

Recommendation xx: MPD and the City should devise and promote a mediation program to resolve civilian complaints outside of the traditional disciplinary process. [OIR 130]

Discussion: Mediation provides an alternative complaint resolution mechanism.¹² Under the existing MPD complaint process, when a civilian files a complaint about officer conduct, MPD conducts an internal investigation. If the investigation shows violation of policy, discipline is imposed, generally including some form of remediation. The complainant is not involved in the process, other than filing the complaint and being notified of the final result.

Many municipalities (e.g., Minneapolis, New York City, Boston, New Orleans, Portland, Milwaukee, Washington D.C., San Francisco, etc.) now handle some police complaints through a mediation process. Mediation involves the informal resolution of the complaint through a face-to-face meeting in which a professional mediator serves as a neutral facilitator and where both parties ultimately agree that an acceptable resolution has been reached. As OIR notes, “When the mediation is successful, it proves to be consistent with principles of restorative justice, allows both participants a window into each other’s perspectives, and provides an opportunity for productive dialogue.” The traditional legalistic complaint-resolution process focuses on fact-finding, pinpointing responsibility, determining guilt or innocence, and punishing those found guilty. In contrast, mediation focuses on understanding, problem solving, and reconciliation.

Mediation is a voluntary and confidential process. Confidentiality promotes candor and open communication. It assures the officer that any apology or acknowledgment of wrongdoing will not be used against them, either by the police department or by a private attorney. Parties entering mediation sign a written confidentiality agreement. Typically, the agreement leaves parties free to talk with others about what was said in mediation, but specifies that all communications, negotiations, or settlement discussions by and between parties is inadmissible and not subject to discovery in any arbitration, administrative adjudication, civil action, or other non-criminal proceeding. Confidentiality of mediation is protected by Wisconsin (Wis. Stat. §904.085) and Federal (28 U.S.C. §652) statutes, which also establish professional standards for mediators. Mediation programs offer officers a tangible incentive because a successfully mediated complaint is not investigated and does not appear on an officer's record (and officers are paid for the time they spend in mediation). Mediation can result in creative, nontraditional outcomes, including agreements to take some type of action outside the mediation session (e.g., an officer agreeing to attend a cultural diversity course). Municipalities vary in the range of complaints eligible for mediation. Complaints involving potential criminal charges against the officer are generally not eligible for mediation and the majority of programs do not permit mediation of use-of-force complaints. Cases involving officers with a history of citizen complaints are ineligible for mediation in many programs, to prevent officers from avoiding departmental discipline for repeated misconduct.

Mediation offers many benefits as a mechanism of police complaint resolution. It is typically quicker, more efficient, and less expensive than the traditional complaint process. In addition, research indicates that both complainants and police officers who go through mediation report greater satisfaction than with the traditional approach. Mediation introduces a new dimension to police accountability—in traditional complaint procedures, an officer accused of misconduct is directly accountable only to other police officers (such as internal affairs investigators) whereas an officer participating in mediation is directly accountable to the community member who filed the complaint. By bringing the parties together in a face-to-face meeting, mediation may be uniquely suited to helping bridge racial and ethnic divides. Furthermore, in mediation, officers are empowered to take responsibility for resolving the problem, in contrast to traditional processes that disempower officers by rendering

¹ Police Training and Standards Commission. (2017) *Community Member – Police Complaint Mediation Program Reference Guide*. Maryland Department of Public Safety & Correctional Services. Retrieved from https://mdle.net/pdf/Mediation_Reference_Guide_April2017.pdf

² Walker, S., Archbold, C., & Herbst, L. (2002) *Mediating Citizen Complaints Against Police Officers: A Guide for Police and Community Leaders*. U.S. Department of Justice, COPS. Retrieved from <http://restorativejustice.org/am-site/media/mediating-citizen-complaints-against-police-officers.pdf>

them passive subjects of investigation. Mediation creates an opportunity for self-expression and participation, including, potentially, apology, whereas in traditional complaint procedures officers are reluctant to say anything that could be interpreted as an admission of guilt. Consistent with the basic philosophy and goals of community policing, it may lessen the "us versus them" perspective that can result in community members being viewed in a hostile light. At its best, both citizens and officers may leave the mediation feeling a sense of empowerment and recognition.

In its response to the OIR report, MPD stated that it "supports the concept of utilizing mediation to resolve certain external complaints against officers." The Madison City Attorney's Office offered a number of concerns, but the Committee believes those concerns are inapt. The City Attorney's Office stated that for the recommendation to be effective the "citizen would have to sign a document waiving their right to bring an action against the officer with the PFC" and "a second document waiving their right to initiate a civil action," and that "the police officer would have to sign a waiver document agreeing to accept the results of the mediation and waiving his/her right to appeal the matter to the PFC." The Madison City Attorney's Office also expressed concern that "either party could attempt to argue against the signed waiver, ignore the mediation outcome and proceed with the matter either before the PFC or in civil litigation."

However, most experts in the field believe that requiring waiver of the right to any further action as a precondition to taking part in mediation undermines the basic purpose of mediation, which is to get both parties to discuss the issue and reach an acceptable agreement. It removes the incentive for meaningful participation (e.g., an officer could choose to stonewall) and, thus, very few programs impose such a requirement. Instead, a confidentiality agreement is signed at the outset, and a successful mediation session is documented with a statement signed by both parties (which can be used to prevent either party from attempting to later reopen the case). For the most part, enforcement of mediation agreements for police complaints is not a concern because the final outcome does not involve the exchange of tangible resources. In addition, a review of mediation of police complaints published by the U.S. Office of Community Oriented Policing notes: "The interviews and site visits for this report revealed no breaches or attempted breaches of confidentiality (e.g., a private attorney seeking to obtain mediation records).... Although concern about confidentiality exists, we could not find a single violation of confidentiality in a citizen complaint mediation case."³ In most programs, when the mediation is unsuccessful the complaint is returned to the police department or civilian oversight agency for investigation in the traditional manner.

Both MPD and the City Attorney's Office noted that funding would be needed for an external mediator. OIR notes that in some jurisdictions, cost has been mitigated by recruiting volunteers from the legal community or having the independent police auditor facilitate the program. In addition, it is worth noting that police departments with mediation programs have found that the cost of mediating a complaint is generally several fold lower than the cost of investigating and processing a complaint, resulting in net savings.

Many cities have vibrant mediation processes that have served both their communities and police agencies well, and the Ad Hoc Committee believes that such a program would be of benefit to Madison. The Ad Hoc Committee thus endorses this recommendation.

³ Walker, S., Archbold, C., & Herbst, L. (2002) *Mediating Citizen Complaints Against Police Officers: A Guide for Police and Community Leaders*. U.S. Department of Justice, COPS. Retrieved from <http://restorativejustice.org/amsite/media/mediating-citizen-complaints-against-police-officers.pdf>