

Dear Ordinance committee members,

This will be the fourth ordinance committee meeting concerning the petitioners' proposed ordinance. The purview of the Ordinance Committee is whether the Ordinance is in the right 'legal shape' and whether it is already addressed by a non-legislative measure. Other policy and substantive discussions will be had at the substantive committee--- Public Protection.

In the last meeting, after inputting the changes from others, we reviewed as a group Peter Gold's proposed changes and input the ones the group accepted. At the suggestion of Ms. Flug, we then asked Mr. Dugas to provide a legal review and provide his feedback. He did so, and we incorporated his changes.

One of the major changes we made in this process was making the complaint and investigatory stages **joint**. The Board has the discretion to ask the Police to handle certain aspects of the investigation, or even to perform most of it. Much of the investigation and leg work could be handled by a police investigator, under the oversight and in coordination with the Board. **Under the present model, the investigative stage would always be collaborative between the Board and the police investigators.** Credibility findings would be determined by the Board, however.

There is no measure presently in place in Westport that addresses the same issues in the same way that the proposed ordinance addresses. The below recaps why this proposed Board is very different from the Panel format that Jim Marpe has temporarily instituted.

There are **eleven significant differences** between the ineffective Panel/appellate approach, and the Petitioners' CRB approach: 1- transparency of complaints; 2—transparency of investigations that are unbiased; 3—subpoena power; 4-- predictability, consistency and permanence; 5—staggered terms for continuity of experience; 6—independence of members; 7—delay; 8—duplication of effort and waste; 9—potential legal problems; 10—disparate contradictory findings; and 11—the ineffectiveness of the appellate cure

1. **Transparency of complaints**: The Board **receives complaints simultaneously**; the Panel does not. This is a critical difference. Part of the problem is that people's complaints are being miscategorized, discouraged, discounted, lost, etc. **The Panel proposal does nothing to solve for the "disappearing complaint" problem**; whereas the CRB ordinance would ensure that complaints must also be filed with the CRB so that they are not 'lost', 'mischaracterized,' or discouraged from being filed. **The transparency of the complaint process is an issue that the CRB solves for, but the Panel does absolutely nothing to resolve.**
2. **Transparency of investigations that are unbiased**: the **Board has the power to investigate complaints** from the outset, either jointly, or as delegated with oversight, but always collaboratively. The panel, in contrast, is set up to be appellate in nature and to leave the investigation and credibility determinations entirely to the police. The panel solution is inferior on this point for several reasons. **The CT ACLU has found that the**

CRB MUST have investigative power in order to be successful.

<https://www.acluct.org/en/news/civilian-review-boards-work-they-must-avoid-past-mistakes> (“The *first major thing* that CRBs **must be structured to include is**

investigative powers, including subpoena power. Subpoena power allows a CRB to compel witnesses to testify and produce documents in the course of investigations – an important tool to combat police obstruction of CRB investigations into public complaints, police misconduct, or other policing issues.”) **Thus, the proposed CRB proposes transparent, unbiased investigations. The Panel does zero to promote an initial transparent, unbiased investigation.**

3. **Subpoena power:** The panel has no **subpoena power**, and cannot have it. Only a CRB established by ordinance can have subpoena power. Subpoena power is a critical discovery tool to get to the truth.
4. **Predictability, consistency and permanence:** The panel is temporary, and can be dissolved at any time. This makes **predictability, planning, and consistency** difficult. The next Selectman can change the rules and the jurisdiction at any time; so can the present First Selectman. The CRB, in contrast, would be enacted as an ordinance, and therefore would have the benefits of **predictability, consistency and permanence**, and would not be varying from administration to administration or disappearing entirely at a whim.
5. **Staggered terms for continuity of experience:** Staggering service to ensure continuity is not possible with a panel. The panel is like a presidential Cabinet. The panel appointments have no relevance the moment the first Selectman’s administration ends, as the panel does not even exist under the Charter or by ordinance. The panel has zero power once the administration is over and leaves office. For that reason, all panel appointees are gone all at once. This makes impossible the desirable staggering that this committee suggested and included in the ordinance. **In contrast, the CRB has staggered terms.** The staggering of CRB Board member terms was to ensure there are always more experienced members on the panel, so that only half the board would be new every two years. Such continuity of experienced Board members for four years and from administration to administration, even when a Selectman’s administration ends, is possible with the CRB, but not the panel.
6. **Independence and objectivity of members:** **Independence and objectivity** is another critical difference—the proposed CRB has such independence, whereas the Panel is selected in precisely the way the ACLU advises against—by the Selectman. The ACLU states that CRB members should be elected by the electorate, or appointed by the legislature. However, it has found that the Town executive (Mayor or Selectman) should not be involved in appointing the CRB members, because the executive also appoints the Chief of Police, who is a direct report to the executive, and therefore has a vested interest in exonerating the Chief and the police. The CT ACLU has advised *“Decisions about who serves on a civilian review board should be made by the community and its legislative body, not those with conflicts of interest like the police chief or executive*

branch members who select police chiefs.” <https://www.acluct.org/en/news/civilian-review-boards-work-they-must-avoid-past-mistakes>

7. **Delay:** **Delay is a problem with the Panel/Appellate approach;** there is no such delay in the CRB approach. According to the Panel/appellate approach, the complainant does not get an objective unbiased review until after exhausting his complaint at the WPD. When time is of essence, such delay can hurt the delivery of justice, and memories can fade, stories can be arranged to line up with a particular narrative. Justice delayed is justice denied.
8. **Duplication of effort and waste:** **Duplication of effort and waste is a problem with the Panel/Appellate approach;** there is no such duplication of effort in the CRB approach. The investigation is done collaboratively with the police in the CRB approach. If a complainant is concerned that an avenue is not being investigated or his or her words are being twisted, the complainant can raise those concerns to the CRB which can evaluate them, discuss them with a police officer assigned to assist the investigation, and decide whether to immediately remedy those concerns by addressing the deficits in the first investigation, instead of waiting until it is over, and then attempting to reinvent the wheel and redo the investigation in a second investigation. Having two investigations occur consecutively as the panel/appellate approach would suggest is wasteful. Having one investigation done correctly and collaboratively with both the CRB and police involved with appropriate guidance from the CRB is more efficient.
9. **Potential legal problems:** The Panel/appellate approach presents **potential legal problems** that are not posed by the CRB. The Panel/appellate approach allows the panel to veto and over-ride the Chief’s decision. The CRB, instead, has recommendation authority, which the Chief reviews and then articulates why he will accept or reject. The due process concerns raised by the union lawyer only come into play when a panel or board makes the definitive decision for the police. There is no such problem when the Board only has recommendation authority. Thus, the panel/appellate approach creates legal problems that the CRB does not present.
10. **Disparate/contradictory findings:** The Panel/appellate approach presents the problem labor attorney Floyd Dugas said was best to avoid—two sets of potential contradictory findings of fact, and two different disciplinary sentences, which could make it difficult for him to defend before a mediator arbitrator. In contrast, the CRB approach involves a single sets of findings of fact, and only one final decision regarding discipline.
11. **Ineffectiveness of the appellate/panel cure:** Attorney Floyd Dugas has explained another aspect of realpolitik at the mediation/arbitration level that will make a panel/appellate approach a completely ineffective cure. He explained that in his experience, if he is defending two conflicting sets of findings and disciplinary sentences, the mediator/arbitrator will inexorably default to the discipline that is weaker and more lenient. The panel/appellate approach comes into play when the complainant is

unhappy with the discipline and the investigation, and appeals it. If the CRB makes different findings and reverses and imposes the sought after more severe discipline, the more severe discipline will go to mediation/arbitration, where Mr. Dugas claims the **mediator/arbitrator will typically default to the softer discipline**. What this means is that, inevitably, the panel/appellate approach will be futile, because the revised more serious discipline will be rejected. Thus, the appellate effort will be futile. The appellate decision will be rejected in favor of the lighter discipline. Thus, the only thing the panel/appellate approach will achieve is duplication of effort, delay and a false promise.

As set forth in #11 above, **the panel/appellate approach will cause delay, duplication of effort, legal issues, and ultimately will be completely ineffective**. The Petitioners have no interest in being part of a completely ineffective law that this Town passes as a feint to pretend to be doing something about a serious problem.

Such a panel/appellate approach will simply be misleading Westporters into believing that it is a measure with teeth, but we know for all the above reasons that it will provide no progress. Therefore, the Petitioners have worked for over a year and a half on the present approach, which investigates collaboratively and jointly. The petitioners have no interest in being part of a panel/appellate approach which is ineffective and misleads Westporters into believing that its elected officials are doing something about justice equity, checks and balances, accountability and transparency, when instead such officials are simply kicking sand in the face of those serious concerns.

In any event, this is the fourth Ordinance committee hearing and the Ordinance is now in good legal shape, and is ripe for an up or down vote.

Thank you.

Jason Stiber and more than 100 Westport Petitioners