State of Connecticut
Commission on Human Rights and Opportunities
Central Office – 450 Columbus Blvd Ste 2, Hartford CT 06103
Promoting Equality and Justice for all People

To: Representative Joshua Hall and Ken Barone

From: Tanya A. Hughes, Executive Director, and Cheryl A. Sharp, Deputy Director

Re: Qualified Immunity of Police Under Section 41

Date: August 11, 2020

Introduction

The relationship between the police and the people of our country has reached a crossroads. A change is here. Section 41 is the beginning of the conversation regarding police accountability. This memo will discuss qualified immunity under Section 41 of the newly enacted Police Accountability statute.

A. Concern Regarding Frivolous Claims

A common refrain regarding Section 41 is that now every frivolous lawsuit brought by any insincere complainant will move forward. That this will, in turn, place good police officers at financial risk and force taxpayer funded settlements on even baseless claims. The reality is that Section 41 does no such thing.

A useful comparison for the purposes of showing how this bill does not eliminate qualified immunity is to compare it to the recently passed HR 7120 – The George Floyd Justice in Policing Act. The George Floyd Act passed by the US House of Representatives does, in fact, eliminate qualified immunity for the police officer as well as several possible defenses to the case in chief. It states that it, "shall not be a defense or immunity… that the defendant was acting in good faith, or that the defendant believed, reasonably or otherwise, that his or her conduct was lawful… [O]r [that] the rights, privileges, or immunities secured by the Constitution… were not clearly established at the time of their deprivation." The George Floyd Act at least profoundly changes, and arguably eliminates, the qualified immunity of the police officer. Many of the concerns currently being raised by State of Connecticut police regarding the passing of Section 41 would be better suited as a critique of The George Floyd Act. This is in no way to suggest that The George Floyd Act is inappropriate or unnecessary, but it does recognize that the impact of The George Floyd Act (if it

were to pass the Senate – which is unlikely) would be far reaching and not completely understood at this time. Section 41 as passed in Connecticut simply does not do what The George Floyd Act would.

Connecticut's Section 41 does not eliminate qualified immunity. It only serves as a moderation for the interpretation of qualified immunity within the setting of a state court. Section 1983 claims will remain the same and are not touched by Section 41. It is important to note that all cases brought against the police require a violation of one's Constitutional rights as a threshold issue. Should the State believe no Constitutional right was violated, a motion to dismiss (or summary judgement if relevant) may be brought. Should the Court side with the State the apparent "frivolous" lawsuit would be dismissed. Thus, the concern of "every frivolous lawsuit moving forward" under Section 41 can be easily countered.

It is not correct, however, to argue that Section 41 makes no changes to the law. Section 41 appears to have aligned Connecticut's qualified immunity standard with the current federal standards of qualified immunity under Section 1983 cases. Section 41 reads, "… [immunity exists where] the police officer had an objectively good faith belief that such officer's conduct did not violate the law." This compares closely to Section 1983's language which states, "[immunity exists where] a reasonable officer in the defendant's position would have known about the lawfulness of his conduct." The federal courts have consistently found that the language of Section 1983 has preserved the qualified immunity of police officers in federal court, hence, the need for The George Floyd Act. Now, Section 41 has put this same job of legal interpretation before the Connecticut state courts. There is little to no reason to believe that the Connecticut state courts will vary greatly from the federal courts in their interpretation of the law. Perhaps the most important thing to keep in mind, however, is that Section 41 is to be applied to the Connecticut Constitution, not the federal. There are certain areas under the Connecticut Constitution, perhaps most relevantly the right to privacy, which are granted greater protections in Connecticut than under federal law. It is possible that state courts limit immunity in these areas to a greater extent than federal courts have to this point.

Given these standards there is absolutely nothing barring the State from filing a motion to argue for qualified immunity in Connecticut. The State can continue to argue that the officer had an "objectively good faith belief" that their actions were legal. It is worth note, however, that Section 41

is going to limit the State's ability to file for qualified immunity when the claim is solely asking for equitable relief. If no monetary damages are being sought after, Section 41 eliminated the ability of the officer to seek qualified immunity. This should be viewed as an opportunity for the police to engage with a concerned citizen. It is a chance to consider policy changes and best practices. The concerns regarding financial liability on the part of the officer or the taxpayer is simply not present in this situation.

B. Concerns Regarding Willfulness

Another common refrain is that courts will now have the ability to hold individual police officers personally liable should they be found to have acted in a "malicious, wanton, or willful" manner. While this concern is valid, it is not new. Police officers can currently be sued under Section 1983 and found personably liable in federal court under nearly identical language to Section 41. Further, and even more relevant, Connecticut courts have long interpreted Section 7-465 and Section 7-101(a) to allow for a police officer to be held personally liable when their actions are "found to be willful, wanton, or malicious."

The court in *City of West Haven v. Hartford Insurance Company,* 221 Conn. 149 (1992), held that while a municipality has the obligation to pay for the defense of a police officer against charges that they acted willfully, wantonly, or maliciously in denying an individual their constitutional rights, that should the officer be found to have acted in such a manner, the municipality can then look to recover such costs and have the officer pay any further damages. This case arose out the City of West Haven asking the insurance company to reimburse their legal expenses when the City had refused to pursue reimbursement from the liable officer. So, the notion of Section 41 radically altering the individual liability of a police officer is simply not true. Section 41 is merely moving case law into statute. A municipality will have the same choice today as they would under Section 41 – they can pursue reimbursement, or not. Section 41 in no way changes that policy. Any additional individual liability decisions will be based on internal police decision making, and insurance companies, not this piece of legislation.

It is also worth note that in *City of West Haven* the court made it clear that willful, wanton, and malicious behavior goes beyond mere indifference or recklessness. For example, the officers in *City of West Haven* completely falsified an arrest warrant in order bring revenge on a motel owner who had failed to cooperate in an unrelated investigation. *City of West Haven* also cites *Smith v. Wade,* 461 U.S. 30 (1983) as an example of behavior that rises to the threshold of willful, wanton, or malicious.

In *Smith,* the court found a corrections officer to have displayed "evil motives" and "callous" indifference when said officer returned a juvenile inmate to the same holding cell where he had just been severely beaten. The juvenile was subsequently further beaten and raped. The court found this officer to have acted willfully and went so far as to award punitive damages.

So, by objecting to the "malicious, willful, or wanton" standard, this is type of behavior that the police are attempting to protect. There is no reason to believe that Section 41 is looking to expand current case law. In fact, the exact opposite conclusion is much more reasonable. Section 41 was passed to legislate these preexisting case law standards.

C. Fears Regarding Recruitment

First, it is true that the police are struggling to get recruits. This is an internal issue which the police have known about for years. The Hartford Courant reported back on August 3, 2018 in the article, "Fewer People in Connecticut Are Applying to Become Police Officers" that the applicant pool in Connecticut had already fallen by nearly half its all-time high by that time. Police leaders from Hartford, Manchester, Glastonbury, South Windsor, and others are quoted as blaming a litany of problems including "media portrayals," "a booming economy," "overnights…holidays… physicals," "the 128 day hiring process," even the training needed to be in a K-9 unit. This hiring crisis long predates our current social upheaval and certainly predates anything to do with the recent expansion of qualified immunity. As such, Section 41 of the newly enacted statute has not created the recruiting problems in Connecticut. We must endeavor to work cooperatively to address issues of police accountability, police protection of our communities and community mistrust. Recruitment must change. Training must change. What it means to be a police officer will in turn change.

D. "Proactive" Policing

It is uncertain what "proactive" or "protective" policing is referring to in its entirety, however, Proactive Policing has somewhat recently become a buzzword in police training circles. It has been extensively promoted by the National Institute for Justice (an organization that commonly trains police forces) and comes in four varieties:

Place-based: Based on the evidence that crime often is concentrated in small geographic areas and look to prevent crimes in those areas. Examples include hot-spots policing, and predictive policing

Problem-solving: Look to identify problems and their causes and then prevent future crime by tailoring solutions to affect the cause.

Person-focused: Based on the evidence of the strong concentration of crime among a small population. Examples include focused deterrence; repeat offender programs; stop, question, and frisk.

Community-based: Use the resources of the community to identify and control crime. Examples include community-oriented policing; procedural justice policing.

While it is theoretically possible that some of these practices could be conducted in a constitutional manner, place-based and person-focused policing may fail constitutional muster. They are both predicated on the use of profiling and approaching individuals without the necessary probable cause or individualized articulable suspicion to warrant such a seizure or search of the person. These terms simply appear to largely be euphemisms for the more commonly known "Stop and Frisk" policing and "Broken Windows" policing. Both of these styles of policing have been found to be inherently damaging to communities and in many cases flat out unconstitutional. The failures of these practices have been well documented in New York City over the past 20 years. In Connecticut, we cannot preserve unconstitutional policing methods, nor should this argument be persuasive.

E. Increase in Costs

This topic has largely been covered in the Section A which addressed individual officer immunity and the handling of frivolous cases. If municipalities make a conscious decision to attempt to get reimbursement from officers found to be acting in a willful manner, their cost of insurance may go up. That, however, is not a change being brought about by Section 41. Once again, motions to dismiss can still be written and qualified immunity can still be applied for in all matters unless only equitable relief is being sought. There is nothing inherent to Section 41 that will increase police costs. If the concern is the defunding of the police, even more reason to embrace this change. Section 41 is an attempt to open a conversation that very easily could have opened with a movement to defund. The legislature and the people of Connecticut have made it clear that defunding is not their first desire. Engaging in this change makes any defund movement eminently avoidable.

F. Criminal Liability

Section 41 is not designed to address the criminal liability of the police. Qualified immunity has never been applied to criminal charges against the police and it will not be now. Police officers are often sued for allegedly violating the civil rights of individuals. These claims rarely rise to the level that a District Attorney's Office decides to prosecute criminally. It appears that this "concern" is suggesting that the only priority of the legislature should have been the most heinous of police acts. Yes, those officers who kill civilians should be prosecuted. That does not mean that the smaller instances of officers bringing about injustice should be ignored. Through the passing of Section 41 the Connecticut legislature has made it clear that they are concerned with more than just the most atrocious acts of the police.

G. Recruitment and Retention

This issue was largely covered in Section C but allow it to be restated in a more succinct fashion here. Section 41 establishes very few new obligations and, for the most part, has been used to bring past case law into statute. This limited accountability, this small check on power, is not catastrophic. As a civil rights organization, equality, equity and fairness are of the utmost importance and together, as a State, we can work collaboratively to embrace the changes that will make all of our citizens feel valued and safe.