



NEW ENGLAND POLICE BENEVOLENT ASSOCIATION, INC.
CORPORATE HEADQUARTERS
7 Technology Drive, Suite 102 - NEPBA Building
Chelmsford, Massachusetts 01863
www.nepba.org



"Representing New England's Finest"

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July 17, 2013

President
 Christopher S. Ryan
Secretary-Treasurer
 Francis J. Goode, Jr.

Sent Electronically To: Testimony.HWMJudiciary@mahouse.cov

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Chairman Michlewitz, Chairwoman Cronin and Members of the House Ways and Means and Judiciary Committees,

Please accept this letter as the written testimony of the New England Police Benevolent Association (NEPBA) and its many locals and members from across the Commonwealth of Massachusetts with regards to SB2820 - An Act to reform police standards and shift resources to build a more equitable, fair and just commonwealth that values Black lives and communities of color, which has been passed by the Senate and is now before your committee.

The NEPBA represents police and support personnel in more than 120 bargaining units across our State. Our members span the Commonwealth – they are from both large and small departments in Western, Central and Eastern Massachusetts Police Departments, all the way to the tip of Cape Cod. They are law enforcement working for our UMASS system protecting our students and university communities. The NEPBA family also includes the hard-working corrections officers and civilian staff in Middlesex County, Worcester County and Norfolk County. Our locals represent the best of Massachusetts' working families. I write to you on behalf of these members, and on behalf of those working families.

First, let us thank you for ensuring that there would be an opportunity for all members of the public, who so desired, to give their input, testimony, views and arguments for or against the many novel, and in some cases overreaching, provisions in this bill before any determinative action is taken by the House.

Second, it is our opinion that the bill that the Senate passed was much more about punishing the police than professionalizing them and bringing unity to the issue of racism. As a result, the Senate missed the opportunity of bringing everyone together in this just cause.

We stand here as citizens of the Commonwealth in support of ending racism and, as law enforcement officers, appalled by the actions that took the life of Mr. Floyd in Minneapolis.

However, we cannot, and nor should you, support Senate Bill 2820 which marginalizes those who have taken the oath to protect and serve all the other citizens of the Commonwealth while fulfilling their duties in the most dangerous situations in society. The following are just a few key issues that we would like to bring to your attention that unnecessarily degrade law enforcement officers and their careers and, which will eventually be to the detriment of those that they are to protect and serve.



1. Police use-of-force practices in Massachusetts are a success, not a failure, and there is no public emergency that justifies the hurried, extremely damaging fait accompli legislative process that produced Senate Bill 2820.

Based on a what everyone agrees was a criminal act in Minnesota, our Senate has put forth the premise that every police officer in Massachusetts needs to serve as a test-case for a national anti-police agenda. This effort, incredibly, authorizes the gutting of basic collective bargaining rights and civil service protections that are as synonymous with Massachusetts as the Boston Tea Party. In Massachusetts, we have long recognized that public employees are particularly susceptible to politically motivated employment decisions, and so, as a bedrock principle, our government has long assured public servants that they will be protected from discipline or removal absent “just cause.” If SB2820 stands, that bedrock protection will be tossed aside for our police officers, making their careers once again – and in fact by design – subject to the political whims of those who openly seek to abolish much of this honorable profession. This is not necessary, and you should stop it.

Our use-of-force statistics are among the nation’s best. Before you accept the false premise that Massachusetts policing is a failure that requires an emergency fix, take a look at the data. Even using national reform advocates data (reported on mappingpoliceviolence.org), police in the Commonwealth are among the best in the nation when it comes to deadly uses of force. We have an annual deadly use of force rate of only 1.2 incidents per million residents. That is an amazing success, considering that we police a nation that literally has more guns than citizens, that we are a heavily and often densely populated area with major to small cities, and that our communities are made up of many diverse cultures, languages and challenges. Adding to this success story is that our officers are able to accomplish this low rate while state and local leaders continue to pile more on our plates – traditional police work has evolved into handling just about every other societal problem that comes down the pike.

Ask your district’s officers how they are doing in this area. Have you done your due diligence? Do not accept the national narrative that police are arbitrarily killing citizens - it is a false narrative. Look at the data from our state, and specifically from your district. Are you prepared to wipe out the due process protections and jeopardize the security of so many thousands of families without knowing what change is actually needed? For example, you will see that the City of Worcester, in the 7-year period tracked by reform advocates, has had ZERO use of force deaths (the one cited by their website was a taser incident which, contrary to their assertion, was not caused by the police, but was ruled a drug overdose by the state medical examiner). Likewise, the City of Lowell, where I spent my career as a police officer, has had only ONE use of force related death in that time period.

These are two significant cities, with many urban challenges, and between them in 7-years have had one police use of force death (justified) while handling millions of calls for service. In fact, of the deaths in Massachusetts in that 7-year period, all but 5 involved suspects were armed. Also, when anti-police hold out these so-called victims of police violence and ask us to remember their names, they include among them people like the Boston Marathon Bomber, and the despicable individual that murdered Auburn Officer Ronald Tarentino, a native of Tewksbury, in 2016. The marathon bomber injured and maimed 264 people in Boston and killed 3 others. Officer Tarentino was murdered keeping us safe, and here we sit in full view of the public and accept data that characterizes these killers and terrorists as “victims” in the name of emergency police reform? Are we still in Massachusetts? Are we still in America?

Most State Representatives will find that their own district's police officers have had no use of force deaths, and have very low rates of use of force complaints. That is the data you should analyze before deciding to eviscerate the rights of police officers, or aid the attempts by others to villainize this profession in a relentless drive to satisfy a social media driven sense of conscience.

There is no emergency that justifies forcing through legislation as fait accompli – setting out a pretext that something must be done immediately, before considering the results, before thoughtful examination and without transparency. That method will most certainly result in years of negative consequences. This is not speculation. We know there will be labor unrest and explosive labor related litigation. We know there will be an onslaught of litigation against communities that will be underwritten by the taxpayers – the Senate Bill expressly allows and encourages it. There are many mandates that are unfunded. There are baked-in impediments to officers actually doing the jobs. We are already seeing officers retire in record numbers and our departments will suffer an experience deficit. The public will pay the price. This is not speculation, and the more people use that label – speculation – the more it is apparent that nobody can say for sure, because nobody has really thought this through.

As you debate the nature and extent of reforms, now knowing that there is plenty of time for common sense legislative action, please keep in mind the following considerations: the role and function of any POST committee, the preservation of due process rights, and the truth about what qualified immunity is, and what the proposed changes will accomplish.

2. The POST committee – like every other professional licensing board in Massachusetts - must be comprised of a majority of experienced individuals from this particular profession, and its role should be certification and review – not independent crusaders.

Committee Make-Up. In the wake of the Minnesota incident, fueled by social media, the Massachusetts Senate has created a police licensing board made up of a minority of law enforcement members, mostly from management, and a majority of agenda-driven advocacy groups, many of which oppose and even sue police as part of their core missions. This is, frankly, outrageous both in principle and in practice. The matter under consideration right now – this legislative effort - instructs us that policing and using force requires extensive annual training and professional certification. We know that policing involves many dynamic, fast moving situations, and technically advanced weapons and response techniques. Departments require use of force trainers to be state certified instructors. Court's employ expert witnesses to explain force issues to juries because the technical nature of the profession is well beyond the knowledge of the layperson. Despite all of this, the Senate has seen fit to appoint a majority of untrained people to judge the actions of those who are trained. Not only will the majority lack the specialized knowledge, but they will be designated by political advocacy groups that openly oppose police and their practices. For example, the Lawyer's for Civil Rights, Inc. – one of the Senate appointees to the Committee – boasts on its website that it has made millions of dollars suing police officers. No reasonable person can agree this is either fair or an appropriate committee make-up.

GL c. 13 sets out all of the professional licensing boards in the Commonwealth. Look at them. All are basically the same make up – a majority of members must have several years of experience in the subject profession and be similarly licensed. Then, a small minority is comprised of experienced but related professionals, or in some cases citizens. The Pharmacy Board is mostly licensed pharmacists.

Same goes for the Board of Accountancy, Physicians, Podiatrists, Plumbers, Nurses, etc. No board is made up of a majority of people who are from outside the subject profession, and who openly oppose the profession. This is untenable and wrong. Can you point to any other professional board in our state that does this? If the idea of the board is to properly analyze a set of circumstances, then the board must also have the training and experience to make that judgment. Otherwise, the only function of this system will be to ensure arbitrary and capricious treatment of public employees.

You must not punish police officers by creating a licensing board made up of those who advocate against police. Design a common sense, professional committee that is consistent with every other licensing committee in our state.

Committee's Role. Governor Baker's original bill was 11-pages. It has since ballooned to 89 pages. The original bill set the role of the Certification Committee as a review board. In addition to training standards and re-certification, the board was tasked with reviewing conduct that, if sustained by the appointing authority, would result in board action based on that sustained finding. While this "sustained finding" system in the Governor's bill remains problematic (discussed below in Due Process Concerns), the review system the Governor proposed makes much more sense than expanded powers granted by the Senate.

In a use of deadly force incident, there is currently significant review in Massachusetts. Immediately, a State Police CPAC unit investigation is commenced, followed by a review and opinion by the District Attorney regarding whether force was justified and whether excessive force was used in violation of the criminal law. In addition, a Department internal investigation is performed, often by independent, outside agencies. That investigation determines whether rules or procedures were violated. If discipline is issued, the subject officer has a right to a hearing before the appointing authority (i.e. Mayor, Manager, or Select Board, etc.). If there is discipline, the officer then gets to appeal – for the first time in this process – to a neutral hearing officer or arbitrator. That person makes factual findings and a decision on discipline. Those findings – by this one and only neutral – are binding on all parties. This is consistent judicial and administrative precedent in Massachusetts and everywhere else in America.

Now, SB2820 proposes that this new Committee may disregard all of the above processes and professional review, and on its own, solicit complaints, investigate complaints, and make findings that may be contrary to binding findings on the parties. This is inconsistent with due process, any sense of fairness, and contrary to American jurisprudence. No other profession lives under such an arbitrary system. Allowing this politically designed committee to both solicit complaints and make its own findings, unbound by an advocacy process that is governed by just cause principles and neutral factfinders, cannot possibly achieve fairness.

The House should limit the role of any committee to review of established findings made pursuant to the same due process that is available to every other public employee in the Commonwealth. Police – because of the highly charged, often emotional, frequently violent, and always unsettling nature of their occupation - need this protection more than most.

3. Due process rights must be preserved.

Police, like teachers, firefighters, and state and municipal workers of all types, depend on protection from employment decisions that are politically motivated or not based on merit. All public employees in the country enjoy such due process rights. The government cannot remove a property right (in this case, a public job) without due process of law. This is right guaranteed by the US Constitution. In our state, that due process is also guaranteed for unionized employees by Collective Bargaining Agreements, and for civil service communities, by the just cause provisions of GL c. 31.

In fact, because Massachusetts was acutely aware of public employees' susceptibility to political employment decisions, it created the Civil Service Commission specifically to guard against employment decisions motivated by bias or political considerations, or something other than basic merit principles.

In this legislation, the Senate has expressly flouted the very reason for the creation of the civil service law. The Senate created an inherently political committee made up of many anti-police advocates, gave them the power to solicit complaints directly, the power to ignore binding findings of fact made pursuant to just cause analysis, and even allowed them to remove an officer's certification without the benefit of those basic due process rights. Moreover, they then expressly insulate themselves from the Civil Service Commission – the very body set up to guard against political or biased employment decisions not based on just cause.

The House must reinstate a police officer's right to appeal disciplinary decisions to the Civil Service Commission and make the Committee's actions subject to those full appeals. Any attempt to remove an officer's right to appeal to a neutral arbitrator (selected by both parties) would be an unlawful government interference with a Union's collective bargaining agreement, and a violation of the Contracts Clause of the US Constitution. These agencies are the only neutral factfinders in the entire process. Anything short of full due process is no due process.

It is very easy to envision a certification system that could protect all due process rights and allow the Committee to act on pending matters. New Hampshire has that very system, and regularly issues temporary restrictions on law enforcement certifications during the pendency of due process appeals. It is not a difficult goal to achieve if advocacy is not run amuck.

The definition of "Sustained Complaint" must be changed. Both the Senate and Governor's bill propose that a sustained complaint is one that has been appealed only through the appointing authority. At that point, having made such a finding, the Committee would be required to decertify certain officers. This process would remove the neutral appeals to arbitrators and civil service hearings, and would force the committee, and the officer, to rise and fall on the final decision of the appointing authority. This cannot stand.

As stated above, a neutral, advocacy-based process, does not happen until after the appointing authority has acted. In fact, long established legal precedent states that employees do not even have a right to a fair hearing before the appointing authority, nor should they expect one. The law acknowledges that appointing authority hearings – by nature – are unfair, and the law doesn't care, because employees do have the right to fair, de novo appeals to either civil service or arbitration. The proposed law would remove all fairness from the system, and stick employees with the admittedly unfair, final decision of the appointing authority.

The House must not accept this as the standard for police officers. No other public employees in our state suffers such unfairness. A sustained finding can only be made when an employee exhausts, or waives, his or her complete appeal rights under their CBA or GL c. 31.

4. Qualified Immunity.

Do not accept the assertion that there is not much of a change here. Not only did the Senate make it more difficult to get Qualified Immunity (essentially turning it into a fact issue to be decided at trial, as opposed to a legal issue a judge could weed out early) - but the real shell game is done by removing elements from the State Civil Rights Act, particularly the requirement to prove violations were done by "threats, intimidation or coercion," and also at the same time adding a provision for attorney's fees to be awarded to plaintiffs that sue police and other public employees. These two changes will create a flood of new state law claims against public employees to be brought in the state courts - as opposed to Federal Courts - where they will cost employees and Cities and Towns so much. This has been confirmed by recognized by experts in the field that represent Cities and Towns, not unions.

Some legislators are pointing to the lack of changes in the State Indemnification Law (GL c. 258) as a reason that officers should just not worry - suggesting they will still be defended against all of this expected onslaught. This is not true. GL c. 258 presently discriminates against municipal officers as indemnification for municipal employees (police, fire, local officials, etc.) is discretionary. Employers do not have to do it. On the other hand, people like state legislators and the State Executive branch enjoy mandatory defense and indemnification for up to \$1,000,000.00 if they violate the civil rights laws

Also – please don't forget - the Massachusetts State Police have a special statute of their own - GL c. 258, Sec. 9A – which provides mandatory defense and indemnification for up to \$1,000,000.00 for civil rights violations as long as they are not willful or malicious.

Under the Senate bill, only municipal employees – not just police but all municipal employees – will be left walking a tightrope without a net.

We urge you to strike the changes to the State Civil Rights Act and leave the long-standing law in place that protects good officers, good municipal employers, and taxpayers. Currently, an officer that uses excessive force can be sued – no change is needed for this. Excessive force allegations rarely result in Qualified Immunity. Those officers can be fired. Those officers can be prosecuted. No changes are needed for any of this. Do not put the careers and security of the many good public employees at risk to satisfy a need that does not exist.

The NEPBA respectfully requests that you address these serious and important concerns as you consider the legislative action before you.

Respectfully,

Jerry Flynn, Executive Director
New England Police Benevolent Association, Inc.

On behalf of the NEPBA and its members in the following member locals:

Andover Police Dispatcher's Union

Montague Police Officers

Andover Superior Officers

Montague Police Sergeants

Ashburnham Police

Natick Police Department - 911 Dispatchers Union

Natick Police Superiors Officers Assoc.

Athol Police Union

Newburyport Police Patrolman's Union

Ayer Police Supervisor's Union

Newburyport Police Supervisor's Union

Billerica Emergency Service Telecommunicators

Norfolk Correctional Officers

Billerica EMT Association

Norfolk Corrections Superiors

Billerica Police Patrolman's Union

North Andover Communications Officers

Billerica Police Supervisor's Union

North Andover Police Officer's Union

Boston Housing Police

North Brookfield Police Union

Boston School Police Patrolmen

Northampton Patrol Officers
Bourne Police Patrolmen's Association
Northampton Superior Officers
Bourne Police Superior Officers
Northbridge Dispatcher
Brookfield Police Union
Northfield Police Union MA
Carver Police Association
Orange Police Union
Carver Police Dispatchers Association
Palmer Police Union
Chatham Police Dispatchers Association
Provincetown Police Labor Federation (Patrol)
Chelmsford Police Supervisor's Union
Provincetown Police Superior Officers Assoc.
Chelsea Dispatchers
Randolph Police Patrolmen
Chelsea Patrol
Randolph Police Supervisor's Union
Chelsea Superior Officers Rockland Police Superior Officers
Union
Cohasset Police Association
Rockland Police Union
Cohasset Police Superior Officers Association
Salisbury Police Patrolman's Union
Dracut Police Dispatchers Union
Salisbury Police Supervisor's Union

Dracut Police Patrolman's Union
Shrewsbury Patrol
Dracut Police Supervisors Union
Shrewsbury Superior Officers Assoc.
Dunstable Police Union
Somerset Police Dispatchers Association
Everett Police Betterment Association
Somerset Police Patrol Officers Union
Everett Police Superior Officer's Union
Somerset Police Superior Officers Assoc.
Fairhaven Police Brotherhood Southampton MA Dispatchers
Fairhaven Police Dispatchers
Southampton MA Police
Falmouth Police Lieutenants Association
Stoneham Police Supervisor's
Association
Falmouth Police Superior Officers
Tewksbury Police
Groton Superior Officer's Union
Tyngsboro Police Patrolmen
Groveland Dispatcher's Association
Tyngsboro Police Supervisor Union
Hardwick Police Union
UMass Amherst Police Dept.
Harwich Police Superior Officers Assoc.
UMass Boston Patrolmen/Dispatchers
Harwich Telecommunication Dispatchers

UMass Boston Supervisors
Haverhill Police Dispatchers
UMass Worcester Patrol Union
Holbrook Police Patrolmen's Union UMass Worcester Supervisors Union
Holbrook Police Superior Officers Union
Ware Police Patrol
Hubbardston Police Union
Wareham Police Communications Officers
Hudson Patrolmen's Union
Wareham Police Sergeants Union
Lakeville Police Association
Wareham Police Superior Officers Association.
Malden Superior Officers
Warren Patrolmen's Association
Marlborough Police Patrol Officers
Wayland Police Officer's Union
Mass DOC Captain's Union
West Brookfield Police Association
Mass Port Authority Police Association
Westford Police Association
Mattapoissett Police Brotherhood
Weston Police Dispatchers Union
Maynard Dispatcher Union
Weston Police Union
Maynard Patrol Officer's Union
Weymouth Telecommunicator Union
Maynard Superior Officer's Union

Wilbraham Patrol Officers and Superiors

Methuen Police Dispatchers

Wilmington Police Dispatchers

Methuen Police Superior Officer's Association

Wilmington Police Patrol Officer's Union

Middleboro Police Patrolmen's Assoc.

Wilmington Police Supervisor's Union

Middleboro Police Superior Officer's Union

Worcester County Admin

Middlesex Correction Officer's Association

Worcester County Corrections Supervisors

Middlesex Civilian Staff

Worcester County Sheriffs

Middlesex Sheriff Superior Officers Association

Worcester Police Patrolman's Union