

COMPLAINT REVIEW BOARD STRATEGY

By Chip DeBlock

Some states allow for Complaint Review Boards (or equivalents) to be utilized during the discipline process. These Boards (or panels) allow your case to be reviewed by select individuals who then make a recommendation (or determination) as to the disposition (deciding whether or not you violated any rules or regulations). They are typically used in serious cases after the investigation is complete but before any discipline has been handed out. There are distinct advantages in using strategy when picking your Complaint Review Board. Even if your Board is only advisory in nature and their decision is non-binding, their determination could sway the outcome of a grievance, appeal or arbitration.

When Not To Use a Complaint Review Board

If you are guilty of all the accusations, intend to openly admit your guilt and “throw yourself on the sword”, there may be no distinct advantage in having a Complaint Review Board.

Making Your Picks

Take the state of Florida for instance (we’ll use Florida as a basis for this article). Florida State Statute 112.532(2) [known affectionately as The Policeman’s Bill of Rights] deals with Complaint Review Boards. You might even have a department Standard Operating Procedure that deals with this (the Tampa Police Department’s is SOP 641.2). Officers are entitled to utilize a 3 or 5 man Complaint Review Board depending on the size of the agency. Assuming you’re using a 5 man Complaint Review Board, the Agency picks 2 of the members and the Aggrieved Officer picks 2 others. Both groups (the 4 Picks) then select the 5th member. This 5th Pick is the most important pick and can be crucial to the outcome.

Select people on your Complaint Review Board who will be fair. The goal should be for the right thing to happen. This not only adds credibility to the process, but to you as well. Also, approach them and make sure they are willing to do this before submitting their names.

The Agency will typically select upper management (i.e. Captains) as their picks. Not only are they loyal to the Agency, but they can use their position of rank to influence your picks in the selection of the 5th Pick. Remember, they are representing the Agency! At least one of your two picks has to be a strong individual who cannot be easily swayed. Since your 2 Picks can be anyone, you may want to select individuals who would not necessarily be approved by the other side as a 5th Pick. This will increase your chances of having the 5th Pick that you want.

Selecting the 5th Pick

Almost NEVER go with the Agency's recommendation for a 5th Pick! They are being selected by your Agency for a reason and they will normally feel some pressure to side with the administration when recommended by them for this position.

Be in control! There are no rules about you calling the shots. Let your 2 Picks know who you'd like the 5th Pick to be. You may even want them to run potential names by you as they're submitted by the other side. By doing this you might even uncover a potential conflict between the proposed 5th Pick and the Aggrieved Officer.

Any potential 5th Pick should be approached by one or both of your existing Picks and asked the following:

1. Are they willing to serve on your Complaint Review Board
2. If so and if their conscience leads them, are they willing to be the swing vote if both sides are tied, even if it means casting a vote against the Agency's or Administration's position?

Believe it or not, a lot of people will not be able to do this last step. I've had people tell me that they could not do it, I've had people tell me they had to think about it for a while and I've had people tell me that they were uncomfortable about it but would if it absolutely came down to them being the swing vote.

The process of both sides picking the 5th Pick can be done via email, telephone or in person. One of the picks generally acts as spokesman for their side until a tentative agreement is reached; then, everyone casts an official vote. Email is a good way of documenting this procedure. Since there are no time restrictions for this process, it can take days or even weeks. Be careful about intentionally delaying this process, as you don't want the agency to go to court seeking a ruling that you are circumventing the system.

If no agreement can be made on the 5th pick in a day or two, the other side can become frustrated and begin making contact via telephone or even in person. This is why you need to have at least 1 Pick representing you who is strong and will not buckle under pressure. Being behind closed doors with 2 captains and raised voices is no picnic, I can assure you. I've even been told that they gave in last time on another Complaint Review Board and that now it was our turn to agree to their 5th Pick. Be strong and remember that the Aggrieved Officer is depending on you.

The goal here is to get your 5th Pick selected. If you select someone with rank, there's a greater likelihood that he'll be accepted by the other side. They typically will not agree to picks who have a history of not supporting the department or who have no reason to (i.e. they are retiring soon). Even if it's subtle, they like leverage.

If you've exhausted your efforts in getting your 5th Pick selected and there is no one else within your agency that you feel comfortable with, consider going outside your agency.

You have the legal right to select a LEO (or, if you're a Corrections Officer, another Corrections Officer) from any State, County or Municipal Agency within the county. This may not be well received, but it is your legal right under state statute. It has been my experience that the other side will seek to prevent you from doing this by going back and agreeing to accept one of your prior 5th Picks. If this happens, that's great! You won. This is also why it's important to submit 5th Picks they'd be willing to accept, even if only under these circumstances. Submitting lower rank officers or your buddies is not going to cut it. I'd focus on finding a sergeant or higher as a 5th Pick to make it easier on them to accept.

Picking the Chairman

I've been on Complaint Review Boards where the chairman is picked at the end and at the beginning. I recommend picking one at the first opportunity. The Chairman can make certain procedural decisions, most of which have no bearing on the outcome, and drafts a letter detailing the Board's finding (a simple majority rules). If you are one of the 5 Picks on a Complaint Review Board and this is your first time, you may want an experienced member to serve as the Chairman. You, as the Board, will take a vote and decide. However, here are 2 important points to consider:

1. The Chairman decides if the Board can ask the Aggrieved Officer any questions. Although introducing new material, testimony or evidence would require that the Aggrieved Officer go back to Internal Affairs and be interviewed again, the ability for Board members to ask questions of clarification is very important and should be permissible. All too often I've heard Board members state that they ruled against an Aggrieved Officer because they had unanswered questions. I've had Chairmen openly allow Board members to ask as many questions as they like. I've also had Chairmen refuse to allow Board members to ask any questions at all, citing that it was not permitted. Then again, I had a shrewd Chairman allow Board members to question the union representative instead as the Aggrieved Officer sat at his side. In the case of the Tampa Police Department, the SOP clearly refers to "additional information not previously documented" as a hurdle before sending the Aggrieved Officer back to Internal Affairs. In my opinion this clause is often misinterpreted.
2. The Chairman holds the power of the pen. Letters detailing the Board's decision are typically not thorough. They outline the finding of the Board on each charge (by a majority) and every Board member signs the document, but that's about it. If the Board finds in favor of the Aggrieved Officer, even if it's a 3-2 decision, this may not matter much. But, if the Board rules against the Aggrieved Officer and it goes to arbitration, this could be a big deal. Will each Board member remember why they ruled against the Officer if it's not documented? I remember two Captains ruling against a Sergeant for Supervisory Responsibility in part because he was the supervisor on paper even though he was recovering from an injury at home and not at work when

the incident in question occurred. That's important information for an arbitrator to have.

So, clarify the proposed Chairman's position on these topics before selecting him.

Addressing the Board

If provided the opportunity to address the Complaint Review Board, by all means, do it! Contact your union representative and/or attorney and do it! You'll also have access to your Internal Affairs case before doing so. When addressing the Board, be confident and sure of yourself. Look everyone in the eyes when you talk and pay special attention to the 5th Pick. Remember, he can be the pivotal player in all of this. If there is part of the complaint that you are admitting to, openly acknowledge it and move on. They will appreciate your honesty and already know what you did.

Bring documentation with you highlighting a timeline. Almost every Internal Affairs package I go through lacks a timeline. By the time he finishes reading the package, the reader has no idea what order the events happened in and is confused on at least some points. Do not discount the importance of this. I have seen a written timeline submitted by the Aggrieved Officer sway the 5th Pick in a 3-2 win. If you do a good enough job on your timeline, Board members will refer to it instead of the lengthy Internal Affairs package while debating the outcome of your case. This is what you want!

If the Chairman does not permit the Board to ask you questions, you might consider asking the Chairman to pose this as a legal question to the Police Legal Advisor. The Police Legal Advisor should, in turn, document both the question and his response for the file. Get with your attorney or union representative (they should be there with you) before making this move.

Board Room Battles

The Board Room is usually very informal. You show up and everyone is on a first name basis. Instructions are given, the Chairman is selected and the Internal Affairs package is passed out. After reviewing the package and hearing from the Aggrieved Officer, a preliminary vote is not unusual. If everyone is in agreement at the onset, you may not need to go any further. However, this is the exception rather than the rule. Discussions begin and even debates until everyone's mind is set in stone.

Don't expect everything to be fair. Just because the case deals with an undercover officer doesn't mean the Agency's 2 Picks have ever worked undercover or even supervised a plain clothes squad. Your 2 Picks might have their work cut out for them in swinging the other side's 2 Picks your way.

Standard of Proof

I have serious concerns over the level of proof required in convincing Board members to rule against Aggrieved Officers. I have seen Complaint Review Boards all over the spectrum in this area and I don't understand why. Even when it comes to Truthfulness issues where the Officer can be fired and other issues that can affect his certification and/or pension, Board members historically do not always require a high degree of proof.

There are basically 3 Standards of Proof that can be used to weigh the evidence:

1. Preponderance of the Evidence (Balance of Probabilities) - this is the standard required in most civil cases. It is met if the proposition is more likely to be true than not true. The standard is met if there is greater than a 50% chance that the proposition is true.
2. Clear and Convincing Evidence – this is the highest level of burden of persuasion sometimes employed in the U.S. civil procedure. To prove something by "clear and convincing evidence", the party with the burden of proof must convince the trier of fact that it is substantially more likely than not that the thing is in fact true. This is a lesser requirement than "proof beyond a reasonable doubt", which requires that the trier of fact be close to certain of the truth of the matter asserted, but a stricter requirement than proof by "preponderance of the evidence," which merely requires that the matter asserted seems more likely true than not.
3. Proof Beyond Reasonable Doubt - this is the standard required by the prosecution in most criminal cases within an adversarial system. This means that the proposition being presented by the government must be proven to the extent that there is no "reasonable doubt" in the mind of a reasonable person that the defendant is guilty. There can still be a doubt, but only to the extent that it would *not* affect a "reasonable person's" belief that the defendant is guilty. If the doubt that is raised *does* affect a "reasonable person's" belief that the defendant is guilty, the jury is not satisfied beyond a "reasonable doubt".

I would like to think that all Board members would at least use the Clear and Convincing Evidence standard and hopefully the Proof Beyond Reasonable Doubt standard before ruling against an Officer. If an officer admits to lying; fine, hang him. But if he denies it and the threshold of Proof Beyond Reasonable Doubt has not been met, err on the side of caution and give him the benefit of the doubt by ruling in his favor.

Bite Your Tongue

Everyone wants to talk about their case and 180 days is a long time to go during a stressful investigation while being tightlipped. Especially when selecting people to be your Picks, you tend to want to share things so there are no surprises. Remember that it's a 1st Degree Misdemeanor to disclose information or documentation about your investigation before it becomes public record (which is when you receive your

Disposition Letter). You can talk with your attorney and you can talk with your union representative.

Reference Material

If you work for an agency outside Florida, please refer to your state statutes and department standard operating procedures for procedural differences. If you work for an agency within Florida, please refer to your department's SOPs.

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