



MEMO

November 6, 2020

TO: Police Transparency & Accountability Task Force – Logistics Subcommittee
FROM: Mike Muszynski, CCM Advocacy Manager
RE: **Impact of the Police Accountability Bill (PA 20-1) on Municipalities**

This memo is intended to provide an overview of the impact that the police accountability reform bill is anticipated to have on municipalities.

About Connecticut Conference of Municipalities (CCM)

The CCM is Connecticut's statewide association of towns and cities. We are the voice of local government representing 99% of Connecticut's population. We advocate on important issues that impact local property taxpayers, promote and foster collaborations, and provide training and resources for municipal officials.

Municipal Reaction to Police Accountability Reform

CCM has not been opposed to enacting police accountability reform, but are insistent that it be done in a thoughtful and deliberate manner. As an organization, in July, we urged the Governor and legislature to seize the opportunity to act in response to the injustice that was seen throughout the country and to enact police accountability reform in order to enhance and improve community and law enforcement relationships. In doing so, we emphasized that any proposal should be balanced between the intent in providing a meaningful benefit for society and ensuring it was not too onerous for local property taxpayers to fund.

When the Judiciary Committee released their initial draft legislation to address police accountability, CCM had very serious concerns with several provisions. Throughout this period, we neither endorsed nor opposed the legislation as we actively worked with the Committee and legislative leaders to address our concerns. Our suggested modifications were intended to improve police and community relations, provide accountability to police officers who infringe on an individual's civil rights, limit liability exposure for towns and cities as well as attempt to reduce legal ambiguity. Modifications were made - some in accordance with CCM's suggestions – while others that have serious implications for municipalities are still outstanding and need to be addressed.

Public Act 20-1 has some provisions that we anticipate will have a positive benefit for towns and cities, in particular allowing POST to consider additional actions for decertification of an officer – which may reduce labor disputes – require mental health assessments, and creating greater transparency in law enforcement. There are also some problematic components in the new law, in particular imposing some restrictions on particular police officer actions and creating a new state cause of action that may increase liability exposure.

CCM is hopeful that the new law is only the start of the conversation, and the framework upon which we build to make Connecticut a safer and more just place for our residents and the officers who protect us. In doing so, we do not recommend repealing the law, but rather making modifications in order to strengthen it for the benefit of our communities and property taxpayers.

Governmental Immunity - Section 41

CCM was fortunate that several of the concerns raised by municipal officials regarding the original draft of section 41 were addressed; however, the law as signed by the Governor and fully enacted will have significant adverse implications for municipalities.

Section 41 establishes a new civil cause of action in state court against police officers who deprive an individual of equal protection or privileges and immunities of state law. While Section 41 attempts to mirror federal law regarding qualified immunity, it makes unique changes. In particular, the new “governmental immunity” under this provision will not be a defense (1) for actions solely seeking equitable relief or (2) in actions seeking damages, unless at the time of the conduct, the officer had an *objectively good faith belief* that their conduct did not violate the law.

Within the new state law, there appears to be an imbalance in favor of a plaintiff, including that: (1) the new state governmental immunity defense will present novel untested questions of state law; (2) there will not be an interlocutory appeal; and (3) more cases will need to be decided through trial and by a jury rather than through summary judgment -which will be a contentious and costly process. In addition, it does not prohibit an individual from bringing both a federal claim for a §1983 civil rights violation, as well as a claim under this new cause of action in state court. Therefore, a municipality may have to defend a claim in both federal and state court.

CCM would agree with the Connecticut Bar Association assessment regarding interlocutory appeals. The U.S. Supreme Court has held that interlocutory appeals are critical because qualified immunity is not just a defense, it is an immunity from suit. It is against public policy to force a municipal official who acted in good faith, did not violate clearly established law, and whose conduct was objectively reasonable, to endure costly and time-consuming litigation (including discovery, depositions, and trial), when they would otherwise have a viable immunity defense. The courts certainly view interlocutory appeals as an exception, however, the complete abolition of a police officer’s right to an interlocutory appeal is a radical departure from well-established precedent.

There have also been suggestions to increase the statute of limitation for these claims from one to three years. CCM does not agree with this increase. The one-year statute of limitation aligns with the current policy for police departments to retain body and vehicle camera data for one year. Increasing the statute of limitations may prohibit a police officer facing a claim to have access to the body cam footage as a means of defending himself or herself. If a claim is made after the one year, the police officer may then be defenseless. Increasing the retention period for the data may not be practical. Storage of this data is the largest cost factor for body and vehicle

camera programs in police departments. As a result, increasing the retention period would have drastic cost implications for property taxpayers.

It is clear that there will be consequences for municipalities, both intended and unintended, much of which won't become evident until Section 41 becomes effective, and furthermore once cases are adjudicated. CCM is fearful of legislation that would impose greater liability for municipalities. This is not only due to the cost factor but more importantly the divisiveness and increased tension that is created in judicial proceedings. *Therefore, at this point, CCM would recommend not making any changes to Section 41 until municipalities have a better understanding of how court rulings impact their liability and police operations.*

Use of Force Provision – Section 29

CCM understands the Task Force has specific directives on the topics and issues that you need to examine. While not under your purview, there are certainly other provisions within the new law that CCM feels are worthy of modifications and we feel it is important to provide you with some of those details.

In particular, CCM is committed to working on revisions to provisions within Section 29 of the law which narrow the use of force for officers. The concern local officials have with the provisions is not only the potential increase in liability, more so that it could expose law enforcement officers to situations where they may question their engrained policies which may result in in their own injury or death.

Section 29 would codify two dramatic changes to CGS §53a-22 by adding a (1) “de-escalation” requirement for police officers and (2) recognizing the “provocation doctrine”. The current statute authorizes a law enforcement officer to use physical force upon another person to effect an arrest, prevent an escape, or defend himself or herself or a third person from the imminent use of physical force. Under the revised section an officer who uses deadly force would need to prove that he or she:

“(i) has exhausted all reasonable alternatives to the use of deadly force, (ii) reasonably believes that the force employed creates no substantial risk of injury to a third party, and . . . [F]or purposes of evaluating whether actions of a peace officer . . . are reasonable . . . factors to be considered include, but are not limited to, whether (A) the person upon whom deadly physical force was used possessed or appears to possess a deadly weapon, (B) *the peace officer . . . engaged in reasonable de-escalation measures prior to using deadly physical force, and (C) any conduct of the peace officer . . . led to an increased risk of an occurrence of the situation that precipitated the use of such force.*”

The last two requirements, de-escalation measures and provocation, would be new elements that a police officer in a deadly force case would need to prove. From a legal perspective, it is unclear whether the plaintiff or the officer, would have the burden of proof on these issues. From a practical perspective this may lead to implications for law enforcement in the field. For example, a police officer who confronts a deranged or suicidal person who is threatening a family member or third party with a gun might not be authorized to use deadly force to protect that innocent victim, or even protect the officer himself, or herself, from being

killed, until *after* the officer first tried to negotiate (de-escalate) with the gunman. If the officer drew his or her firearm, or raised his or her voice, and demanded that the gunman “drop the weapon,” this would be viewed as the opposite of de-escalation. An argument can be made that the officer provoked the deadly confrontation and must be held liable, and be criminally charged because the deadly force was not justified.

The latter issue, the provocation doctrine, was explicitly rejected by the United States Supreme Court in City and County of Los Angeles v. Mendez, 137 S. Ct. 1539 (2017). The provocation theory has been specifically rejected because, under well-established law, the United States Supreme Court has directed that courts must not judge an officer’s conduct with “the 20/20 vision of hindsight.” Graham v. Connor, 109 S.Ct. 1865 (1989). This new law would deprive law enforcement officials of legal protections that have been established for decades.

CCM suggests modifications to this section in order to reduce ambiguity and provide law enforcement with greater direction of the actions that they will need to employ in the field. The specific modifications recommended in section 29(2)(c)(B) include:

- Replace “exhausted” with “considered” in regards to the alternatives prior to the use of deadly force;
- Replace “no substantial risk” to “unreasonable risk” in regards to the risk to a third party;
- Insert “unreasonable” prior to “conduct” in regards to the use of force being necessary.

Disciplining and Discharging “Rogue” Police Officers

CCM continues to encourage the legislature to create new laws that will allow municipalities the ability to remove police officers whose misconduct places the community and their department at risk. This will help set in place an environment wherein malicious, willful and wanton behavior or misconduct will not be tolerated within police departments.

The new law increases reasons for suspension or decertification of a police officer, in particular it allows POST to develop and issue written guidance to law enforcement units on grounds for certification suspension, cancellation, or revocation. This is a valiant effort, however too often, municipalities attempt to remove a police officer for misconduct only for the officer to be returned to the department by the State Labor Relations Board. As a result, the municipal CEO is responsible for explaining to the public why an officer who has engaged in misconduct continues to be employed by the department. CCM recommends that labor laws are improved to allow for formal discharge and removal of a police officer when decertification occurs.

Furthermore, CCM recommends separate bargaining units between rank and file officers and their supervisors. This would help facilitate the removal of bad actors by providing greater autonomy in bringing action against rogue officers, along with fostering higher ethical standards within law enforcement.

Additional considerations

Certainly, the provisions of the new law are intended to promote higher standards for law enforcement in order to reduce tensions between communities and law enforcement. The fear is that the intended and unintended consequences may impose greater burdens on municipalities. If so, the property taxpayers across Connecticut will be impacted with local tax hikes and cuts in

social services where they are needed most. Our recommendations to modify the law are intended to reduce those burdens. CCM recommends:

- Modify Section 29 with the modifications listed above;
- Change the existing language to *encourage* CALEA and *not mandate* the accreditation. Furthermore, allow for departments to acquire POST accreditation in lieu of CALEA.
- Encouraging the state to offer greater financial support for the acquisition of police body and vehicle cameras, in particular allowing the funding to be used for data storage. In addition, collaborate with the state on a central deposit for camera data.

The Task Force has the great opportunity to utilize time and resources to develop meaningful recommendations that will reduce tensions within our communities and promote higher standards within law enforcement. CCM is also taking a proactive role in this effort. Along with engaging in meaningful dialogue regarding this new law, CCM is hosting a series of online discussions called *CCM CARES*. The Communities Advancing Racial Equity Series (CARES) discussions have included community and municipal leaders throughout the state. The intent of the conversation is for communities to become comfortable with what has been an uncomfortable topic. The *CCM Cares* conversations allow for greater understanding of what divides our communities in order to develop plans to unite them. CCM will build on these conversations and remains committed towards continuing the dialogue and engaging with stakeholders on meaningful actions to improve community discourse regarding race throughout Connecticut.