings

The supervisor can recommend one of three findings: **Sustained** (officer was out of policy), **Unproven** (there is not enough evidence to prove or disprove the allegations, or the incident did not happen as alleged), or **Exonerated** (officer did what was alleged but was within policy).

--> Police Review Board

In cases involving officer Use of Force or Sustained findings that will result in time off as discipline, the case goes to the Police Review Board (PRB) for a hearing. The PRB was recently restructured and consists of an Assistant Chief, the officer's supervisor, one "peer officer" picked from a pool, the IPR Director, and one civilian picked from a pool (nominated by the Auditor, confirmed by Council). If it is a Use of Force case, there are two peer officers and two civilians on the board.

The PRB hearings are closed to the public. The officer under scrutiny is allowed to be present. Representatives from the Training Division and IAD make presentations about the facts of the case. The board then votes on the proposed findings and/or proposed discipline.¹

--> Appeals

Once the officer's supervisor or the PRB recommend findings, the complainant is notified and has 30 days to file an appeal with the CRC.²

--> Appeal hearings

At the CRC appeal hearing, the complainant can testify, make use of an advocate, bring witnesses and other information. An officer has the same rights, whether responding to a civilian's appeal or appealing a Sustained finding.³ The CRC can vote to (a) affirm the Bureau's findings, (b) challenge the findings (a recommendation to change the findings, which the Chief or his designee can accept or reject), or (c) send the case back for further investigation.⁴

The standard of review is whether the findings are "supported by the evidence"⁵ which is further defined in the IPR ordinance as "when a reasonable person could make the finding in light of the evidence, whether or not the reviewing body agrees with the finding."⁶

--> Chief of Police

Normally, after a Commander, the Police Review Board, or the CRC recommends findings, the Chief of Police makes the final determination on outcome and discipline. Sometimes, the Police Commissioner is involved in the decision.

--> Council hearing

If the Bureau rejects a CRC recommendation, the ordinance directs the case to be heard before City Council for a final determination. The CRC makes a presentation. The civilian and the officer also are allowed to speak directly to Council, though no new evidence may be introduced at the Council hearing.

¹ Portland City Code [PCC] 3.20.140

² PCC 3.21.140 [A] and [B]

³ PCC 3.21.160 [B]

⁴ Citizen Review Committee [CRC] Hearings protocol 5.03 [6] [m]

⁵ PCC 3.21.160 [A][1]

⁶ PCC 3.21.020 [S]

Council also uses the "reasonable person" standard.⁷ In theory, the Council's finding can overturn the Chief's, though labor agreements allow officers to appeal through a "mitigation" procedure. The Council hearing process has only been used once since 2001.

BACKGROUND: PUBLISHED PERSPECTIVES

*** Luna-Firebaugh Report**

In 2008, consultant Eileen Luna-Firebaugh conducted a Performance Review of the IPR, stating:

The Merriam Webster Dictionary of Law defines the Reasonable Person Standard as: a fictional person with an ordinary degree of reason, prudence, care, foresight, or intelligence whose conduct, conclusion, or expectation in relation to a particular circumstance or fact is used as an objective standard by which to measure or determine something (as the existence of negligence). This standard is more difficult for a layperson to understand than the Preponderance of the Evidence standard used by the Portland IAD in its investigations, by other civilian oversight agencies, and in Civil law. The definition of Preponderance of the Evidence is that the party bearing the burden of proof must present evidence which is more credible and convincing than that presented by the other party or which shows that the fact to be proven is more probable than not.⁸

*** Citizen Review Committee**

The Citizen Review Committee, examining the structure of IPR and CRC, agreed with Luna Firebaugh in their June 2010 "Structure Review Report":

The workgroup supports changing the standard of review on appeal from the "reasonable person" (substantial evidence) to "preponderance of the evidence." Although the preponderance standard cannot be reduced to a simple formula, it has been described as just enough evidence to make it more likely than not that the fact the complainant seeks to prove is true. The workgroup agrees with Luna-Firebaugh's statement that the "reasonable person" standard is more difficult for a layperson to understand than the preponderance standard used by the Portland IAD in its investigations, by other civilian oversight agencies, and in Civil law.⁹

The CRC followed up with a letter to Council regarding the September 2010 Police Oversight Stakeholder Group recommendations, stating:

The reasonable person standard applies whether the appeal is taking place before the CRC or City Council. The proposed change would apply to both CRC & Council appeals.

The reasonable person standard is not used in many other police oversight systems across the country. The Luna-Firebaugh report critiqued our use of this standard noting it is overly legalistic and difficult for a lay person to understand and implement, that it differs from the standard used by IAD in its investigations, and from the standard often used in civil law. She recommended the standard be modified to remove reasonable person and include preponderance of the evidence. This substitution would mean that the party challenging the bureau's finding would have to present evidence which is more credible and convincing than the bureau concluded and would have to prove it is more probable than not that bureau policy was violated.

The CRC spent 19 months reviewing its structure and our police oversight system and presented a Structure Review report earlier this year. The process for that review included personnel from IPR. That report endorsed following this recommendation.

Not all appeals that come before the CRC have first gone through a Police Review Board (PRB). IPR now has subpoena power and parties are able to bring material witnesses to their appeals. This creates the potential for new information to be considered by the CRC not considered by the commander or PRB. Because of these aspects of our own, unique system of oversight, individuals hearing appeals should be granted more power to judge the evidence and draw their own conclusions as to whether or not PPB policies have been violated. The overly deferential and difficult-to-understand-and-implement¹⁰ standard of review should be changed to replace the reasonable person with preponderance of the evidence.

⁷ PCC 3.21.160 [C]

⁸ Performance Review of the Independent Police Review Division, January 2008, p. 119, available online at: <http://www.portlandonline.com/auditor/index.cfm?c=27068>

⁹ Citizen Review Committee Report on the Structure of the Independent Police Review Division, p. 14

¹⁰ *Sic.*

* Police Oversight Stakeholder Group

After some changes were made to the IPR ordinance and the PRB was added to City Code, the City Council convened a Police Oversight Stakeholder Group to recommend further changes to IPR. In the Stakeholder report, a recommendation was made to change the standard of review:

(Checkmark indicating consensus item)

A. Change the definition of "supported by the evidence" as that term is used in Portland City Code 3.2.160 Hearing Appeals. The definition should change from the "reasonable person" standard defined in 3.21.020 Definitions to a "preponderance of the evidence" standard, per the discussion in the Luna-Firebaugh report.

General consensus recommendation. This recommendation was supported by the committee with no opposition stated.¹¹

(Note: the draft report added, "a request to indicate at least one staff abstention was requested following the meeting in which this issue was discussed.")

* Auditor

Auditor Lavonne Griffin Valade presented a response to the Stakeholder Report, referencing the request to change the standard of review. In her reply, she wrote:

I disagree. The "preponderance of the evidence" standard is used by those responsible for deciding whether it is more likely than not that a complainant's allegations are true based on the facts of a case. In our system, the commander and voting members of the Police Review Board (PRB) are the fact finders, and they determine whether that standard has been met and make a recommendation to the Chief of Police.

The purpose of an appeal is to allow a complainant or Police Bureau member to challenge fact finder recommendations. The role of the CRC in an appeal hearing is to assess whether or not recommendations made to the Chief were reasonable. It is not the role or responsibility of CRC to make independent judgments regarding the facts of the case or efficacy of allegations. Rather, the role of CRC is to determine whether the fact finders acted reasonably in making recommendations. Therefore, the "reasonable person" standard is the appropriate standard.

* Chief

Chief Mike Reese wrote his own response to the Stakeholder Report. In his section about the standard of review, he said:

Disagree; the current role of the CRC is to be an objective body that is responsible for determining if the commander's or review board's recommendation is reasonable and supported by the investigation. It is not the role of the CRC to hear new evidence¹² or re-investigate the case. It is appropriate for the appeal standard to remain at "supported by the evidence."¹³

ANALYSIS

The "reasonable person" standard limits the Citizen Review Committee to determine whether a Commander's finding was reasonable in light of the evidence. If the CRC were to adopt the more widely used "preponderance of the evidence" standard, the Committee would need:

- (a) 50% plus one evidence that the officer violated a rule/training to find the allegation "Sustained"/out of policy,
 - (b) 50% plus one evidence that the officer did not violate a rule/training to find the officer "Exonerated"/in policy, or
 - (c) 50% plus one evidence that the incident did not happen as alleged to find the allegation "Unproven."
- With less than 50%, the finding would be "Unproven," but here it would mean insufficient evidence rather than the incident did not happen as alleged.

¹¹ City of Portland, Oregon Police Oversight Stakeholder Committee Report, section II (p. 8)

¹² CRC can hear new evidence--PCC 3.21.160 [B]

¹³ The standard would still remain "supported by the evidence" if the definition of "supported" were changed to "preponderance." PCC 3.21.160 [A]

* Courtroom analogies

While the process of determining whether an officer violated policy is entirely an administrative process, there have been many attempts to create analogies to the civil or criminal court system. To take that analogy seriously, we would need to have:

(Step 1) Presenters of facts (the state or the plaintiff's attorneys in court, IAD and IPR here)

(Step 2) A decision-making body making findings about the facts (a judge and/or jury of one's peers in court, Bureau management and sometimes the Police Review Board here)

That analogy likens the CRC to an appeals court:

(Step 3) An appeals court is limited to reviewing the facts laid out in the lower court (an appeals court panel or full bench review in criminal/civil cases)

Here is where the analogy fails. The CRC, by the current ordinance, is able to hear new evidence at this level.¹⁴ And, since the standard spelled out in the ordinance states that "a reasonable person, given the evidence..." means that if CRC believes there is evidence that was not gathered during the investigation, they can send the case back to IAD for further investigation.¹⁵

In a courtroom setting, the appeals court could order the lower court to re-examine the case or hold a new trial but generally can't gather new evidence on its own by hearing from the involved parties directly.

If the Bureau (whether the officer's Commander, the Chief or the Police Commissioner) agrees with the CRC's recommendation, the CRC's opinion holds and there is no more appeal.

(Step 4) Final review (the Supreme Court in criminal/civil cases, City Council here)

If the Bureau disagrees with the CRC, the City Council holds a hearing on the case, and is given final say in the outcome.¹⁶ Because the CRC's proposed finding is only a recommendation to the Bureau, their power is not analogous to an Appeals Court, even though City Council might be considered in a similar role to the Supreme Court. To clarify: The party who lost at the Appeals Court level (the Bureau) is not filing an appeal with Council at their discretion, the ordinance dictates that if Bureau's opinion differs from the CRC, there is an automatic appeal.

City Council, by the ordinance, acts as an appeals body as it is limited to reviewing evidence already on record.¹⁷

Auditor Griffin-Valade has stated her objection changing the standard, arguing that the role of CRC is to "determine whether the fact finders acted reasonably in making recommendations" to the Chief of Police. IPR Director Mary-Beth Baptista also stated that the CRC acts as an appeals body and so can only review what's already in the record. Again, the ordinance simply states that the CRC must determine whether the findings are "supported by the evidence"; it is only in the definition of that term any limitation is implied on CRC as a decision making body.

The Auditor also argues that cases go before the Police Review Board (PRB) prior to reaching this administrative appeal hearing. However,

(a) the community member who filed the complaint is not allowed to attend the Police Review Board hearings to present evidence and talk to the members reviewing the case. The community member can only do that when appealing the findings to the CRC, and

(b) very few cases have gone or will go before both the PRB and the CRC.

In other words, if this were analogous to a judicial appeal, the civilian would have had a right to speak and present evidence before the first "judge/jury" (the Commander and/or the Police Review Board-Step 2). Instead, the CRC "appeal hearing" is the first level hearing at which the civilian can make his/her case and the unbiased "jury" (the CRC) can hear all the evidence (Step 3).

¹⁴ PCC 3.21.160 [B]

¹⁵ CRC Hearings protocol 5.03 [6] [m])

¹⁶ PCC 3.21.160 [A] [2] [b]

¹⁷ PCC 3.21.160 [C]

It should be noted that the formal name for this process is a "request for review," (3.21.140) and not an "appeal" which is the commonly used term and which appears in discussion of the hearings.

* Civilian oversight

Another objection that has often been raised is that CRC weighing the evidence for a preponderance would mean they are "substituting their judgment for that of the Commander." Perhaps that is not such a bad thing. The purpose of creating a civilian oversight body was to "respond in such a way that services are improved and trust in government is restored" (Ordinance No. 175652). Public trust is not enhanced by restricting CRC from having the authority to effectively oversee the Portland Police Bureau.

It is also worth noting that of 500 or so complaints filed with IPR each year, CRC hears between one and eight appeals. In those very limited appeals heard by the CRC, allowing the CRC to use the less deferential "preponderance" standard should help guide PPB management to make future decisions better knowing community standards.

Part of the objection to CRC using its own judgment is their lack of knowledge or experience on police matters. CRC members are required to go on ride-alongs with police¹⁸ and are given orientations, mostly by police (and rarely by civil rights attorneys or public defenders). They sit on the Committee for two year terms. Thus, an average CRC member will know more about police policies and protocols when determining whether an officer violated administrative rules than most jurors know about law when they make decisions about a person's guilt or innocence.

* Other oversight bodies

The preponderance model is cited by the National Association for Civilian Oversight of Law Enforcement as in use by many oversight agencies.¹⁹

Oversight systems in other cities which allow appeals before citizen review bodies, such as Albuquerque, NM, Charlotte, NC, Cincinnati and Dayton, OH, use the preponderance of the evidence standard.²⁰

* History of use by the City and the CRC

When an appellant requests that the CRC change the Bureau's findings, the appellant must convince the CRC that the findings were not only unsupported by the evidence, but "unreasonable" for an individual with IAD experience to have reached that conclusion. The ordinance directs them to determine whether a reasonable person could have come to the finding, "whether or not the reviewing body agrees with the finding."²¹

CRC members are regularly reminded of this standard by the City Attorney. In years past, the City Attorney has added words to the ordinance that asks whether "a reasonable person could make the finding in light of the evidence" by stating "in light of the evidence in front of them." That reading of the ordinance is inaccurate and undermines one purpose of the "reasonable person" standard. "In light of the evidence" carries the implicit imperative for CRC to decide whether the decision-maker had enough evidence to make the decision, since no reasonable person would make a decision based on a partial presentation of facts. It is that distinction which has allowed CRC to send cases back for further investigation.

¹⁸ PCC 3.21.080 [B] [1]

¹⁹ <http://www.nacole.org/archived/investigative%20guidelines.html>

²⁰ Albuquerque, New Mexico Police Oversight Commission:

<http://www.cabq.gov/iro/documents/RulesandRegulations.pdf>

Charlotte, North Carolina Citizen Review Board,

Charlotte Code of City Ordinance, Part II, Chapter 16-58(a)(2) - (4):

http://library.municode.com/HTML/19970/level4/PTIICOOR_CH16PO_ARTIIDE_DIV2CIREBO.html

Cincinnati, Ohio Citizen Complaint Authority Board (2009 annual report):

http://www.cincinnati-oh.gov/ccca/downloads/ccca_pdf39182.pdf

Dayton, Ohio Citizens' Appeal Board:

<http://www.cityofdayton.org/departments/hr/Documents/CAB%20Flyer%20for%20Internet.pdf>

²¹ PCC 3.21.020 [S]

However, CRC has on several occasions stated reluctance to call the Bureau "unreasonable," and/or ignored the directive to decide whether the decision is "reasonable" regardless of whether or not they agree with it.

In 2007, during an appeals hearing vote regarding whether an officer stated he could shoot an unarmed man he saw jaywalking, the CRC was considering whether to change the finding assigned by Commander Derrick Foxworth from "Unfounded" (meaning the incident did not occur as alleged) to "Insufficient Evidence." The CRC Chair stated "I know Commander Foxworth is a reasonable person, so I'm going to agree with this finding." It was clear he did not understand that the "reasonable person" refers to an imaginary average person reviewing the facts. The Chair gave the same explanation at least one other time that evening. That same CRC member, who is no longer Chair by his own decision, has admitted to not understanding the standard of review in his eight years on the Committee.

In another incident, an officer who was found out of policy for using profanity appealed the "Sustained" finding. Though she admitted to using profanity in a way that was not allowed by policy, the CRC asked to change the finding to "Exonerated with a Debriefing," meaning they thought she was in policy but needed to be counseled for her action. The IPR Director worked with the Bureau to change the finding to a "Service Complaint," meaning the officer was talked to about her action but no discipline could be imposed by the Bureau. In this instance, the CRC had the evidence, but disagreed with the finding. They therefore disregarded the part of the "reasonable person standard" stating a reasonable person could come to the decision in light of the evidence, even if they disagreed with the decision. If the standard were preponderance, the CRC would have had to clearly articulate what the facts were that led them to believe 50%+1 of the facts "Exonerated" the officer, rather than proved the allegation should be "Sustained."

CONCLUSION

Based on all the above information, the following change should be made to the ordinance:

3.21.020 (S) "Supported by the Evidence." A finding regarding a complaint is supported by the evidence when ++the finding can be reached by a preponderance of the evidence.++ [a reasonable person could make the finding in light of the evidence, whether or not the reviewing body agrees with the finding]

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