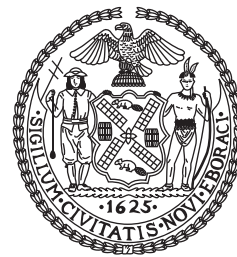


# **A MUTATED RULE:**

## **Lack of Enforcement in the Face of Persistent Chokehold Complaints in New York City**

**An Evaluation of Chokehold  
Allegations Against Members of  
the NYPD from January 2009  
through June 2014**



**NYC**

**CIVILIAN  
COMPLAINT  
REVIEW  
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## CCRB Mission and Values

The New York City Civilian Complaint Review Board (CCRB) is an independent agency, created by Chapter 18-A of the New York City Charter. The Board is empowered to receive, investigate, mediate, hear, make findings, and recommend action on complaints against New York City police officers alleging the use of excessive or unnecessary force, abuse of authority, discourtesy, or the use of offensive language.

### **In fulfillment of its mission, the Board has pledged:**

- To report apparent patterns of misconduct, relevant issues and policy matters to the police commissioner and the public.

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## **Preface**

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In July 2014, CCRB Board Chair Richard Emery, in the wake of the tragic death of Eric Garner and on behalf of his fellow Board members, asked the CCRB staff to undertake an objective, comprehensive assessment of chokehold complaints made to the CCRB. This study investigates chokehold complaints, primarily from January 2009 until June 2014, in order to report findings and make recommendations to the Police Commissioner and the public. After documenting and evaluating five and a half years of chokehold complaints, their patterns and the likely causes of their persistence, this report recommends ways in which the CCRB and the NYPD can collaborate to reduce chokehold incidents and eliminate future chokehold tragedies. This report is an agency report prepared by staff as directed by the Chair.

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## **Executive Summary**

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For more than 20 years, the NYPD Patrol Guide has prohibited the use of chokeholds, relying on a Police Department rule that unequivocally forbids any pressure to the neck, throat or windpipe that may inhibit breathing. This rule was plainly intended to prohibit all chokeholds. As defined, chokeholds, though not illegal, are unambiguously prohibited by Department policy.

This report reveals that officers have continued to perform chokeholds and, based on the complaints the CCRB received from the public, the use of chokeholds appears to be increasing despite the Patrol Guide prohibition. It also reveals that this crystal clear prohibition has been degraded over the course of the last decade.

Put simply, during the last decade, the NYPD disciplinary decisions in NYPD administrative trials of chokehold allegations failed to enforce the clear mandate of the Patrol Guide chokehold rule. In response to these decisions which failed to hold offending officers accountable, the CCRB and NYPD Department Advocate's Office failed to charge officers with chokehold violations pursuant to the mandate of the Patrol Guide chokehold rule. In essence, in their respective charging decisions, the CCRB and the Department Advocate redefined a "chokehold" to require force to the neck during which an officer actually and substantially interfered with a complainant's breathing rather than "pressure" to the neck which "may" interfere with breathing. In this respect the chokehold rule "mutated" to adapt to the NYPD disciplinary process, rather than the disciplinary process following the NYPD rule.

This pragmatic redefinition of the rule in response to the NYPD's systematic refusal to impose discipline in all but the most severe chokehold cases, evolved into an unwritten, much less protective definition: actual and sustained interference with breathing was substituted for the Patrol Guide's clear and unequivocal prohibition of any pressure to the neck which "may" inhibit breathing. In essence, inadequate disciplinary practices transplanted the heart of the chokehold rule during a period in which, as the number of chokehold complaints suggests, chokehold incidents were increasing. The NYPD's blanket prohibition of chokeholds should be restored and uniformly enforced.

## **Chapter One, Chokehold Policy and Definitions**

- Under the NYPD's use of force policy, "a chokehold shall include, but is not limited to, any pressure to the throat or windpipe, which may prevent or hinder breathing or reduce intake of air." The Department policy appears to be broad in its understanding of respiratory neck restraints.
- 
- Under the current rule, the definition of a chokehold is a two-pronged test. The first prong is the definition of a chokehold as "any pressure to the throat or windpipe." The second prong is the definition of any pressure that "may prevent or hinder breathing or reduce intake of air." A review of CCRB chokehold complaints and administrative decisions shows that there has been a distortion of this standard, in particular when determining whether breathing must be restricted.
- At a minimum, under the current wording of the applicable Patrol Guide provision and the common sense understanding of the word "may," it is clear that the chokehold prohibition extends to all contact, other than incidental touching, with the complex and fragile pathway of nerves, blood vessels and airway that constitutes the anatomy of the neck.
- This report concludes that in the face of an unequivocal NYPD Patrol Guide definition, requiring a finding of misconduct for its violation, the NYPD disciplinary process for officers in physical force incidents tended to degrade the protection afforded to citizens by the rule. Therefore, this report recommends, among other things, collaboration between the NYPD and CCRB to reinvigorate the Patrol Guide definition so that it captures the imperative articulated by First Deputy John Timoney in 1995: to stay away from the neck.

## **Chapter Two, Analysis of Chokehold Complaints**

- From July 2013 through June 2014, the CCRB received 219 chokehold complaints, which was a level of chokehold complaint activity that the agency had not seen since the period of 2006-2010 when the CCRB received more than 200 chokehold complaints per year.

- In relative numbers, from July 2013 through June 2014, the CCRB received the highest number of chokehold complaints as a percentage of both force complaints and total complaints since 2001. For example, in 2001, for every 100 force complaints filed, 3.8 were chokehold complaints; from July 2013 through June 2014, for every 100 force complaints, 7.6 were chokehold complaints.
- When a civilian filed a complaint with the CCRB in the last five and a half years, there was a greater chance that he/she would allege a chokehold than at any time in the recent past. These findings demonstrate that, at least from *the complainants'* perspective, police officers continue to use chokeholds, and the persistence of this practice puts civilians at risk of physical injury.
- Half of the officers identified in chokehold complaints had a history of six or more CCRB complaints, with 25% of officers having a history of ten or more complaints. On average, the identified 554 officers involved in the chokehold complaints had 6.94 misconduct complaints each. By comparison, from January 2009 through June 2014, the 13,603 officers who had CCRB complaints not involving any chokehold allegations had an average complaint history of 3.83 complaints each.
- There were significant differences among precincts where chokehold incidents allegedly occurred and among commands to which these chokehold incidents were attributed. The precincts with the highest number of chokehold complaints were the 75<sup>th</sup> and 73<sup>rd</sup>. There were none in Central Park, the 66th Precinct in the Borough Park section of Brooklyn and the recently created 121<sup>st</sup> in Staten Island.
- In the majority (64%) of chokehold cases there were 3 or more officers listed in the complaint. In a third of cases there were 5 or more officers present and in nearly a quarter of cases (24%) there were two or more officers. In 11% of cases, there was just one officer.
- These findings provide a basis to create a CCRB early warning system for the NYPD and new training protocols to prevent future chokehold incidents.

## Chapter Three, Police Department Discipline

- Since the implementation of the chokehold ban, the CCRB has substantiated 32 chokehold allegations and recommended the most serious form of discipline, Charges and Specifications, in all but one case.
- NYPD's use of force policy precisely defines a "stay away from the neck rule." Notwithstanding this prophylactic rule, during the last 10 years judges in the NYPD's trial room emasculated the plain language of the Patrol Guide and repeatedly refused to apply the rule as written. As a result, officers who applied pressure to complainants' necks were not disciplined, and CCRB investigators and Department prosecutors responded by not pursuing chokehold cases that should have been recognized as falling under the Department's prohibition.
- 
- Limp enforcement of recommended discipline for substantiated chokehold allegations, stemming from a dilution of the Patrol Guide definition, was not always the case, and the Department's record got worse over time, rather than better. From 1998 through 2002, the CCRB substantiated 12 chokehold allegations and the Department pursued Charges in 11 cases. Five officers were found guilty, and 6 were found not guilty.
- 
- From 2003 to 2008, the CCRB substantiated chokehold allegations in 10 cases. The Department pursued charges in 9 cases and imposed a Command Discipline against one officer. Of the 9 cases in which the Department pursued charges, the officer was found not guilty or the Charges were dismissed in 8 instances. In only one case was the officer found guilty. During the final period, from 2009 through June 2014, the CCRB substantiated 10 cases and recommended the most serious form of discipline – Charges. The Police Department disposed of seven allegations. In these seven cases, Charges were filed in only one case. The Department imposed a Command Discipline "B" on one officer (loss of up to 10 days of vacation); instructions to three officers; and declined to prosecute two chokehold allegations. (Three allegations are pending disposition and are being prosecuted by the CCRB's Administrative Prosecution Unit.)



## Chapter Four, Audit of CCRB Investigative Practices

- The report finds that there were 156 chokehold incidents which the CCRB never classified as chokehold cases or were categorized only as use of physical force. The evidence appears to show that this undercount was the result of the degraded interpretations of the Patrol Guide chokehold prohibition adopted by some of CCRB's investigative teams.
- To test the claim that, "the interpretation of what constitutes a chokehold varies from CCRB investigator to investigator, from team to team, and from team attorney to team attorney," the audit conducted statistical analyses of team differences in disposition outcome. These statistical techniques show team differences that are not explicable by chance or other factors and are statistically significant.
- There is no greater area of inconsistency than the interplay between the pressure test and the breathing test for chokehold complaints. For some investigators, a chokehold existed if and only if breathing was restricted, while for others, it is the presence of pressure regardless of whether breathing was restricted.
- In the cases where a complainant described a chokehold but a chokehold was not pleaded, the audit found three patterns: a) the chokehold incident is not pleaded as an allegation and the investigator explained the reason, generally as the lack of breathing restriction; b) the chokehold incident is pleaded as a generic allegation of physical force; and c) the chokehold incident is discussed in the body of the report but the investigator does not consider the alleged action to meet the definition of a chokehold.
- The inconsistencies in the CCRB's Investigations Division were plainly the result of the degraded definition of a chokehold and a lack of coordination within CCRB to detect and respond to the altered definition. Elimination of these discrepancies and the unacceptable variations in applying the Patrol Guide's chokehold ban must be addressed through CCRB-wide retraining of investigators and better monitoring by team supervision and attorneys.

## Chapter Five, Policy Recommendations

- As a preliminary matter, the Board would like to acknowledge two key Police Department initiatives adopted that have shaped our policy recommendations. First, Police Commissioner William Bratton has previously announced that the NYPD will begin an extensive new retraining program later this year involving guidelines and tactics for all non-firearms uses of force by NYPD Officers.<sup>1</sup> The first phase of this in-service retraining program will involve a three-day program for all 20,000 Patrol Officers, Sergeants and Lieutenants primarily engaged in patrol supervision in the NYPD. The second phase will involve the remaining 16,000 officers receiving the same extensive three-day in-service retraining program. Thereafter, these 36,000 officers and all future officers will receive regular in-service retraining on the guidelines and tactics for non-firearms use of force (in addition to their regular in-service bi-annual firearms training). In addition, all new recruits will receive the same use of force training in the Police Academy as the current officers will receive in this in-service retraining program. Training in the implementation of the chokehold regulation will be a focus of this NYPD initiative.
- Second, more recently, Police Commissioner Bratton has instructed his senior leadership team to review all provisions of the current Patrol Guide related to use of force, including the chokehold policy. The goal of that review is to make appropriate revisions to the existing provisions of the Patrol Guide so that clear guidance is given to all NYPD officers and the public about when and how officers will use various types of force to ensure their safety and the safety of the public. That review will be done in collaboration with the CCRB and other external stakeholders who have important interests in these policies and practices.
- The CCRB strongly supports the retraining and Patrol Guide review initiatives the NYPD is undertaking at the direction of Police Commissioner Bratton. The main additional recommendation of the Report is the creation of an inter-agency collaboration between the NYPD and the CCRB in order to strengthen data collection and analysis. The purpose of this pooling of resources and cooperation is to develop risk management strategies to create early warning alerts that reduce chokehold incidents. It is a “Vision Zero” action plan for chokeholds.

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<sup>1</sup> The NYPD already holds firearms training programs for all officers twice a year.

- Finally, the report recommends that the NYPD monitor disciplinary trial judges so that they follow the explicit intent of the chokehold regulation. Judges in specific cases of chokehold misconduct who believe the facts warrant mitigation can exercise discretion by appropriately mitigating penalties rather than exonerating misconduct.

## **Abbreviations**

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ADCT	Assistant Deputy Commissioner of Trials (NYPD)
ALJ	Administrative Law Judge
APU	Administrative Prosecution Unit (CCRB)
CCRB	Civilian Complaint Review Board
IACP	International Association of Chiefs of Police
NYPD	New York City Police Department
MOU	Memorandum of Understanding
DAO	Department Advocate's Office (NYPD)
DCT	Deputy Commissioner of Trials (NYPD)
DUP	Department Unable to Prosecute
OGA	Obstruction of governmental authority (arrest or summons),
OATH	Office of Administrative Trials and Hearings (NYC)
OMN	Other Misconduct Noted
SOL	Statute of Limitations Expired

## **Chokeholds: Defining the Scope of the Report**

### **Introduction**

On July 17, 2014, the death of Eric Garner shocked the City. The circumstances of Mr. Garner's death raised questions about the use of chokeholds by members of the New York City Police Department (NYPD) and the training police officers receive from the Department in the use of force. The encounter between Mr. Garner and officers from the 120<sup>th</sup> Precinct, in Staten Island, began when the officers sought to arrest Mr. Garner for the sale of untaxed cigarettes, which he denied. Although he did not attack the officers or attempt to flee, Mr. Garner resisted arrest. As officers attempted to put him in handcuffs and restrain him, with an officer positioning his arm around Mr. Garner's neck from behind, Mr. Garner complained repeatedly that he could not breathe. He died soon thereafter. An autopsy was conducted, and the NYC Medical Examiner's Office ruled Mr. Garner's death a homicide, which "was caused by compression of his chest and a chokehold applied as he was being subdued."<sup>1</sup>

On July 19, 2014, the newly appointed Chair of the Civilian Complaint Review Board, Richard Emery, announced that the agency would conduct a comprehensive examination of the chokehold complaints the agency investigated since 2009. Mr. Emery set two research priorities. The main focus was to discern "why officers continue to use this forbidden practice."<sup>2</sup> To that end, the CCRB was to examine the statistical prevalence of the practice, officers' understanding of the chokehold policy, the training officers receive in the use of force, the circumstances surrounding the alleged use of chokeholds, and the outcomes of these incidents. The study was also to "shed light on the CCRB methodologies" that led to what seems to be a large number of cases being unsubstantiated or not fully investigated by the CCRB.

The ultimate finding of the report is that, although chokeholds are unequivocally prohibited as a matter of policy, not of criminal law, the tools used to implement and enforce that prohibition have failed to reduce its prevalence. These tools include the Department's training, the disciplinary process and the CCRB's complaint process.

This report shows that, as measured in terms of the number of chokehold incidents compared to both the total number of complaints and the total number of force

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<sup>1</sup> Joseph Goldstein, "Six Members of Congress Ask Holder to Open Federal Inquiry in Chokehold Case," New York Times, August 13, 2014. See also: David Goodman and Joseph Goldstein, "Handling of New York Chokehold Cases 'Disappointing,' Review Board Chief Says," New York Times, August 5, 2014.

<sup>2</sup> NYC Civilian Complaint Review Board, Press Release, June 19, 2014. <http://www.nyc.gov/ccrb>

complaints filed, the use of chokeholds as a restraint technique persists and has gradually increased over time. This happened even as, in absolute numbers, the frequency of use of force generally and alleged chokehold incidents particularly continues to be statistically low when compared to police-civilian encounters, including encounters where force is used against arrestees.<sup>3</sup>

In response to this state of affairs, the over-arching lesson of the report is that the CCRB needs to transform its mission. It must go beyond the task of investigating allegations for possible discipline. It must go beyond monitoring and tracking chokehold allegations. It must go beyond being the mere repository of data and instead use the data as an analytical engine to detect patterns of conduct that will serve as an early warning system for the NYPD. In so doing, misconduct can be reduced and community-police relations improved.

The principal recommendation of the report is the urgent need to create an inter-agency platform of collaboration in order to strengthen data collection and analysis, as well as agreement on proper levels of discipline. The purpose of this pooling of resources and cooperation is to develop risk management strategies that reduce chokehold incidents. They should lead to the development of new policies coupled with new training and supervision standards. It is a “Vision Zero” plan for chokeholds.<sup>4</sup> This same platform can and should be an effective tool for addressing, more broadly, many misconduct patterns.

When it comes to chokeholds and other forms of prohibited or troubling police conduct, the emphasis in measurement is not how frequently they occur but rather how infrequently. A single “cataclysmic” chokehold incident of police abuse has the potential to take a human life and damage the reputation of a department, substantially eroding community support.<sup>5</sup> The behavior of police officers is not acceptable merely because it is not criminal, a tort, scandalous, or statistically infrequent.<sup>6</sup> The public requires that police departments do everything in their power to reduce less than professional police

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<sup>3</sup> See: Police Commissioner William J. Bratton, “Statement Before the New York City Council Public Safety Committee: Oversight - The Police Department’s Plan to Enhance Officer Trainings,” September 8, 2014. Chart 1: The frequency with which force has been used in arrest situations.

<sup>4</sup> “The primary mission of government is to protect the public.” See Mayor de Blasio’s original “Vision Zero” Plan at <http://www.nyc.gov/html/visionzero/pages/home/home.html>

<sup>5</sup> For this idea of the relevance of a cataclysmic event and its relationship to the use of force by police, See: Kenneth Adams, “Measuring the Prevalence of Abuse of Force,” in William A. Geller and Hans Toch, eds., *Police Violence: Understanding and Controlling Police Abuse of Force* (New Haven, CT: Yale University Press, 1996): 52-93.

<sup>6</sup> This idea was advanced by Professor Klockars in discussing the notion of the “highly skilled police officer” standard. See: Carl B. Klockars, “A Theory of Excessive Force and Its Control,” in William A. Geller and Hans Toch, eds., *Police Violence: Understanding and Controlling Police Abuse of Force* (New Haven, CT: Yale University Press, 1996), 1-24, 8-9.

behavior and actively manage their problem-prone officers. This report is part of a continuing effort by the CCRB to support the New York City Police Department in addressing this imperative.

## **Organization of This Report**

The report is divided into five interrelated chapters. It first describes the NYPD's chokehold policy with its strengths and weaknesses; it analyzes trends and data to better understand where the policy and training may be failing; it discusses the barriers to investigations and prosecutions faced in the NYPD administrative trial division; it examines the internal and external challenges the CCRB confronted, and continues to confront, in investigating these complaints; and applies the lessons learned to specific policy recommendations aimed at implementing an inter-agency chokehold "Vision Zero" plan.

Chapter One defines the scope of the study. It describes the purpose, population and limits of the study. It also examines the Police Department's use of force policy from both a historical and a comparative perspective. It compares the broad and protective definition of a chokehold under the Patrol Guide to other operational definitions - based on interpretation of administrative case law - that have distorted the clear meaning of the policy.

Chapter Two is a review of the 1,128 chokehold allegations that the Board closed from January 1, 2009 to June 30, 2014. This Chapter examines available quantitative information from all complaints as well as qualitative findings from a sample of cases, including civilians' and officers' statements. It measures the prevalence of chokehold complaints and provides a statistical model that identifies relevant predictors of problem-prone officer behavior and factors predicting chokehold incidents. There is an appendix to this chapter.

Chapter Three contains a policy and legal analysis of the Police Department's discipline in cases where the Board found officers committed misconduct by using chokeholds. The emphasis is on whether and how the NYPD employed its disciplinary process to correct the behavior of officers who have committed misconduct. It focuses on three distinct periods and approaches to the prosecution of chokehold allegations.

Chapter Four is an audit of how the CCRB performed its investigations of chokehold complaints. This chapter focuses on the large number of cases that were either "unsubstantiated" or not fully investigated. The emphasis is on internal methodologies

and determining ways to improve CCRB's processes. It also examines the lack of uniformity across agency investigative teams in their handling of chokehold allegations.

Chapter Five sets forth a recommendation based on the main findings of the report. The objective is to create inter-agency collaboration to enhance officer performance and reduce defective, improper and dangerous behavior.

## **Purpose, Population, and Methodology**

### Purpose

The purpose of this study is to understand why police-civilian encounters continue to result in chokehold complaints and why the CCRB continues to find instances of misconduct when the practice has been prohibited for more than two decades. It seeks to connect the dots in more than a thousand chokehold complaints filed by members of the public by looking beyond each individual allegation and its disposition. The intent is not to conduct a new investigation of these individual complaints but rather to look at them in the aggregate, to extract relevant policy information and practical lessons that can enhance the CCRB's handling of future chokehold cases and the Police Department's training and policy.

There are two specific policy goals the report seeks to achieve.

The first goal is to identify patterns and practices stemming from our review of complaints in order to assist the Department in its own review of the use of force policy and training. To the extent possible, the task is to uncover policy and practice deficiencies in the NYPD's regulation of this potentially deadly and forbidden practice while proposing solutions that will aid in police officers' ability to understand and comply with policy.

The second goal is to evaluate the quality of the CCRB's investigations of alleged chokeholds, with an eye towards improving CCRB's processes and to understanding the NYPD's responses to the CCRB's disciplinary recommendations regarding substantiated chokehold complaints.



## Population

The focus of this study consists of all complaints that were denominated as “chokehold complaints” that the CCRB investigated and closed from January 2009 through June 2014. During this period, the CCRB resolved 1,082 cases involving 1,128 chokehold allegations. One case may contain one or more allegations of chokehold made by the same complainant regarding multiple officers or made by different complainants regarding the same officer. They are analyzed and reviewed in Chapter Two and the appendix to Chapter Two.

In the course of the research, we also found that there were 156 possible chokehold incidents (See Chapter Four) that were never investigated as such. The reason is that investigators did not “plead” these allegations during the CCRB investigative process as chokeholds; rather, the allegations were usually categorized as generic use of physical force or ignored. They are not included in the statistical section of this study because no statistical data is available on incidents that we determined not to investigate. Our statistical data is extracted from complaints that were investigated. However, these 156 possible incidents will be explored in Chapter Four, which is, in effect, a CCRB audit.

## Methodology

The report combines quantitative analysis from the information gathered in the CCRB current database, which is known as the Complaint Tracking System (CTS), qualitative review of investigations, and auditing techniques to examine relevant documents such as the Patrol Guide, administrative case law, investigative and training manuals, internal CCRB investigative reports and Board panel voting procedures.

The quantitative analysis includes the use of descriptive statistics as well as bi-variate and multi-variate analysis, when possible. In particular, the CCRB has sought to develop three specific quantitative tools: a measurement of the prevalence of abuse of force, an analysis of problem-prone officers in terms of chokeholds, and a predictive model of chokehold risk factors to be found in CCRB complaints.

The main methodological limitation of a report that relies on citizen complaint records is that, as Professor Kenneth Adams notes, “not all experiences of excessive force lead to complaints, not all complaints of excessive force are valid.” From this perspective, he states that “there is good reason to believe that complaints undercount excessive force relative to the experiences of *citizens or suspects*, while there are good arguments to

suggest that complaints overcount the use of force relative to the experiences of *complainants*.”<sup>7</sup>

Although there are reasons to take Professor Adams’ caution seriously, the academic and policy literature on complaint data and management highlights one primary reason to use and rely on complaint data: complex organizations learn from complaints. The prevailing view is that complaint response should not be only focused on resolving complaints and addressing public dissatisfaction but also on using complaint information to ensure a long-term improvement of service to the public.<sup>8</sup>

## **Policy and Legal Background**

### The Use of Force Policy: Framework and Values

The NYPD policy on chokeholds is part of the Department’s use of force policy. Prior to making sense of the specifics of the chokehold policy, it is important to understand the overall framework and values of the Department’s use of force policy and its context.

The central goal of any use of force policy is to define the limits between proper and improper use of force. Defining these precise boundaries is the central issue of modern policing. However, there is no single, accepted policy definition among researchers, analysts, or police departments on what the precise limits are between legitimate coercive use of force and excessive use of force.<sup>9</sup> Although police departments share model policies and best practices, differences in policies are significant.<sup>10</sup> As a result, the authority and training of officers vary substantially from jurisdiction to jurisdiction. Their levels of restraint in the use of force also vary greatly.

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<sup>7</sup> Kenneth Adams, “Measuring the Prevalence of Abuse of Force,” in William A. Geller and Hans Toch, eds., *Police Violence: Understanding and Controlling Police Abuse of Force* (New Haven, CT: Yale University Press, 1996): 52-93, 63.

<sup>8</sup> J.F.J. Vos, G.B. Huitema, and E. de Lange-Ros, “How Organizations can Learn from Complaints,” *The TQM Journal* 20.1 (2008): 8-17, 10.

<sup>9</sup> See: United States Department of Justice-Community Oriented Policing Services (COPS), “Use of Force,” <http://www.cops.usdoj.gov/default.asp?Item=1374>; National Institute of Justice, “Police Use of Force,” <http://www.nij.gov/topics/law-enforcement/officer-safety/use-of-force/Pages/welcome.aspx>

<sup>10</sup> See, for example: Joel H. Garner and Christopher D. Maxwell, “Measuring the Amount of Force Used By and Against the Police in Six Jurisdictions,” in National Institute of Justice-Bureau of Justice Statistics, *Use of Force by Police: Overview of National and Local Data*, October 1999, NCJ 176330, 25-44. For national model policies of force, See: International Association of Chiefs of Police, “Use of Force Model Policy,” [www.theiacp.org/policies](http://www.theiacp.org/policies).

To deal with this situation of policy indeterminacy, the courts have provided a general framework for the proper use of force which is respectful of constitutional rights and consistent with the notion of constitutional policing. The current national legal standard for differentiating between proper and excessive force is, broadly defined, “whether the police officer *reasonably* believed that such force was *necessary* to accomplish a legitimate police purpose.” It is known as the “objectively reasonable” standard.<sup>11</sup> However, there are no universally accepted definitions of “reasonable” and “necessary.”<sup>12</sup>

Consistent with this national policy and legal framework, the use of force policy of the New York Police Department rests upon two pillars: authority and accountability. All uniformed members of the NYPD have the authority and discretion to use force when the situation calls for it, but they are also “responsible and accountable for the proper use of force under appropriate circumstances.”<sup>13</sup> Put differently, in New York City the use of force is not left to the unfettered discretion of the involved officer.<sup>14</sup>

To limit officers’ subjective determinations and provide guidelines, most police departments have policies that guide use of force. As Professor Reiss highlights, “for a [police use of force] choice to be reviewable, there must be rules or precedents that constrain the choice.”<sup>15</sup> Along with these rules and guidelines, police departments develop training scenarios that teach what is commonly known as the “continuum of force.”<sup>16</sup> These policies and training manuals describe an escalating series of actions an officer may take to resolve a conflict. New York City is no exception. Over time, the NYPD has developed an “escalating scale of force” model that matches force to the nature of the situation.<sup>17</sup>

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<sup>11</sup> Tom McEwen, “National Data Collection on Police Use of Force,” National Institute of Justice-Bureau of Justice Statistics, April 1996, NCJ-160113, 5-6.

<sup>12</sup> United States Department of Justice-Community Oriented Policing Services (COPS), “Use of Force,” <http://www.cops.usdoj.gov/default.asp?Item=1374>.

<sup>13</sup> New York City Police Department Patrol Guide, Procedure No. 203-11, Use of Force.

<sup>14</sup> “A choice [in police use of force] is discretionary when there is no formal provision of its review. One has the authority to decide matters, and regardless of the consequences, the choice cannot be formally reviewed.” Albert J. Reiss, “Controlling Police Use of Deadly Force,” *The Annals of the American Academy of Political and Social Science* 452 (1980) 122-134, 123.

<sup>15</sup> Albert J. Reiss, *Ibid.*, 123.

<sup>16</sup> See: National Institute of Justice (NIJ), “The Use-of-Force Continuum,” <http://www.nij.gov/topics/law-enforcement/officer-safety/use-of-force/Pages/continuum.aspx>

<sup>17</sup> See: New York City Police Department’s Police Academy, “Police Academy Student’s Guide: Use of Force,” 2007, 7. See also: Bernard D. Rostker et al., “Evaluation of the New York City Police Department Firearm Training and Firearm-Discharge Review Process.” Rand Corporation, 2008, 9. [www.Rand.org](http://www.Rand.org)

The scale of escalating force (Figure 1.1) reads as follows:



**POLICE STUDENT'S GUIDE**  
USE OF FORCE

**SCALE OF ESCALATING FORCE**

<b>Provocation or Condition</b>	<b>Appropriate Force Response</b>
<b>Imminent threat of death or <i>serious</i> physical injury</b>	<b>Deadly force:</b> usually the firearm.
<b>Threatened or potential lethal assault</b>	<b>Drawn and/or displayed firearm</b>
<b>Physical assault</b> likely to cause physical injury	<b>Impact techniques:</b> batons, fists and feet.
<b>Threatened or potential physical assault likely to cause physical injury</b>	<b>Pepper Spray</b>
<b>Minor physical resistance:</b> grappling, going limp, pulling or pushing away, etc.	<b>Compliance techniques:</b> wrestling holds and grips designed to physically overpower subjects and/or to inflict physical pain that ends when the technique is stopped and that causes no lasting injury.
<b>Verbal resistance:</b> failure to comply with directions, etc.	<b>Firm grips</b> on arms, shoulders, etc., that cause no pain, but that are meant to guide people (e.g., away from a fight; toward a police car)
<b>Refusal to comply</b> with requests or attempts at persuasion (see below)	<b>Command voice:</b> Firmly given directions (e.g., "I asked for your license, registration, and proof of insurance, Sir. Now I am <b>telling</b> you that if you don't give them to me, I will have to arrest you.")
<b>Minor violations or disorderly conditions</b> involving no apparent threats to officers or others	<b>Verbal persuasion:</b> Requests for compliance (e.g., "May I see your license, registration and proof of insurance, Sir?")
<b>Orderly public places</b>	<b>Professional presence:</b> The officer on post deters crime and disorder; the Highway Unit deters speeding.

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Use of Force

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All officers are trained in the "scale of force" model while at the Police Academy. They are also trained that, in the application of force, a police officer's actions "must be consistent with existing law and the values of the New York Police Department." These values are the preservation of human life and respect for "the dignity of each individual."<sup>18</sup>

<sup>18</sup> New York City Police Department Patrol Guide, Procedure No. 203-11, Use of Force. "Members of the service are reminded that the application of force must be consistent with existing law and with New York City Police Department Values, by which we pledge to value human life and respect the dignity of each individual."

Based on these values, the Department flatly proscribes certain particularly dangerous conduct, such as chokeholds or transporting subjects in a face down position. This conduct is *not* part of the “scale of force.” This type of absolute proscription is the exception to the policy’s general balancing rule because it substantially limits the realm of discretion of the officer and increases her/his responsibility. In the case of chokeholds, from a policy perspective, officer discretion is non-existent and her/his responsibility is absolute.<sup>19</sup>

### The Use of Force Policy: Mechanisms of Control

In order to correct deviations from the policy, three major mechanisms define and control use of force and its excessive, wrongful or improper application.

The first mechanism is, depending upon the circumstances, both federal and state laws that provide for criminal sanctions against any police officer whose use of force is deemed sufficiently serious so as to constitute a crime. Broadly speaking, criminal law requires a degree of intent to inflict harm beyond reasonable doubt, which is difficult to prove.<sup>20</sup> In itself, the act of an officer placing a civilian in a chokehold is not criminal conduct.

Based on the information available in the CCRB database, none of the more than one thousand officers the CCRB investigated faced criminal charges for a chokehold claim.

The second instrument of control is both federal and state laws that provide for civil tort liability against uniformed members of the service for use of excessive force. In 1973, the courts established the standard with which to evaluate claims of abuse of force. The *Johnson v. Glick* standard set four criteria: a) the need for the application of force; b) the relationship between the need and the amount of force used; c) the extent of injury inflicted; and d) whether the force was applied maliciously and sadistically for the very purpose of causing harm (known as the “shocks the conscience” standard).<sup>21</sup>

In 1989, in *Graham v. Connor*, the Supreme Court replaced the “shocks the conscience” standard, which was based on the substantive due process doctrine, with a standard

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<sup>19</sup> “The behavior of members of organizations is not always a matter of choice. ... [There are situations] in which the member of an organization is given no choice.” Albert J. Reiss, Op. Cit., 123.

<sup>20</sup> For analysis of the criminal law landscape in relation to the issue of chokeholds, Rory I. Lancman and Daniel Pearlstein, “Clamping Down on Chokeholds.” New York Law Journal, July 25, 2014. See also: Christopher Mathias, “New York Lawmaker Wants To Outlaw Police Chokeholds Once And For All,” Huffington Post, July 30, 2014.

<sup>21</sup> *Johnson v. Glick*, 481 F. 2d 1028 (2nd. Cir.), cert. denied, 414 U.S. 1033 (1973)

based on “reasonableness” under the Fourth Amendment, which guarantees the right of citizens to “be secure ... in their persons.” With this decision, the evaluation of abuse of force no longer rested on the intention of the officer and whether the officer acted in good or bad faith but rather on what a “reasonable officer on the scene” would do in such a situation.<sup>22</sup>

The City of New York has an interest in addressing potential civil liability for excessive use of force. Under *Monell* and *Canton*, municipalities can be held liable for the existence of an official policy or custom that violates constitutional rights as well as for situations “where the failure to train amounts to deliberate indifference to the rights of persons with whom the police came into contact.”<sup>23</sup>

Although the CCRB collects information as to whether a complainant has filed a Notice of Claim against the City of New York, the most complete information for the purpose of analysis resides with the NYC Law Department and the NYC Office of the Comptroller.

The third way of controlling police abuse of force is through the policies and administrative actions of the Police Department, or through external intervention. These actions include promulgated policies, effective training, supervisory controls, data collection and analysis for the purpose of developing risk management strategies, and the implementation of institutions and procedures used to correct improper conduct.<sup>24</sup> The *Connor* standard of “objectively reasonable” police conduct is the controlling standard in the application of these tools.

The CCRB primarily participates in the use of force disciplinary process through its investigations and, most recently, through the Administrative Prosecution Unit (APU). It also shares its database with the Police Department.

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<sup>22</sup> *Graham v Connor*, 490 U.S. 286 (1989). For a discussion of this issues, See: Geoffrey P. Albert and William C. Smith, “How Reasonable is the Reasonable Man?: Police and Excessive Force.” *The Journal of Criminal Law and Criminology* 85.2 (1994): 481-501.

<sup>23</sup> *Monell v. New York City Dept. of Social Services.*, 436 U.S. 658 (1978); *City of Canton, Ohio v. Harris*, 489 U.S. 378 (1989), 388.

<sup>24</sup> For Professor Klockars, *the fear of scandal* is one of the three major mechanisms, in conjunction with criminal law and civil liability. Carl B. Klockars, “A Theory of Excessive Force and Its Control,” in William A. Geller and Hans Toch, eds., *Police Violence: Understanding and Controlling Police Abuse of Force* (New Haven, CT: Yale University Press, 1996), 1-24, 2.

## The NYPD Chokehold Policy

While defining the precise boundaries between the legitimate use of coercive force and the inappropriate use of coercive force can be a delicate balance in most interactions between police officers and civilians, the NYPD has determined that certain conduct or practices should never be permitted. They are defined as “excessive, wrongful or improper” use of force under all circumstances. The use of a chokehold is one of those practices: the Patrol Guide does not permit a chokehold under any circumstance.

Section 203-11 of the Patrol Guide regulates chokeholds in the context of the use of force by members of the service. The policy is clear and unambiguous: no police officer can reasonably believe that such force is necessary to accomplish a legitimate police purpose. As the Patrol Guide states:

"[M]embers of the New York City Police Department will NOT use chokeholds. A chokehold shall include, but is not limited to, any pressure to the throat or windpipe, which may prevent or hinder breathing or reduce intake of air. Whenever it becomes necessary to take a violent or resisting subject into custody, responding officers should utilize appropriate tactics in a coordinated effort to overcome resistance (for example see P.G. 216-05, "Aided Cases-Mentally Ill or Emotionally Disturbed Persons")."<sup>25</sup>

The Patrol Guide formulation is explicit: *any action by an officer that makes contact with or applies pressure to the throat or windpipe that constitutes a realistic threat to inhibit breathing, whether that action restricts breathing or not, is forbidden under the policy.* An analysis of whether the officer acted in good or bad faith, or what his or her intention was, is simply not relevant to whether an officer violated the NYPD chokehold rule.

The Patrol Guide also makes clear two other important elements. First, it emphasizes the role of the supervisor in supervising and reporting a force incident. Second, it highlights the use of tactics reducing or restricting breathing that, although not forbidden in absolute terms if the action does not constitute a chokehold, should be avoided and be only used under very limited circumstances. As the Patrol Guides states:

“The patrol supervisor, if present, should direct and control all activity. Whenever possible, members should make every effort to avoid tactics, such as sitting or standing on a subject's chest, which may result in chest compression, thereby reducing the subject's ability to breathe.”<sup>26</sup>

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<sup>25</sup> New York City Police Department Patrol Guide, Procedure No. 203-11, Use of Force.

<sup>26</sup> New York City Police Department Patrol Guide, Procedure No. 203-11, Use of Force.

The policy further clarifies the application of force (i.e., the need, the amount and the risk of injury) in relation to the act of effecting an arrest or taking someone into custody:

“Only that amount of force necessary to overcome resistance will be used to effect an arrest or take a mentally ill or emotionally disturbed person into custody. Deadly physical force will be used ONLY as a last resort and consistent with Department policy and the law.”

It is important to put the Department chokehold policy in its proper historical and comparative perspective to understand the type of behavior and police techniques that the Police Department is seeking to control.

In 1976, Adolph Lyons sued the City of Los Angeles for having been the subject of a chokehold, without provocation or justification, when he offered no resistance to being stopped for a traffic violation. The U.S. Ninth District Court of Appeals found that the Los Angeles Police Department authorized the use of such holds when no one was threatened by death or bodily harm; that officers were insufficiently trained; that the use of the holds involved a high risk of injury or death; and, that their continued use in situations where neither death nor serious bodily injury was threatened was “unconscionable in a civilized society.”<sup>27</sup> In seeking remedies, the court ordered the City of Los Angeles and its police department to limit the use of neck holds to life-threatening situations and also ordered an improved training program as well as regular reporting and record keeping.<sup>28</sup>

In response to the court decision, in May 1982, the Chief of Police in Los Angeles prohibited the use of the bar-arm chokehold in any circumstances. A few days later, the Board of Police Commissioners imposed a temporary moratorium on the use of carotid artery holds except under circumstances where deadly force was authorized. At present, in Los Angeles, the use of the Carotid Restraint Control Hold (CRCH) technique, which is the application of pressure to the sides of a subject’s neck, is permitted and classified along with shootings and other serious uses of force as Categorical Use of Force.<sup>29</sup>

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<sup>27</sup> *The City of Los Angeles v. Adolph Lyons*, 656 F. 2d 417 (CA9 1981)

<sup>28</sup> The *Lyons* case eventually went to the US Supreme Court which decided that the respondent did not have standing to seek injunctive relief in Federal District Court. Lyons did, however, have standing for his damages action. No determination was made in this case as to what level of force, within the continuum of force, a neck hold should be categorized as. See; *The City of Los Angeles v. Adolph Lyons*, 461 U.S. 95 (1983)

<sup>29</sup> Office of the Inspector General of the Los Angeles Police Department, “Use of Force Reports,” [www.oig.lacity.org](http://www.oig.lacity.org)



Since *Lyons*, police agencies across the United States wrestled with the question of whether to use chokeholds. Both in the United States and in Canada, several jurisdictions limited or banned the use of chokeholds, in particular mechanical and bar arm holds.

In New York City, in 1985, Police Commissioner Benjamin Ward issued an order limiting the use of chokeholds. The order stated,

“1. Effective immediately, choke holds, which are potentially lethal and unnecessary, WILL NOT be routinely used by members of the New York City Police Department.

2. Choke holds will ONLY be used if the officer's life is in danger or some other person's life is in danger and the choke hold is the least dangerous alternative method of restraint available to the police officer.”<sup>30</sup>

The current prohibition banning the use of chokeholds has been in effect since 1993 when Police Commissioner Raymond W. Kelly implemented the current ban. As Ian Fisher reported, “Commissioner Kelly, characterized the ban not as a new policy but as clarification of a 1985 order.”<sup>31</sup> He also noted that the Police Academy was no longer teaching the technique.

In the same news report, Chief John F. Timoney, speaking for the Department, said that the “policy specifically did not distinguish between various types of holds, but rather banned them categorically. It also prohibited other restraints or tactics - like standing on a suspect's chest or transporting a suspect in a face-down position - which might impede breathing.”<sup>32</sup>

In response to criticisms from police unions that “opposed the ban because it could endanger the life of an officer trying to subdue a dangerous suspect,” Chief Timoney also said that “he could imagine *extreme circumstances* in which a chokehold might be used legitimately and each case would be reviewed afterward on its individual merits.”<sup>33</sup> But, he also added that, “as a matter of policy choke holds are forbidden.”<sup>34</sup> He is finally

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<sup>30</sup> Joseph P. Fried, “Police Officer Is Acquitted In the Killing of a Suspect,” New York Times, March 25, 1992.

<sup>31</sup> Ian Fisher, “Kelly Bans Choke Holds,” New York Times, November 24, 1993, B1.

<sup>32</sup> Ian Fisher, *Ibid.*

<sup>33</sup> Ian Fisher, *Ibid.*

<sup>34</sup> Ian Fisher, *Ibid.*

quoted as saying, "[B]asically, stay the hell away from the neck ... That's what it [the policy] says."<sup>35</sup>

### Defining What a Chokehold Is From a Policing Perspective

Although the Patrol Guide admits of no circumstance where a chokehold is permissible, there is an issue that deserves further attention: what is the precise definition of a chokehold under the current policy.<sup>36</sup> This is important because, as it will be discussed in Chapter Three, the review of substantiated cases where officers faced disciplinary action shows instances where the officers may not have had a clear understanding of what a chokehold is and denied having performed one. It is also important because administrative case law, also reviewed in Chapter Three, seems to redefine key elements of the Patrol Guide's definition of a chokehold. In particular, a review of administrative decisions, both from the NYC Office of Administrative Trials and Hearings (OATH) and the NYPD's Deputy Commissioner of Trials (DCT), suggests that according to these tribunals, there is a chokehold only when there is evidence of prolonged and intentional restriction of breathing.

The definitional issue is not a new one. It was discussed in *Lyons*, when the Court noted that the term "chokehold" refers in actuality, not to one, but various restraint techniques.<sup>37</sup>

This issue is particularly important in the context of this study because, given the forbidden nature of the practice, in a chokehold investigation the central issue is whether the chokehold occurred. In order to make that determination, an investigator needs to be able to clearly differentiate a chokehold from other "police control procedures" or restraint techniques.

In the medical literature, the term chokehold is categorized as a type of neck hold. In a classic medical textbook on deaths in custody, the neck hold is defined as a "restraint

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<sup>35</sup> "The New York City Police Department has issued an order banning the use of **choke holds**, the restraining maneuvers that cut off the flow of blood and oxygen to the brain and have been blamed in the deaths of suspects here and around the nation." Ian Fisher, *Ibid*.

<sup>36</sup> The first known use of the term "choke hold" is in 1964. The Merriam-Webster defines a "choke hold" as "a method of holding someone by putting your arm around person's neck with enough pressure to make breathing difficult or impossible." Merriam-Webster, "Choke hold," [www.merriam-webster.com](http://www.merriam-webster.com)

<sup>37</sup> "The police control procedure at issue in this case are referred to as 'control holds,' 'chokeholds,' 'strangleholds,' and 'neck restraints.' All these terms refer to two basic control procedures: the "carotid" hold and the "bar arm" hold." *The City of Los Angeles v. Adolph Lyons*, 461 U.S. 95 (1983), 113, fn. 1.

technique in which a person is restrained by use of a hold that employs manipulation of the neck.”<sup>38</sup>

Although there are multiple restraint techniques and methods, the scientific and policing literature recognizes two main categories in the spectrum of neck holds or neck restraints: a respiratory restraint and a vascular restraint.<sup>39</sup>

The respiratory restraint is a neck hold in which breathing is either restricted or may be restricted. These techniques include the mechanical hold (performed with a baton or stick), the guillotine choke, the bar hold, and the bar arm hold or choke hold. This type of neck hold is banned by policy in most police jurisdictions in the United States.

The bar hold or “choke hold” is specifically defined as a “restraint maneuver in which the forearm is placed straight across the front of the subject’s neck while the restraining person is positioned behind the subject. The free hand grasps the wrist of the ‘bar’ arm, pulls backward putting pressure on the airway.”<sup>40</sup> This is the narrowest definition of a chokehold possible. The Department’s definition goes beyond that.

The primary medical risk of this hold is that exerting the hold with “too much pressure could cause airway injury, including laryngeal cartilage or hyoid bone fracture.”<sup>41</sup> The vascular structures are supposedly spared in this hold.

This medical explanation is the main reason why the Department defines chokeholds as any pressure “which may prevent or hinder breathing or reduce intake of air.” There is no way to determine the amount of pressure needed not to cause airway injury. The potential for injury exists whenever pressure is applied.

The vascular restraint is a restraint maneuver that focuses on compression of the carotid arteries on both sides of the neck.<sup>42</sup> This type of restraint is commonly referred to as the carotid sleeper hold (including the Koga carotid control hold and the FBI carotid restraint), carotid restraint, the shoulder pin restraint, lateral vascular neck restraint, or bilateral neck restraint.

Vascular neck restraints by design do not restrict airflow into the lungs and do not cause “choking.” They are designed to control subjects by limiting the flow of oxygenated

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<sup>38</sup> Gary M. Vilke, “Neck Holds,” In D.L. Ross and T.C. Chan, *Forensic Science and Medicine: Sudden Deaths in Custody* (Totowa, NJ: Humana Press, 2006):15-37, 15.

<sup>39</sup> See: Grand Junction Police Department, “Lateral Vascular Neck Restraint Staff Study: An Appropriate Force Option?,” Policy Report 2010, 3.

<sup>40</sup> Gary M. Vilke, Op. Cit., 22.

<sup>41</sup> Gary M. Vilke, Ibid., 22.

<sup>42</sup> See: Christine Hall and Chris Butler, “National Study On Neck Restraints in Policing,” Canadian Police Research Centre Technical Report TR-03-2007, June 2007.

blood to the brain, which at the highest levels of resistance may render the subject unconscious. In some jurisdictions that do not permit the use of a respiratory restraint, the vascular neck restraint is taught and permitted under some circumstances within the continuum of force.<sup>43</sup>

In the policing literature, there is little consensus among police professionals regarding the value and risks associated with the use of vascular neck restraints. Some scholars differentiate between high probability lethal force and slight probability lethal force to argue that the vascular neck restraint is a lethal force of slight probability. Other scholars place these holds below the lethal force standard.

Although experts and practitioners debate where to place the neck restraint in the use of force continuum, the central issue is the risk to the life of the civilian on whom it is used.<sup>44</sup> From the perspective of the medical literature, there is evidence to suggest that during a non-controlled situation, such as a real-life struggle, the vascular hold can quickly become a respiratory neck restraint.

There is also evidence that, for certain individuals, both types of hold or restraint will have an injurious outcome.<sup>45</sup>

Although not a unanimous opinion among the medical community, most medical experts insist that all neck restraints, respiratory or vascular, carry an inherent risk and must be understood as “potentially lethal.”<sup>46</sup> It is this potentially lethal character of the practice that mandates its prohibition.

Under the use of force policy of the NYPD, “a chokehold shall include, but is not limited to, any pressure to the throat or windpipe, which may prevent or hinder breathing or reduce intake of air.” The Department policy appears to be broad in its understanding

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<sup>43</sup> Brian Haynes, “Proper Use of Neck Hold Not Fatal, Research Shows,” Las Vegas Review Journal November 27, 2009.

<sup>44</sup> Proponents of the vascular neck restraint argue that the research on the subject of neck restraints or holds suffer three major shortcomings. First, there are no reliable statistics on how frequently neck restraints are used, how frequently they produce injuries, nor on how frequently these holds result in fatalities. Second, the medical research on the subject of neck holds is based on two very specific populations: judo practitioners, a controlled sport activity, and case reviews of fatalities associated with law enforcement restraint. Third, the problem of any research based only on adverse outcomes is that there are no available studies that document effective outcomes.

<sup>45</sup> Noreen Barros, “Neck Restraint Literature Review: A Review of Medical, Legal, and Police Literature on Carotid Neck Restraint Techniques,” Canadian Police Research Centre Technical Report TD-01-2007, January 2007, 6ff.

<sup>46</sup> Donald T. Reay and John Eisele, “Death from Law Enforcement Neck Holds” *The American Journal of Forensic Medicine and Pathology* 3.3 (1982): 253-258, 257. See also: Donald T. Reay, “Death In Custody,” *Forensic Pathology* 18.1 (1998): 1-22.

of respiratory neck restraints, but silent on vascular neck restraints and other take-down techniques around the neck area. In addition, the Department policy uses the term “pressure” as opposed to the term “hold” or “restraint.” This expands the definition of chokehold beyond the traditional conception of a hold or restraint, to any continuous physical force exerted on or against the throat or windpipe by something in contact with it.

Under the current policy, the definition of a chokehold appears to be a two-pronged test. The first prong is the definition of a chokehold as “any pressure to the throat or windpipe.” In the classic textbook analysis of a mechanical hold (a hold performed with a baton) or the bar arm hold, it is clear that these neck restraints are designed to exert pressure to the throat. However, this issue is less clear in real life cases.

This was, for instance, the position of the Department in *NYPD v. Bucher* (2005) where the Deputy Commissioner of Trials (DCT) held that the pressure to the throat or windpipe must be intentional, prolonged, or with the explicit intent of restricting breathing. In this sense, the decision suggested that it was important to determine issues related to the type of pressure, the duration of the chokehold, the intention of the officer generally and the intention to restrict breathing in particular. This 2005 ruling articulating a new standard appears to confine, if not to contradict, John F. Timoney’s 1993 “stay the hell away from the neck” standard.

There is also the issue of whether a chokehold can be performed without pressure to the throat. Thus, for instance, in one case where an officer grabbed someone by the head and pushed his face in the snow for few seconds, investigators were confronted with this question. The complainant claimed that his breathing was restricted during that time.

The second level of analysis is the definition of any pressure that “may prevent or hinder breathing or reduce intake of air.” Again, in the classic textbook analysis, a chokehold, applying proper pressure to the throat, will hinder breathing. However, this issue is sometimes unclear in real life situations.

As noted above, *NYPD v Bucher* specifically addresses this issue in connection with the officer’s “intent to cut off a complainant’s air supply.” In this context, a review of CCRB chokehold incidents shows that some officers did not think that they were performing a chokehold because, from their position, the complainant was breathing.

The policy question – and a central theme of this report - is how and why restriction of breathing became a *de facto* standard in evaluating chokehold incidents. It is one thing to note for the purpose of establishing the correct facts of the case whether breathing

was restricted and for how long. It is a very different thing to set forth in a rule, unlike the Patrol Guide rule, that a restriction of breathing defines a chokehold.

At a minimum, given the current wording of the applicable Patrol Guide provision and the common sense understanding of the word “may,” it seems clear that the chokehold prohibition for the NYPD extends to all contact, other than incidental touching, with the complex and fragile pathway of nerves, blood vessels and airway that constitutes the anatomy of the neck.

Thus, to the extent that confusion or ambiguity has been introduced into the definitional issue of what constitutes a “chokehold,” even in the face of what appears to be an unequivocal NYPD Patrol Guide definition, one must recognize the continuing reality that even an unequivocal definition faces the likelihood of pressure to degrade its protection. Implicit in the findings of this report is the recommendation of continuing vigilance and review of alleged chokehold activity as well as a reinvigorated Patrol Guide definition that captures the Timoney imperative: “stay the hell away from the neck.”

## CHAPTER TWO

# **Analysis of the Chokehold Complaints**

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This chapter examines available quantitative information from all chokehold complaints received and investigated from January 2009 through June 2014. Where the statistical information extracted from the database is incomplete, we rely on information gathered from a sample of 53 cases in which staff reviewed the entire case file.<sup>47</sup> There is a statistical appendix where additional information is discussed.

This chapter has two parts: one is descriptive and the second discusses the practical application and consequences of the descriptive statistical facts. The first part is further divided into five sections: complaint activity; disposition activity; complaint and incident information; complainants' information; and subject officers' information.<sup>48</sup> Within part one, there are two key findings:

1. In the last twelve months, from July 2013 through June 2014, the CCRB has received a greater number of chokehold complaints, 219 complaints, than it has seen since the period from 2006 to 2010 when the CCRB received more than 200 chokehold complaints per year.
2. Officers involved in chokehold incidents in the last five and a half years had almost twice as many misconduct complaints as officers who were not involved in any chokehold incident.

The second part of the chapter is divided into three sections: a statistical model to measure the prevalence and frequency of chokehold incidents; a model to measure chokehold-prone officers; and a model to predict factors present in chokehold incidents. There are two key practical applications. The first application is a statistical model of prevalence that measures chokehold frequency by comparing the relationship between

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<sup>47</sup> The CCRB database, known as Complaint Tracking System (CTS), is a live database and is constantly updated. On July 1, 2014, the CCRB took a snapshot of the entire database and stored it in a separate drive for the purpose of working on the mid-year report. For this study, the CCRB has used this "frozen" database, except for complaint activity from January through June 2014 which was updated on September 25, 2014.

<sup>48</sup> One of the main findings of Chapter Four, is that there were 156 chokehold cases that were underreported during the time period of the study. These complaints were either pled as generic physical force cases or the investigator made the determination not to plead the allegation at all. These cases are not included in this statistical description, as it is not possible to report what has not been sufficiently documented.

the number of chokehold complaints and the number of force complaints. The second application builds a problem-prone officer evaluation model that focuses on three officer characteristics: propensity to use force as measured by the number of force complaints filed against an officer, propensity to arrest as measured by history of complaints in which there was an arrest, and propensity to use proactive types of contact with civilians as measured by history of complaints of stop and frisk, strip search, vehicle stop, and premises entered.

## **Descriptive Statistics**

### Complaint Activity

From January 1, 2009, through June 30, 2014, members of the public filed 1,048 complaints involving chokehold allegations. The CCRB received 240 complaints in 2009; 207 in 2010; 157 in 2011; 157 in 2012; 179 in 2013; and 108 from January through June 2014.<sup>49</sup>

Chart 2.1 shows the number of annual chokehold complaints received from 2001 to 2013 providing a long-term view of chokehold complaint activity. The chart reveals two trends.

The first trend is from 2001 to 2009 when, year after year, except for 2003, the number of chokehold complaints increased, reaching its peak in 2009. From 2001 to 2009, the number of chokehold complaints increased by 193%, from 82 chokehold complaints received in 2001 to 240 chokehold complaints received in 2009.

The second trend is from 2009 to 2012 when the number of chokehold complaints received by the CCRB decreased by 35%, from 240 complaints in 2009 to 157 in 2012. This downward trend appeared to have ended in 2013 when chokehold complaints increased to 179 in 2013. Data available for the first six months of 2014, showing what would be an annual rate of over 200 complaints per year, appear to confirm this upward change.

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<sup>49</sup> January through June 2014 data was updated on September 25, 2014 to reflect the most up-to-date complaint activity information available for 2014.



Chart 2.1: Number of chokehold complaints received, 2001 – 2013

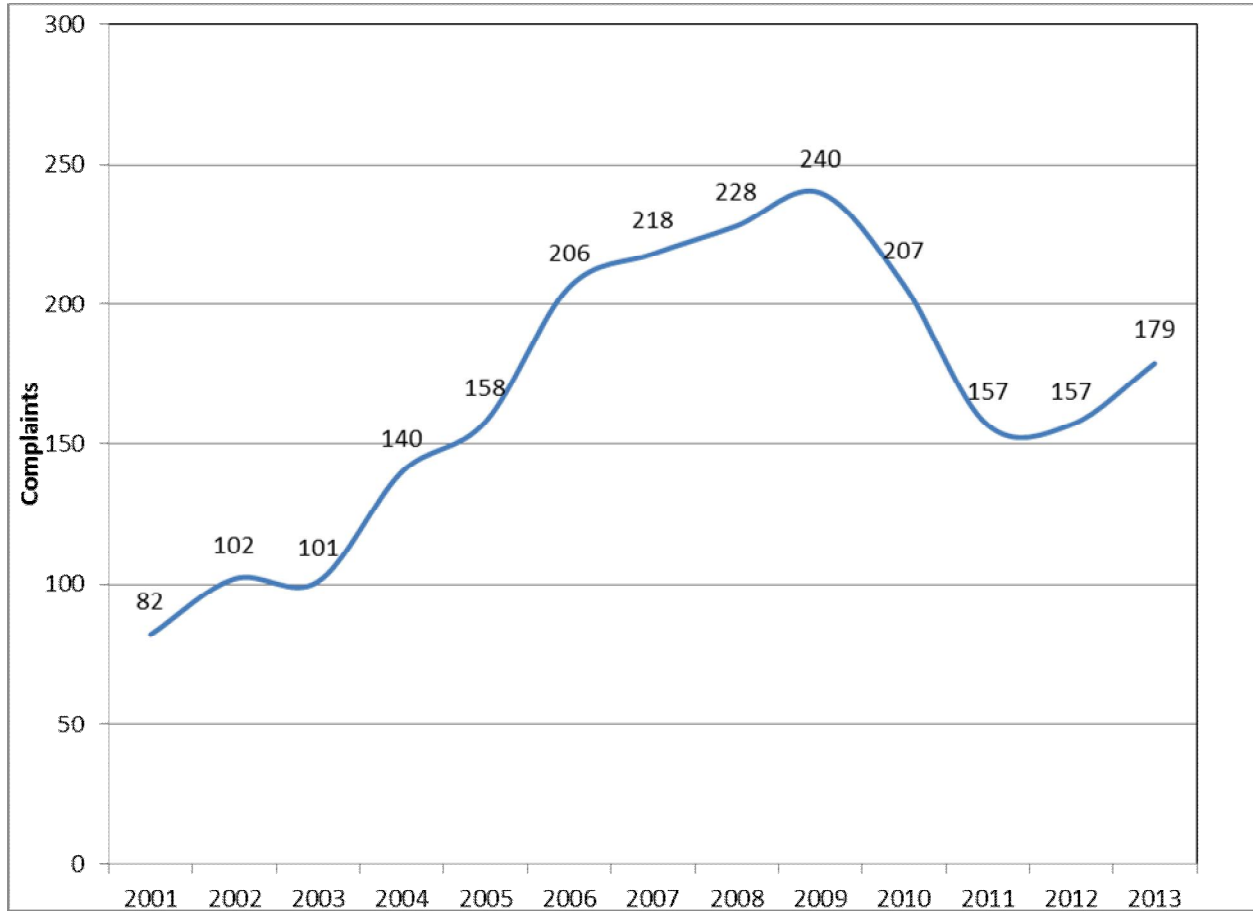
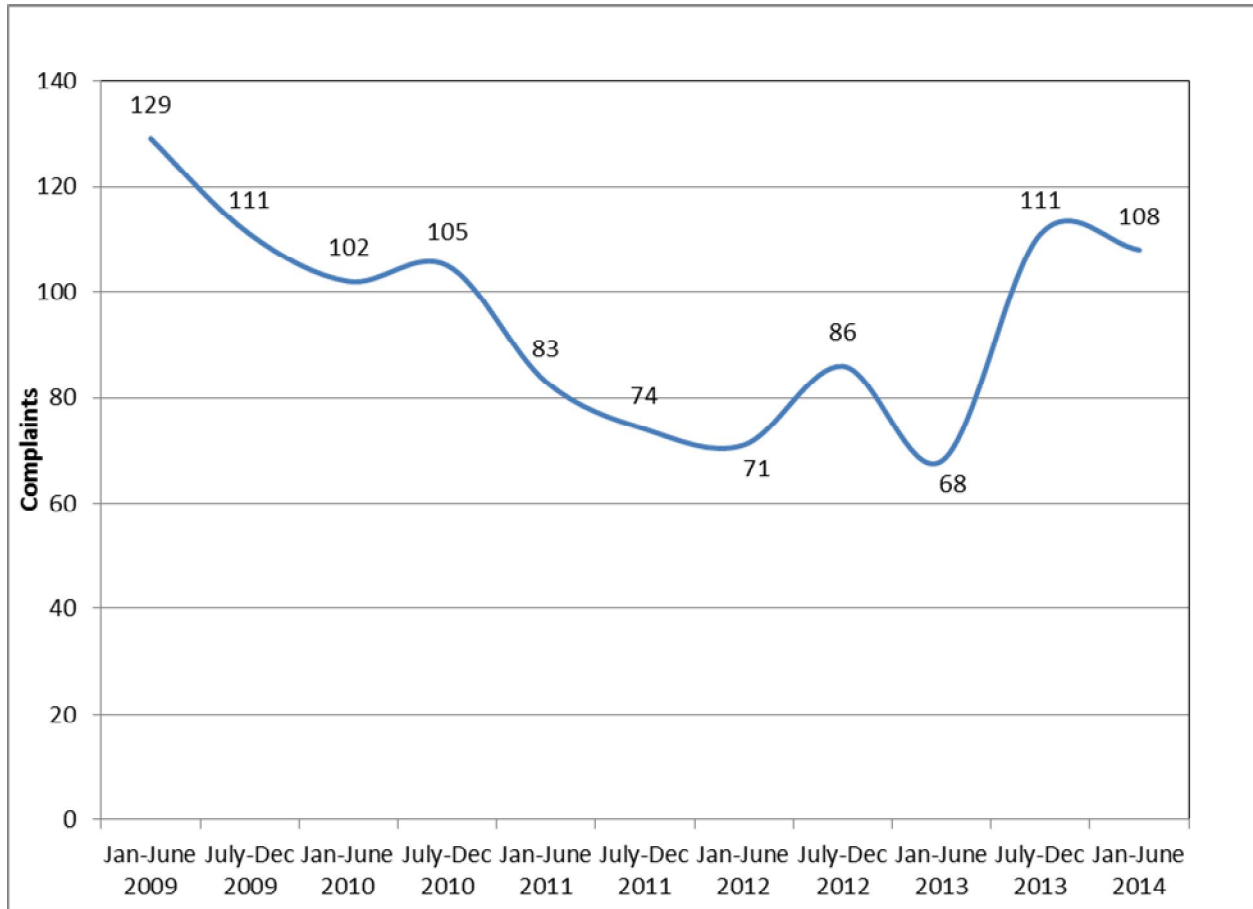


Chart 2.2 provides a more detailed account of the specific five and half years which are the focus of this study by looking at data gathered by six-month periods from January 2009 through June 2014.

This chart shows that, with the exception of increases for two periods, there was a gradual decrease in the number of complaints from January-June 2009 to January-June 2013. The CCRB received 129 chokehold complaints from January-June 2009 as compared to 68 chokehold complaints from January-June 2013.

Chart 2.2 also confirms that there was an upward movement in complaint activity for the last two six-month periods with 111 complaints received from July through December 2013 and 108 complaints received from January through June 2014.<sup>50</sup>

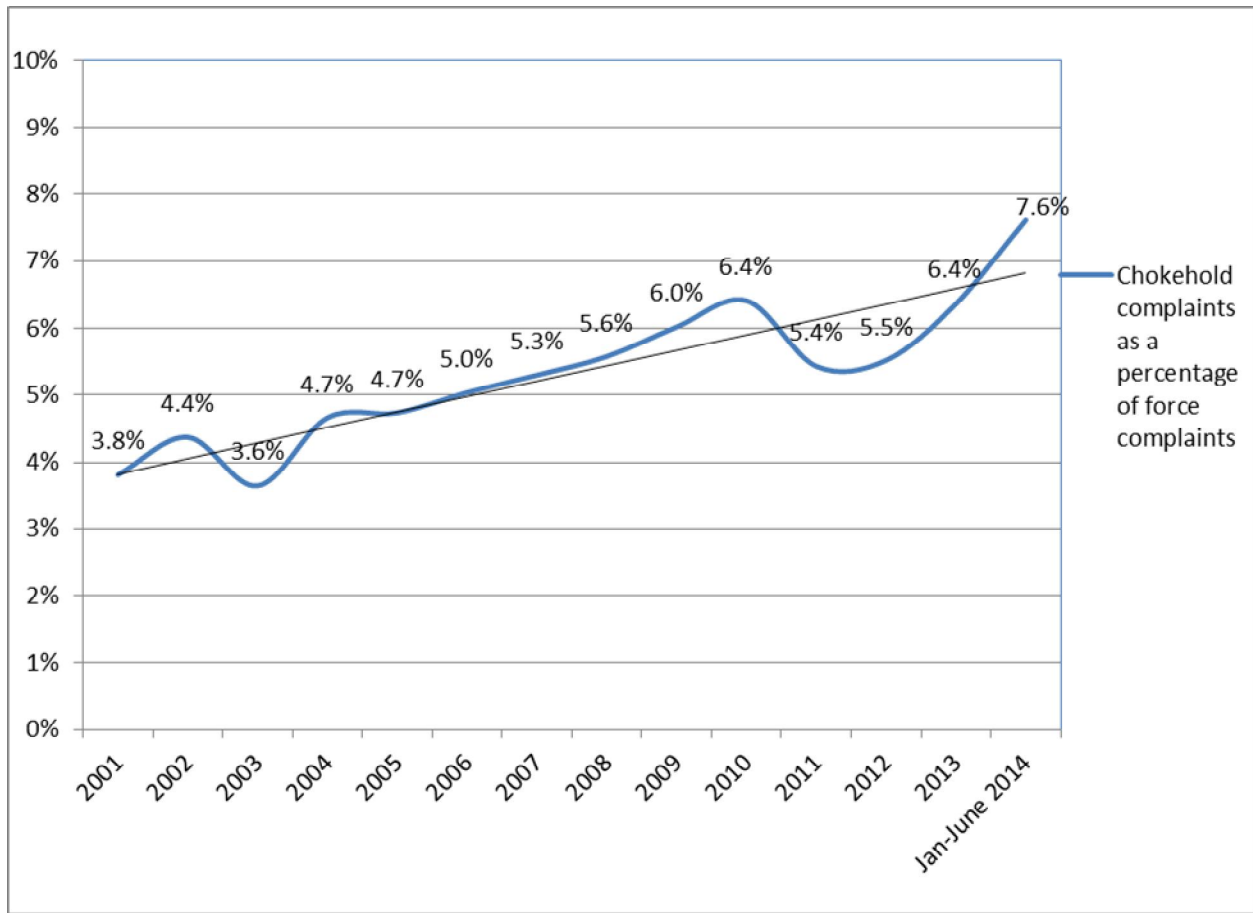
Chart 2.2: Number of chokehold complaints received per six-month period, January 2009 - June 2014



<sup>50</sup> Further analysis of Chart 2.2 shows that there was a period of low chokehold complaint activity concentrated in the period from January 2011 through June 2013. Prior to this period, from January 2009 through December 2010, the average number of chokehold complaints received was 112 chokehold complaints per each six-month period. It decreased to an average of 76 complaints per each six-month period from January 2011 through June 2013. It finally increased to an average of 109.5 complaints per each six month period from July 2013 through June 2014.

Charts 2.3 and 2.4 provide additional information on chokehold complaint activity and its relation to overall use of force complaints.

Chart 2.3: Chokehold complaints received as a percentage of force complaints received, with trend line added, 2001 - June 2014



This chart shows the number of chokehold complaints filed as a percentage of total force complaints received by the CCRB from 2001 to June 2014. A trend line has been added to highlight the overall direction in complaint activity. It shows that chokehold complaints gradually increased as a percentage of total force complaints from 2001 through January 2014 except for two periods, 2003 and the period from 2011 to 2012. Chokehold complaints were 3.8% of all force complaints in 2001 increasing to 6.0% in 2009 and to 7.6% for the period from January through June 2014.

For the purpose of this study, the deviation from the expected trend that is observed for 2011 and 2012 emphasizes the need to focus on the factors that may have contributed to this decrease. Chart 2.4 sheds light on this statistical observation.

Chart 2.4: Chokehold complaints received per six-month period as a percentage of force complaints received, with trend line added, January 2009 - June 2014

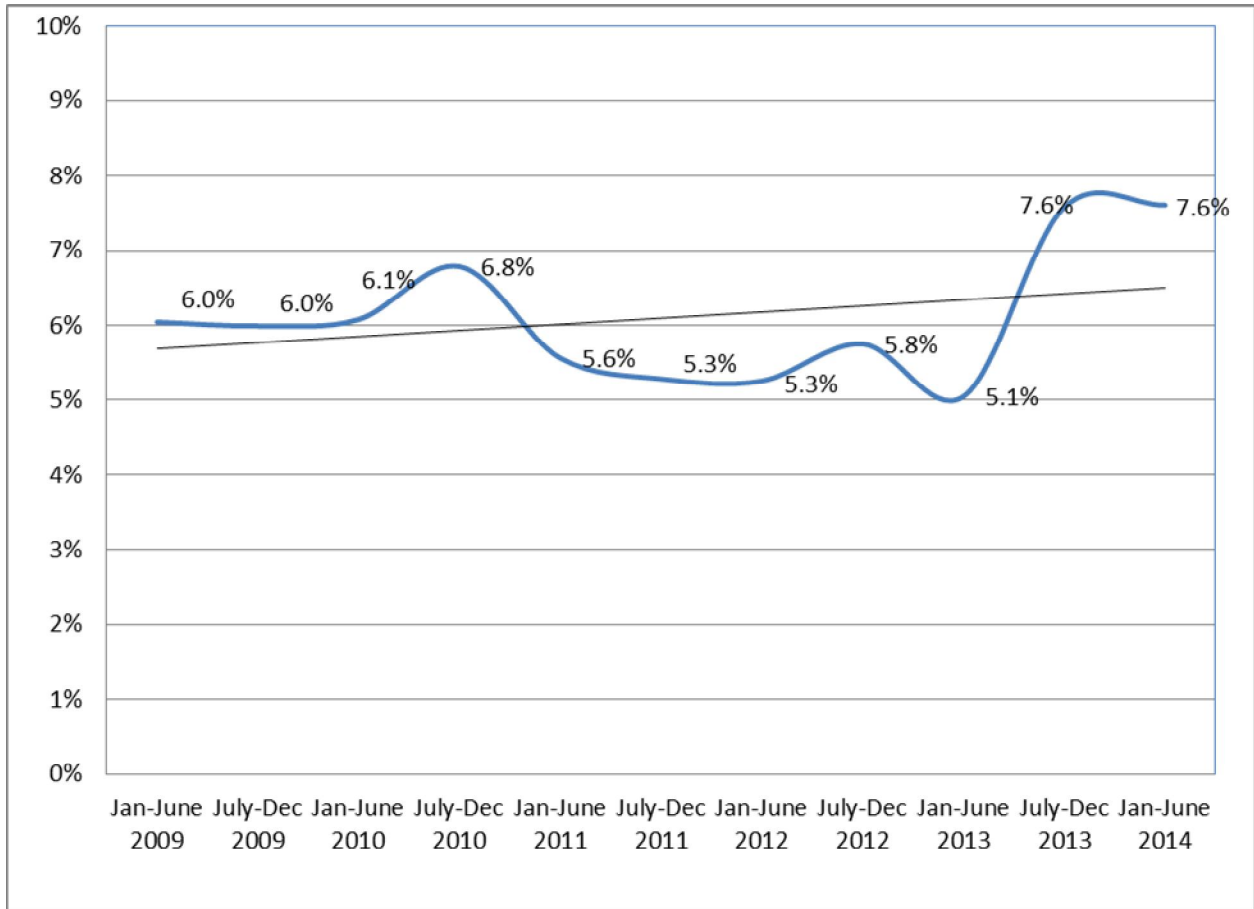


Chart 2.4 shows that chokehold complaints as a percentage of force complaints were above the trend from January through June 2009 to July through December 2010; below the trend from January 2011 through June 2013; and, again, above the trend from July 2013 through June 2014.

Together these four charts highlight three relevant issues.

In absolute terms, after years of increases peaking in 2009, the first year of this study, chokehold complaints decreased from 2010 through the first half of 2013. Deviating from the observed downward trend, chokehold complaints increased in the second half of 2013 and the first half of 2014, the last 12-months of this five and half years study.

The CCRB received 219 chokehold complaints from July 2013 through June 2014, which was a level of chokehold complaint activity that the agency had not seen since the 2006-2010 period. During that period, the CCRB received more than 200 chokehold complaints per year. This increase in absolute numbers by itself is important but it is even more important because of the following finding.

In relative numbers, in the last 12-months, the CCRB received the highest number of chokehold complaints as a percentage of both force complaints and total complaints since 2001. In 2001, for every 100 force complaints filed, 3.8 were chokehold complaints; by July through December 2013 and January through June 2014, for every 100 force complaints, 7.6 were chokehold complaints.

This means that, when a civilian filed a complaint with the CCRB in the last twelve months, there was a greater chance that he/she would allege a chokehold than at any moment since 2001. These charts demonstrate that, at least from the point of view of the particular experience of *the complainants*, police officers continue to use chokeholds and the persistence of this practice may have placed complainants at risk of serious physical harm.

The third finding is that the period from January 2011 through June 2013 was a statistical deviation from the long-term trend. Chokehold complaint activity was both, in absolute and relative terms, lower than expected for this period of time and this matter must receive further attention.

### Disposition Activity

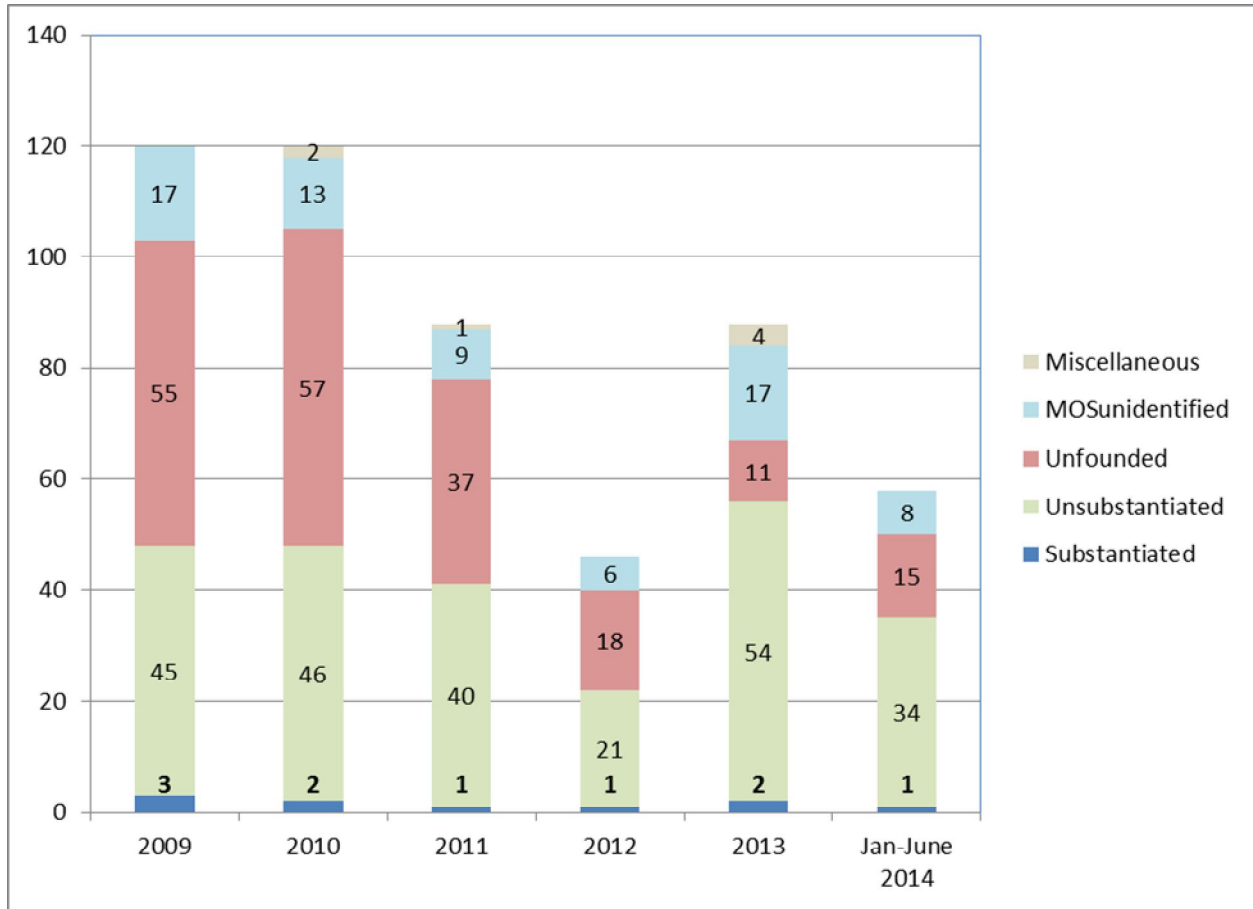
From January 2009 through June 2014, the CCRB investigated and disposed of 1,082 cases involving 1,128 chokehold allegations.<sup>51</sup> An individual case may contain one or more allegations of chokehold.

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<sup>51</sup> The CCRB distinguishes between cases that are fully investigated and those that are not fully investigated. Here the use of the term "investigated" refers to cases where the Board has reached a final outcome.

The CCRB closed 295 allegations in 2009, 232 in 2010, 192 in 2011, 114 in 2012, 201 in 2013, and 94 from January through June 2014. Of these closed allegations, Chart 2.5 shows that the CCRB fully investigated 120 allegations in 2009, 120 in 2010, 88 in 2011, 46 in 2012, 88 in 2013 and 58 from January through June 2014. The total number of fully investigated allegations was 520. During this period, 608 allegations could not be fully investigated.

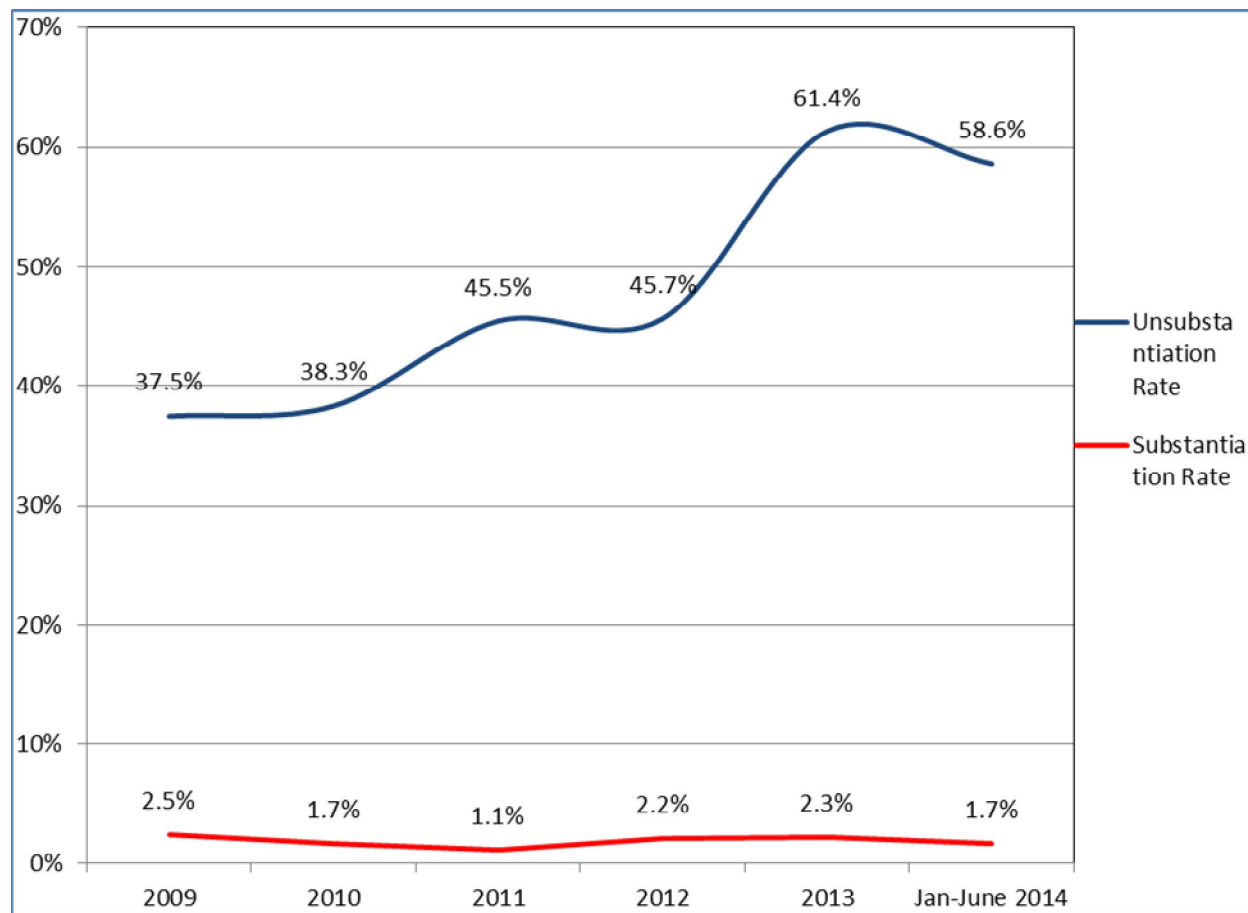
Chart 2.5: Disposition of fully investigated allegations, January 2009 - June 2014



From 2009 through June 2014, the CCRB substantiated a total of 10 chokehold allegations: 3 in 2009; 2 in 2010; 1 in 2011; 1 in 2012; 2 in 2013; and 1 from January through June 2014. An allegation is substantiated when there is a preponderance of evidence to believe that the subject officer committed the act alleged and engaged in misconduct. The substantiation rate is calculated as the percentage of substantiated allegations as a proportion of all fully investigated allegations.

During this period, the substantiation rate - the rate at which allegations are substantiated as a percentage of allegations that are fully investigated - fluctuated between 1.1% and 2.5%. (See Chart 2.6) The average rate was 1.9%. For all force allegations, the overall substantiation rate was 1.8%.

Chart 2.6: Rates at which chokeholds are substantiated and unsubstantiated, January 2009 - June 2014



The CCRB unsubstantiated 240 chokehold allegations. Chart 2.6 shows that the percentage of allegations fully investigated that were disposed of as unsubstantiated increased from 37.5% in 2009 to 61.4% in 2013. It slightly decreased to 58.6% for the period from January through June 2014. From January 2009 through June 2014, the average “unsubstantiation” rate was 46.2%. A case is unsubstantiated when the available evidence is insufficient to determine whether or not the officer committed misconduct. This high rate of cases closed as unsubstantiated is discussed further in Chapter Four.

The CCRB unfounded 193 allegations when there was a preponderance of evidence to believe that the subject officers did not commit the alleged acts in these incidents. The rate at which the CCRB unfounded the allegation was 45.8% in 2009, 47.5% in 2010, 42.0% in 2011, 39.1% in 2012, 12.5% in 2013, and 25.9% from January through June 2014. The average unfounded rate was 37.1% for the five and half years of the study.

### Complaint and Incident Information

In Charts 2.7 through 2.10, we look at the precinct of occurrence of the incident, which is different from the subject officer’s command of assignment.<sup>52</sup> There are 77 precincts in New York City.

Chart 2.7 shows the 19 precincts or police geographic areas where 5 or fewer alleged chokehold incidents occurred within the geographical confines of that precinct from January 2009 through June 2014. Three precincts have no chokehold complaints within the confines of its boundaries: Central Park, the 66<sup>th</sup> Precinct in the Borough Park section of Brooklyn, and the recently created 121<sup>st</sup> precinct in Staten Island.

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<sup>52</sup> It is important to distinguish between the precinct of occurrence and the command assignment of the subject officers: one measures the geographic area where the complaint occurred, and the other the command to which the officer is assigned.



Chart 2.7: By precinct of occurrence, precincts with 5 or fewer chokehold allegations, January 2009 - June 2014

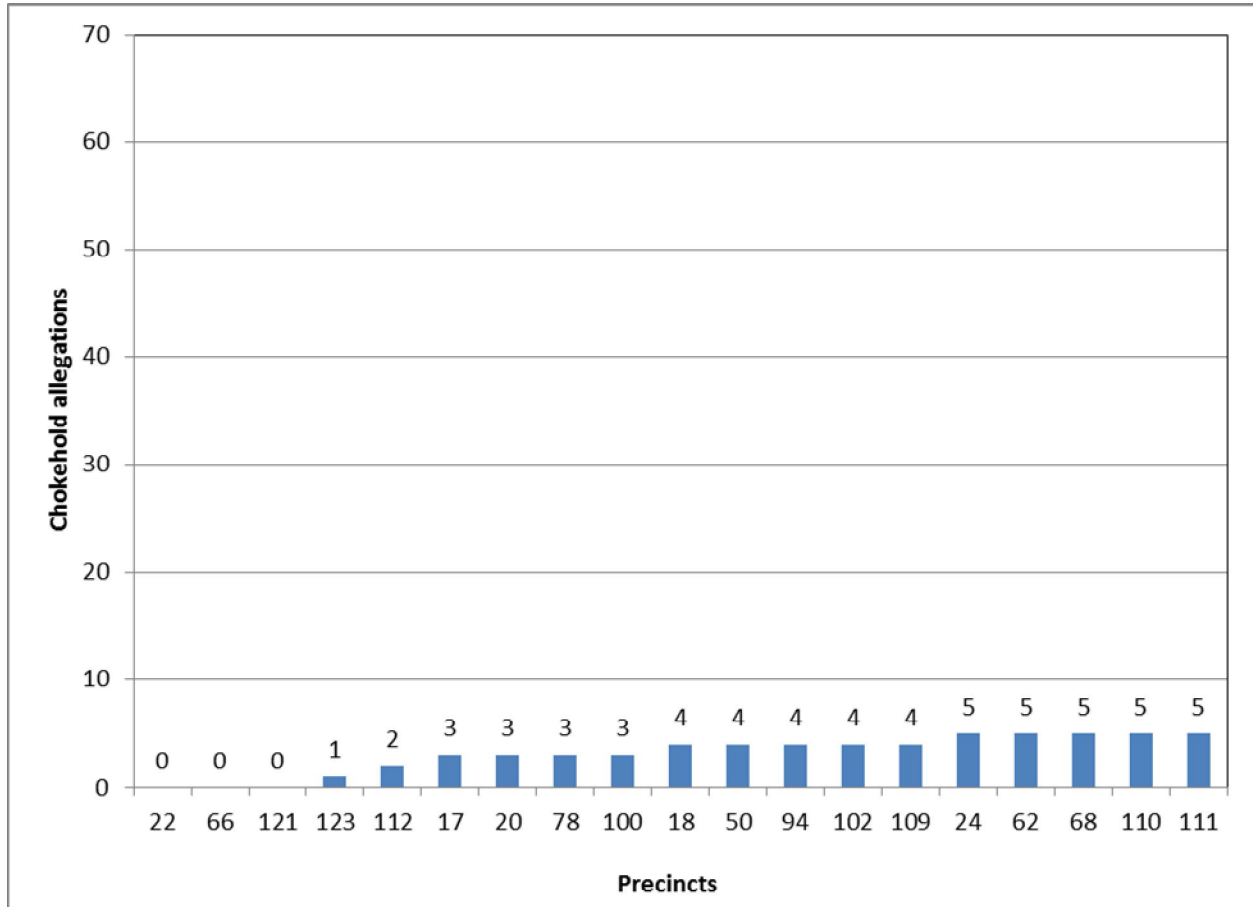
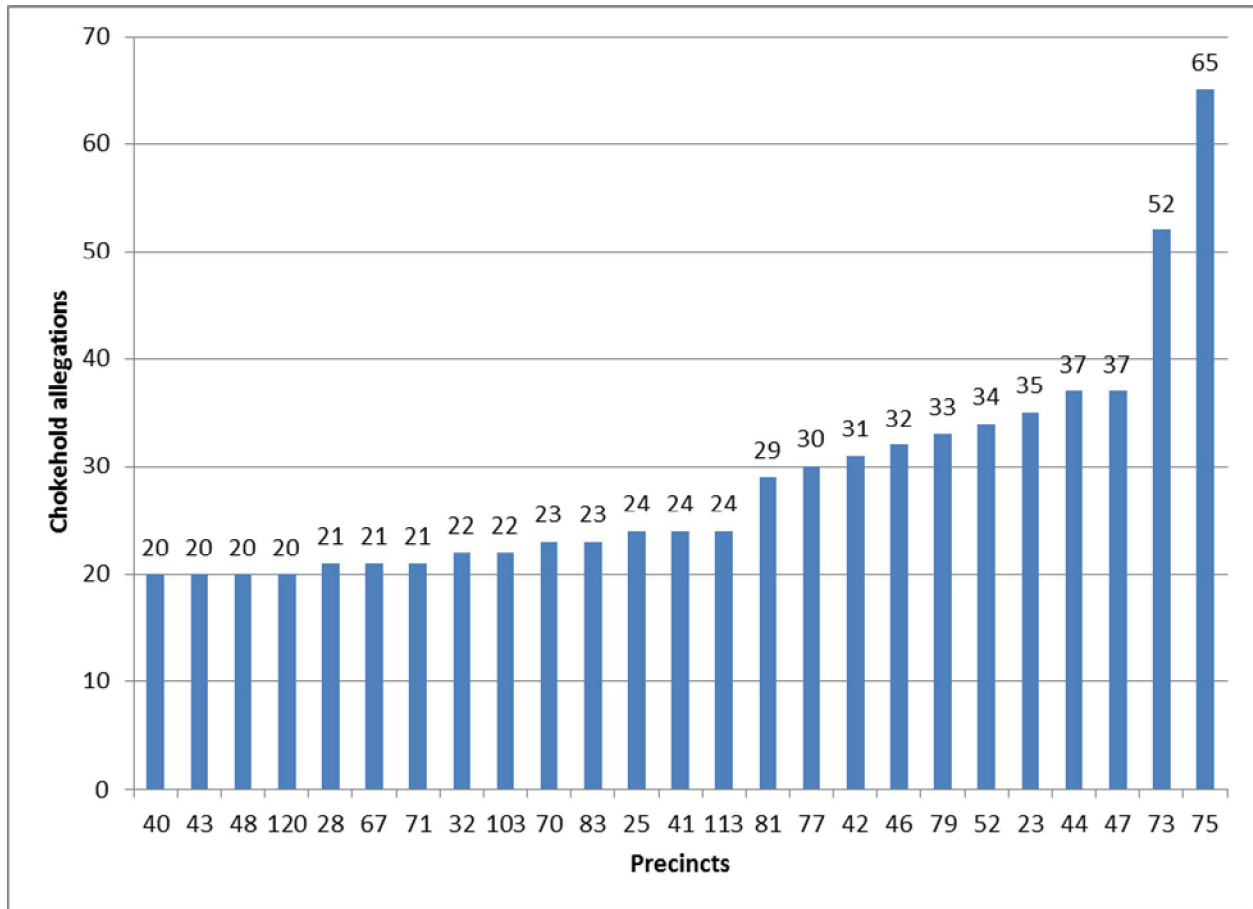


Chart 2.7 shows the 19 precincts or police geographic areas where 5 or fewer alleged chokehold incidents occurred within the geographical confines of that precinct from January 2009 through June 2014. Three precincts have no chokehold complaints within the confines of its boundaries: Central Park, the 66<sup>th</sup> Precinct in the Borough Park section of Brooklyn, and the recently created 121<sup>st</sup> precinct in Staten Island.

Chart 2.8 shows the 25 precincts where 20 or more alleged chokehold incidents occurred within the geographical confines of that precinct. The 75<sup>th</sup> precinct, which is located in the East New York section of Brooklyn, had the most incidents within the confines of that precinct with 65 chokehold allegations followed by the 73<sup>rd</sup> precinct, which is located in the Ocean Hill and Brownsville area of Brooklyn, with 52 chokehold allegations.

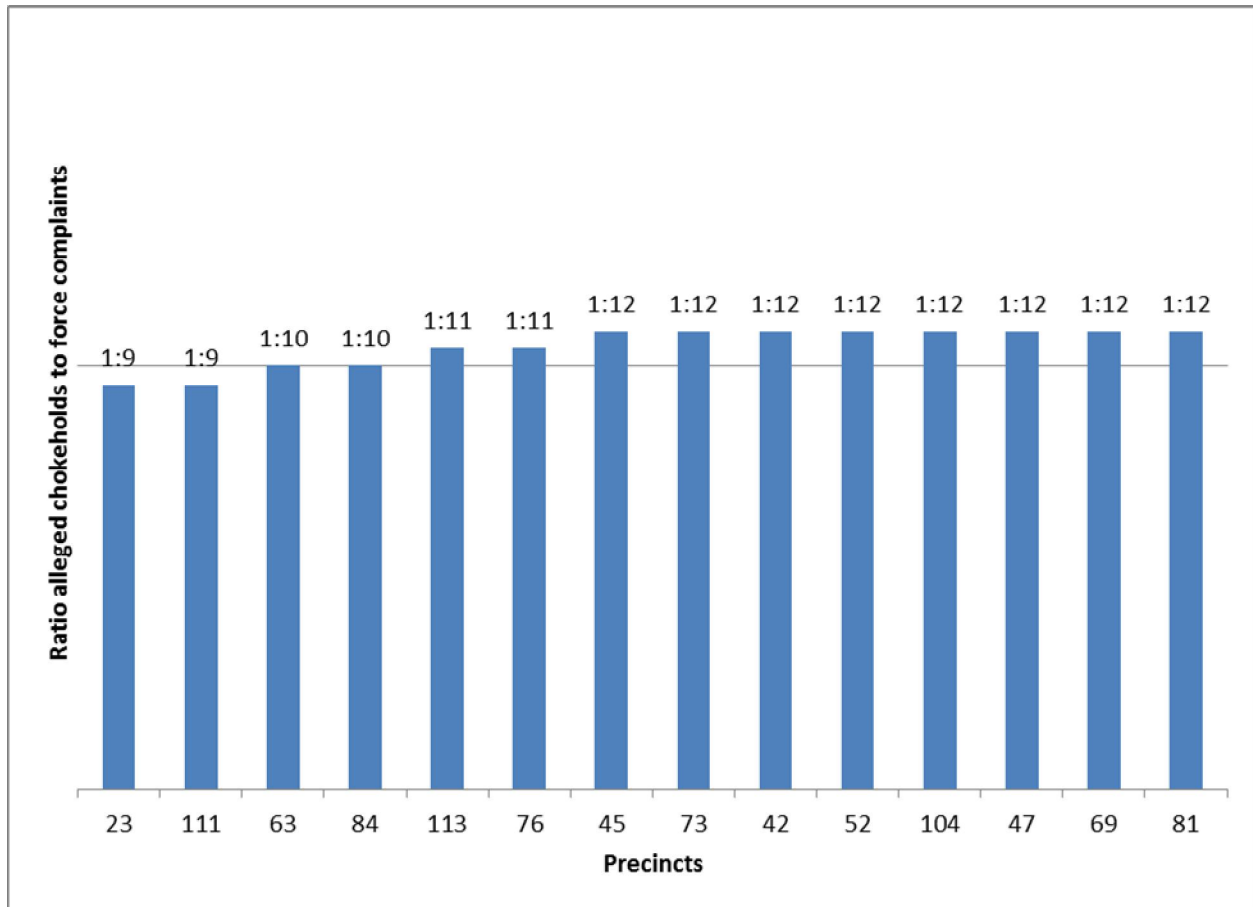
Chart 2.8: By precinct of occurrence, precincts with 20 or more chokehold allegations, January 2009 - June 2014



There is a strong correlation (.933, significant at the 0.01 level, 2-tailed) between the number of chokehold incidents per precinct of occurrence and the number of all force complaints per precinct of occurrence suggesting that the greater the total number of force complaints of any type in a precinct of occurrence, the greater the total number of chokehold complaints in such precinct.

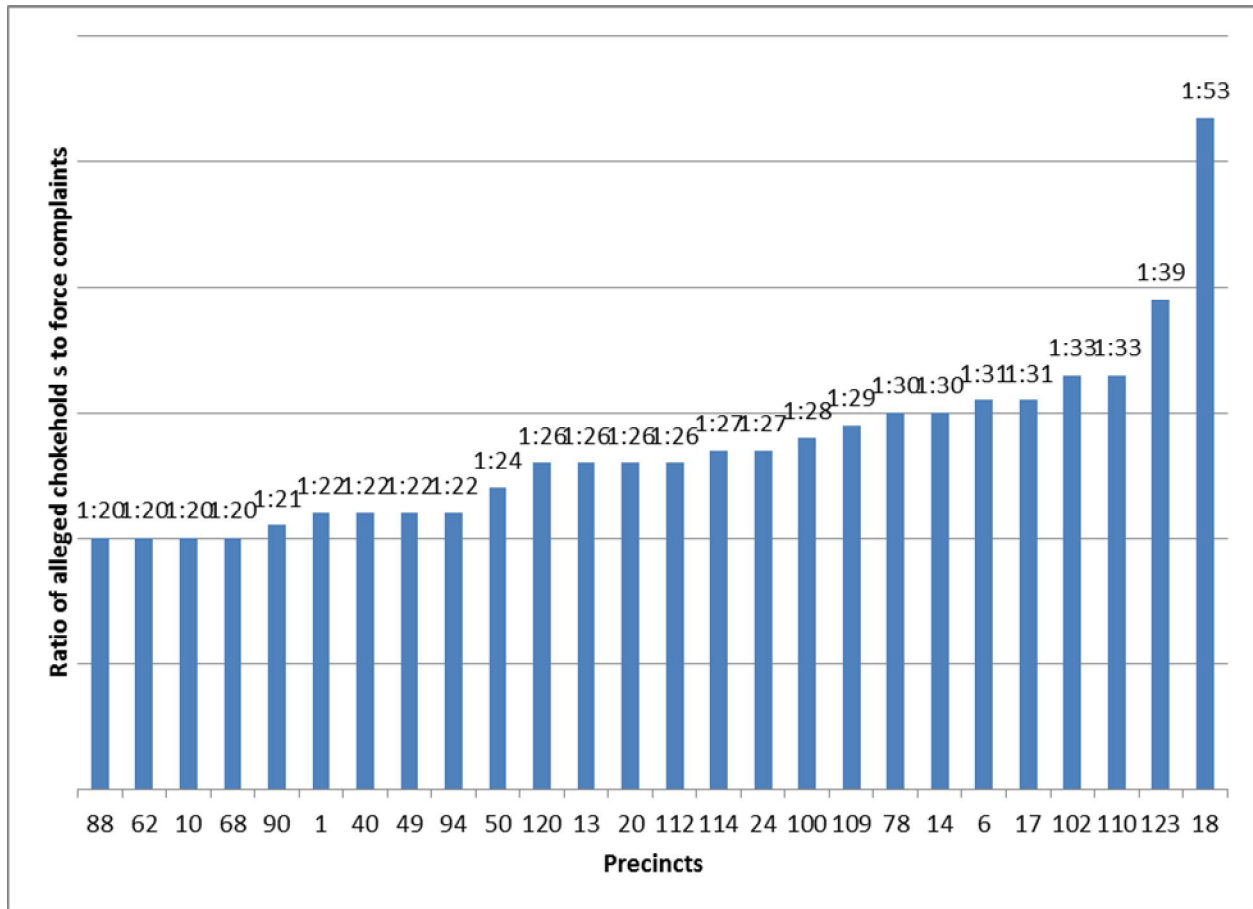
Charts 2.9 and 2.10 provide a ratio of chokehold allegations by precinct of occurrence to total complaints and force complaints, respectively. These charts disaggregate the relation between the number of complaints within the geographic confines of a precinct and the number of chokeholds in that precinct of occurrence.

Chart 2.9: Ratio of alleged chokeholds to force complaints by precinct of occurrence, 1:12 or lower ratio, January 2009 - June 2014



For example, Chart 2.9 shows that within the confines of the 23<sup>rd</sup> and the 111<sup>th</sup> precincts there was one chokehold complaint for every nine force complaints. It also notes that there were 12 other precincts where the ratio of chokehold allegations to force allegations was 1:12 or lower: 63<sup>rd</sup>, 84<sup>th</sup>, 113<sup>th</sup>, 76<sup>th</sup>, 45<sup>th</sup>, 73<sup>rd</sup>, 42<sup>nd</sup>, 52<sup>nd</sup>, 104<sup>th</sup>, 47<sup>th</sup>, 69<sup>th</sup> and 81<sup>st</sup>. These precincts had an average of 263 force complaints within their geographic confines, including an average of 23 chokehold incidents, for an average ratio of 1 chokehold incident per 11 force complaints. In absolute terms, these 14 precincts had a combined total of 321 chokehold incidents within their geographic confines, or 28.5% of all chokehold incidents in the City.

Chart 2.10: Ratio of chokehold allegations to force complaints by precinct of occurrence, 1:20 or higher ratio, January 2009 - June 2014



By comparison, Chart 2.10 shows that, for instance, there was one chokehold complaint for every twenty force complaints within the confines of the 88<sup>th</sup> and 62<sup>nd</sup> precincts. The ratio was 1:30 and above for the 78<sup>th</sup>, the 14<sup>th</sup>, the 6<sup>th</sup>, the 17<sup>th</sup>, the 102<sup>nd</sup>, the 110<sup>th</sup>, the 123<sup>rd</sup>, and the 18<sup>th</sup>. There was no ratio for the 3 precincts with no chokehold complaints. As compared with the group of 14 precincts with the lower ratio, the top 14 precincts in the group of precincts with 1:20 and above ratios had an average of 140 force complaints, including an average of 4.5 chokehold incidents, for an average ratio of 1 chokehold per 31 force complaints.<sup>53</sup> In absolute terms, these 14 precincts had a

<sup>53</sup> The 14 precincts are: the 20<sup>th</sup>, 112<sup>th</sup>, 114<sup>th</sup>, 24<sup>th</sup>, 100<sup>th</sup>, 109<sup>th</sup>, 78<sup>th</sup>, 14<sup>th</sup>, 6<sup>th</sup>, 17<sup>th</sup>, 102<sup>nd</sup>, 110<sup>th</sup>, 123<sup>rd</sup>, and 18<sup>th</sup>.

combined total of 63 chokehold incidents within their geographic areas, or 5.5% of all chokehold incidents in the City.

The comparison of complaints by ratio sheds additional light on the factors that may contribute to a civilian making a chokehold allegation and/or use of force allegation. It shows that it is important to explore why a precinct has a ratio of one chokehold to ten force incidents (1:10), another precinct has a 1:20 ratio and a third precinct has a 1:30 ratio.

For example, there were 322 force complaints, including 35 chokehold incidents, within the confines of the 23<sup>rd</sup> precinct serving the East Harlem section of Manhattan while there were 327 force complaints, including 11 chokehold incidents, within the confines of the Midtown South precinct.

Similarly, there were 154 force complaints, including 15 chokehold incidents, within the confines of the 84<sup>th</sup> precinct serving the northwestern section of Brooklyn while there were 164 force complaints, including 5 chokehold incidents, within the confines of the 110<sup>th</sup> precinct encompassing Corona and Elmhurst.

Finally, there were 111 force complaints, including 9 chokehold incidents, within the confines of the 104<sup>th</sup> precinct covering the northwest section of Queens while there were 117 force complaints, including 4 chokehold incidents within the confines of the 109<sup>th</sup> precinct of Queens.

There are possible explanations for these differences between precincts of occurrence but they are beyond the reach of this report. To provide a more detailed examination, the CCRB would have to examine in detail the number of enforcement actions, changing community demographics and the manner in which commanders policing these areas implemented departmental policies and reinforced force training policies.

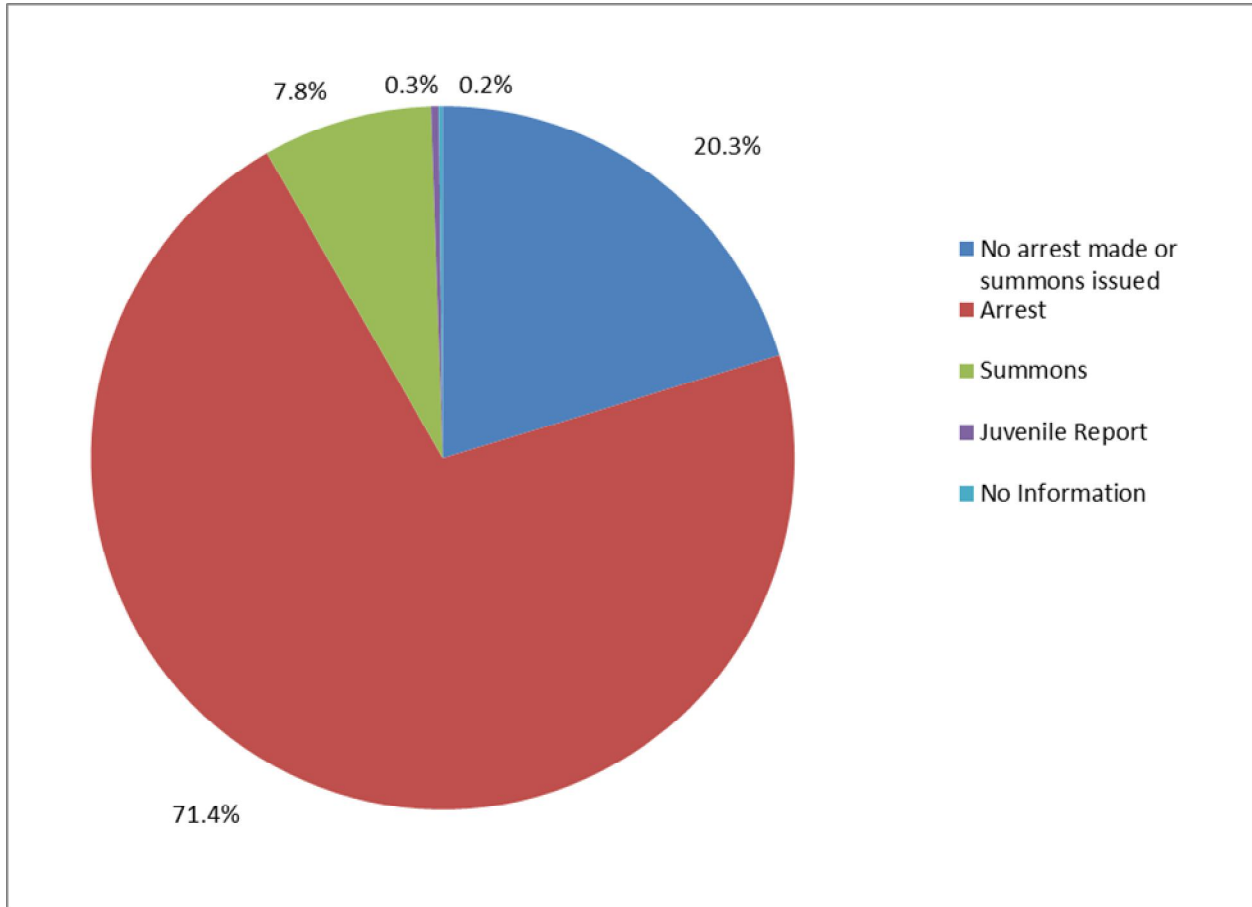
At present, the CCRB is not in a position to further explain how these factors could be determinant except to note that similarly situated precincts in terms of force complaints occurring within their confines had disparate chokehold complaint rates. One of the recommendations of this study is that the CCRB and the NYPD create a task force or study group to look specifically at the information from these precincts where a higher number of chokeholds are alleged, to further explore this finding.

Chart 2.11 shows that arrest and summons were present in the vast majority of alleged chokehold incidents with 71.4% of all chokehold incidents consisting of an arrest and 7.8% consisting of a summons. There was neither arrest made nor summons issued in

20.3% of incidents. Juvenile reports and cases with no information accounted for .5% of all incidents.

When the analysis focuses exclusively on the 520 fully investigated allegations, where the information is most complete, 77.1% of all fully investigated chokehold incidents involved an arrest, 8.9% involved the issuance of summons, 13.6% involved neither arrest nor summons, and .4% involved a juvenile report.

Chart 2.11: Charges and summonses information, January 2009 – June 2014

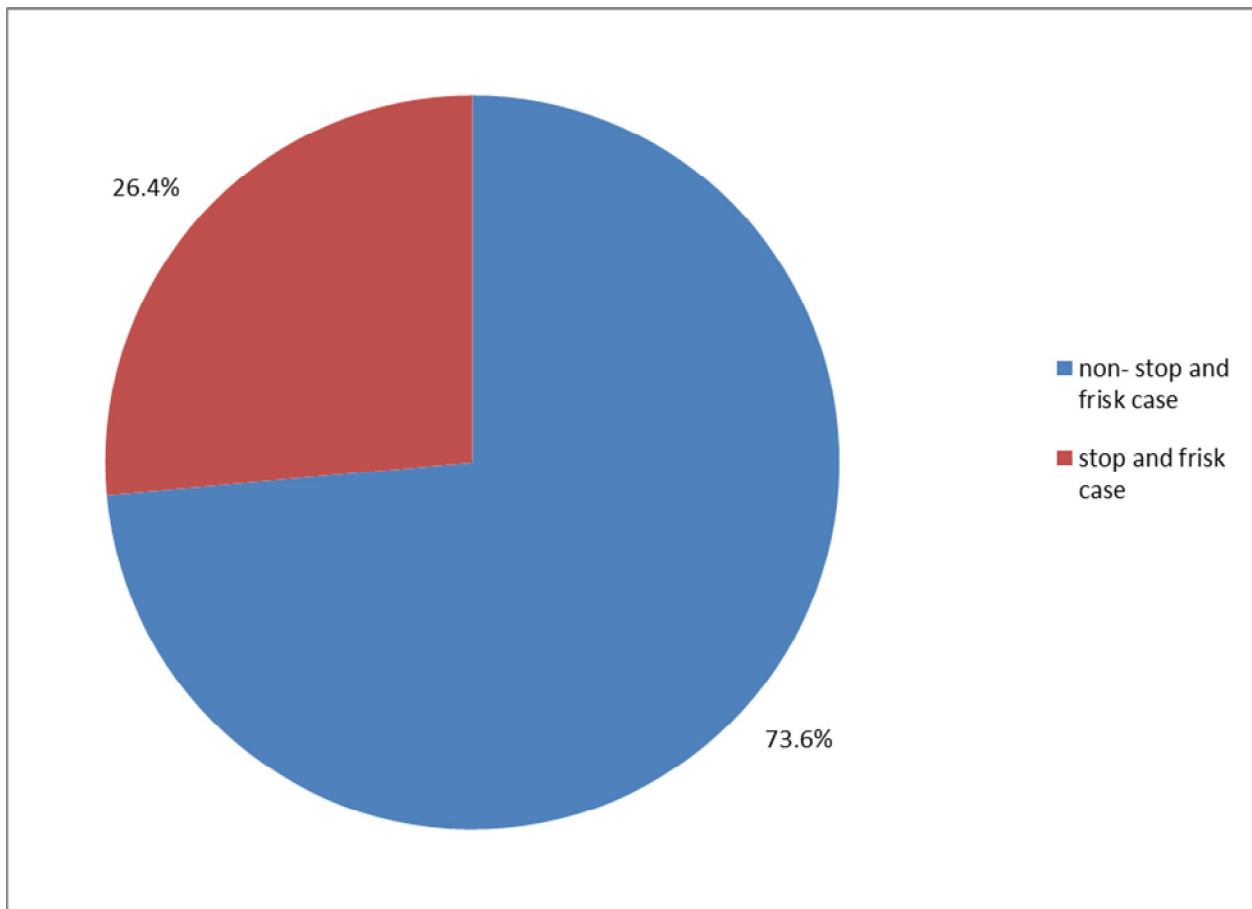


When compared to other complaints from January 2009 through June 2014, excluding chokehold incidents, an arrest was present in 56.7% of all force complaints and in 37.5% of all complaints regardless of type.

The data show that there is a strong relation between the alleged act of using a chokehold and the act of arresting someone. The issue is explored further in the prevalence of the use of force section of this Chapter.

For the period of this report, 28% of all complaints investigated by the CCRB involved question, stop, frisk and/or search allegations (known as stop-and-frisk complaints). Of the 1,082 chokehold cases involving 1,128 chokehold allegations, 286 cases involved an allegation of stop-and-frisk, or 26% of all chokehold incidents. (See Chart 2.12)

Chart 2.12: Alleged chokeholds and stop and frisk complaints, January 2009 – June 2014



There is no statistically significant relation between stop-and-frisk activity and the frequency of chokehold incidents.

This information is consistent with the information collected from the Stop, Question and Frisk database available from the Police Department. In 2009, 24.7% of all stop and frisk activity reports noted that the officer used physical force, in particular his/her hands. The use of force was noted in 23.2% of all stop and frisk reports in 2010; 21.6% in 2011; 17.2% in 2012; and 18.2% in 2013.<sup>54</sup> The fact that, on average, physical force occurred in 21.5% of stop and frisks corroborated the weak relation between chokeholds and stop and frisk activity.

In addition to the 1,128 chokehold allegations, in these incidents the CCRB investigated 4,247 other misconduct allegations. This is an average of 5 allegations per case, including the chokehold allegation, of which 3 were, on average, allegations of force. By comparison, in all cases of misconduct investigated during this period of time the average number of allegations was 2.8 allegations per case, including an average of 0.9 allegations of force per case.

When compared to other serious cases of force, the number of allegations pleaded is similar. The average number of allegations of use of a nonlethal restraining device (including the use of TASER) was 4 allegations per case. There were 4.8 allegations pled in cases where the use of pepper spray was alleged. In both types of cases, there was an average of 3 allegations of force per case just as there were in chokehold cases.

The statistics show that an allegation of chokehold was the sole allegation made in 57 out of 1,082 cases. This was 5% of all chokehold complaints. There were 1,025 investigations of chokehold incidents with multiple allegations, or 95% of all complaints. Approximately, two-thirds of these cases (63%) had four or more allegations and one-third of cases (34%) had six or more allegations.

By looking at the number of officers listed in the complaints as either subject officers or witness officers, there were only 11% of chokehold cases with one officer, suggesting that there was a one-on-one encounter. In 24% of cases, there were at least two officers, listed as either subject and/or witness officers. In 64% of cases, there were 3 or more officers listed in the complaint. In one-third of cases, there were 5 or more officers listed as subject or witness officers.

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<sup>54</sup> The NYPD reported use of force in 143,712 out of 581,168 Stop, Frisk and Question reports; 139,713 out of 601,285 reports in 2010, 148,079 out of 685,724 reports in 2011; 92,073 out of 532,911 reports in 2012; and 34,924 out 191,851 reports in 2013. The most common use of force report was the use of hands: 127,778 in 2009; 122,961 in 2010; 126,406 in 2011; 70,288 in 2012; and 25,444 in 2013.



## Complainants' Information

From January 2009 through June 2014, the CCRB investigated and resolved 1,082 cases involving 1,128 chokehold allegations made by 1,147 complainants. There were rare cases in which the chokehold allegation contained two or more complainants and these allegations were not pleaded separately.<sup>55</sup> Complainants' demographic information is discussed in greater detail in the Appendix.

## Subject Officers' Information

There were 554 unique officers identified as the subject officers of 576 chokehold allegations: 536 officers had one chokehold allegation and 18 officers had two or more allegations of chokehold. Of these 554 officers, 496 were members of the service as of June 30, 2014. Officers' demographic information is discussed in greater detail in the Appendix.

A review of the New York Police Department's roster shows that, from January 2009 through June 2014, there were 43,990 members of service. This includes three groups of officers: officers who served during the five and half years of the study, officers who left service at some point during the study and officers who joined the force at some point during the study. During this period, the average roster of the Department fluctuated between 34,000 and 35,000 officers.

Of these identified 43,990 members of service, there were 14,157 unique officers (32%) identified as the subject officers of at least one CCRB complaint investigated during the time period of this study regardless of whether they were the subject officer of one or more complaints.

The tenure of the officer was identified in 576 chokehold incidents. The average tenure of officers involved in a chokehold incident was 7.9 years. The median was 6.4 years. Approximately one quarter of officers (23.3%) involved in these chokehold incidents had 3 and half years or less on the force and approximately half the officers (46.9%) involved in chokeholds had 5 or fewer years of tenure. Three quarters (75.5%) had 10 or fewer years of service.

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<sup>55</sup> Allegations against two or more individuals should not be combined because allegations of misconduct involve the alleged actions of a particular officer against a particular complainant. If an officer chokes two civilians, they are two distinct acts of misconduct. This means that the number of total allegations was slightly undercounted.

Chart 2.13: Tenure of subject officers, January 2009 – June 2014

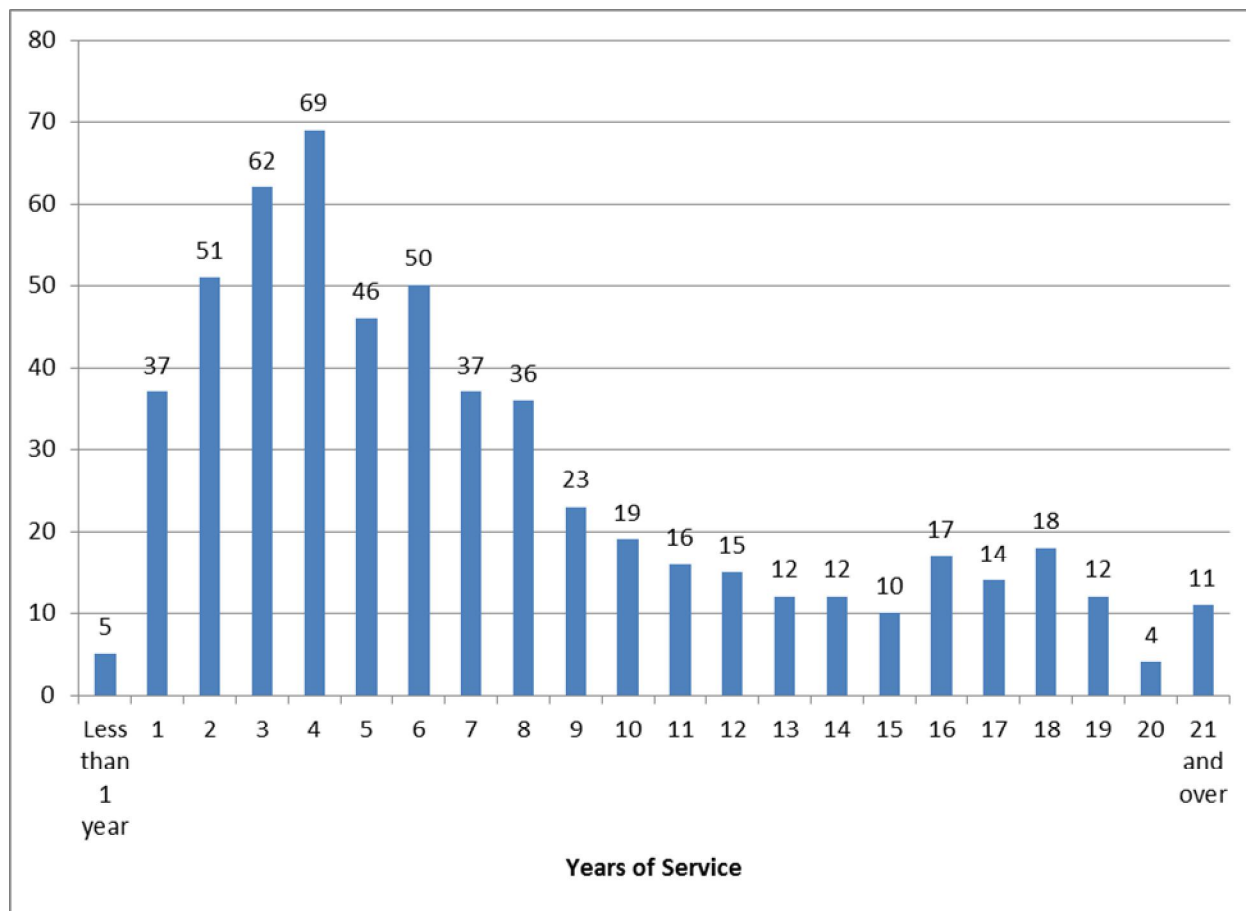


Table 2.14 shows the attribution by command of assignment of chokehold complaints as well as all complaints made against officers. The command of the officer was identified in 716 chokehold incidents (63.5% of all chokehold incidents) and was not identified in 412 chokehold incidents (36.5% of all chokehold incidents).

The table shows significant differences among patrol borough and commands when chokehold incidents are compared to all complaints attributed to officers within a particular command. This finding is consistent with the information gathered by precinct of occurrence. For instance, the Housing Bureau had 83 chokehold incidents attributed

to officers within its commands and had 1,560 CCRB complaints attributed to its officers during the same period of time. This is a ratio of 5.3 chokehold incidents per 100 attributed complaints. By comparison, the Transit Bureau had 20 chokehold incidents and had 1,051 attributed complaints. This is a ratio of 1.9 chokehold incidents per 100 complaints attributed to officers. Similarly, Patrol Brooklyn North had a ratio of 3.7 chokehold incidents per 100 complaints attributed to officers while Patrol Borough Manhattan South had a ratio of 1.5 chokehold incidents per 100 complaints.

Table 2.14 Attribution of chokehold complaints and all complaints to Patrol Boroughs and Other Commands

Command	Chokehold complaints attributed to a command	All complaints attributed to a command	Percentage
Patrol Borough Manhattan South	23	1,496	1.5%
Patrol Borough Manhattan North	71	2,239	3.2%
Patrol Borough Bronx	139	4,203	3.3%
Patrol Borough Brooklyn South	69	2,513	2.7%
Patrol Borough Brooklyn North	121	3,301	3.7%
Patrol Borough Queens South	57	1,676	3.4%
Patrol Borough Queens North	19	1,051	1.8%
Patrol Borough Staten Island	13	725	1.8%
Special Operations Division	1	115	0.9%
Other Patrol Services Bureau Commands	1	10*	10.0%
Traffic Control Division	0	307	0.0%
Transit Bureau	20	1,051	1.9%

Housing Bureau	83	1,560	5.3%
Organized Crime Control Bureau	63	1,793	3.5%
Detective Bureau	29	1,045	2.8%
Other Bureaus	5	315	1.6%
Deputy Commissioners and Misc. Units	2	174	1.1%
<b>Total</b>	<b>716</b>	<b>23,574</b>	<b>3.0%</b>

\* small value, no statistically significant.

Table 2.15 shows the attribution of chokehold complaints and force complaints to officers by command assignment. The report finds significant differences between commands.

Table 2.15 Attribution of chokehold complaint and force complaints to Patrol Boroughs and Other Commands

Command	Chokehold complaints attributed to a command	All complaints attributed to a command	Percentage
Patrol Borough Manhattan South	23	722	3.2%
Patrol Borough Manhattan North	71	1,096	6.5%
Patrol Borough Bronx	139	2,007	6.9%
Patrol Borough Brooklyn South	69	1,168	5.9%
Patrol Borough Brooklyn North	121	1,645	7.4%
Patrol Borough Queens South	57	737	7.7%
Patrol Borough Queens North	19	470	4.0%
Patrol Borough Staten Island	13	361	3.6%
Special Operations Division*	1	76	1.3%

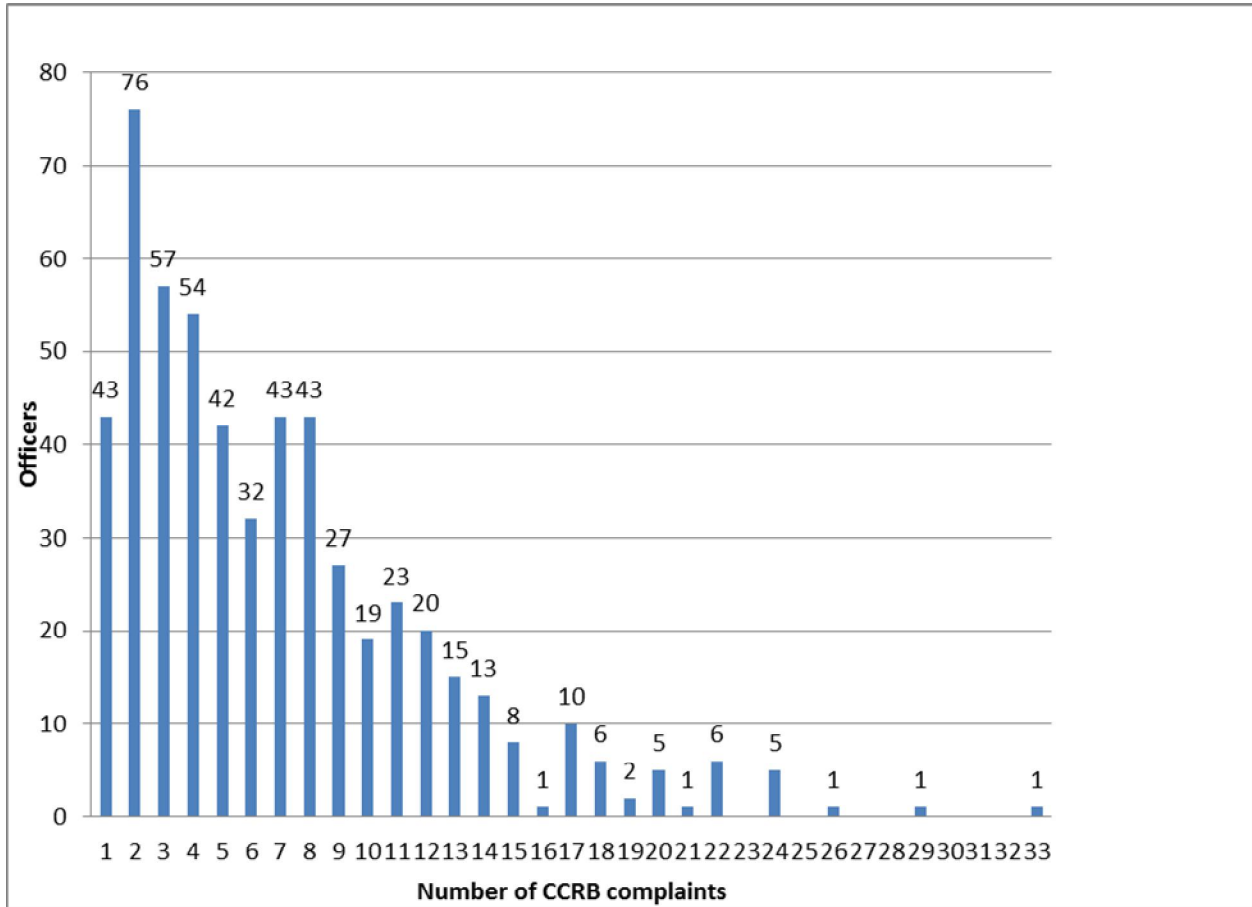
Other Patrol Services Bureau* Commands	1	5*	20.0%
Traffic Control Division*	0	74	0.0%
Transit Bureau	20	610	3.3%
Housing Bureau	83	846	9.8%
Organized Crime Control Bureau	63	963	6.5%
Detective Bureau	29	339	8.5%
Other Bureaus	5	112	4.5%
Deputy Commissioners and Misc. Units	2	80	2.5%
<hr/> Total	<hr/> 716	<hr/> 11,311	<hr/> 6.3%

\* small value, no statistically significant.

Chart 2.16 shows that 50% of the officers involved in a chokehold complaint had a history of six or more CCRB complaints, with 25% of officers having a history of ten or more complaints. On average, the 554 identified officers involved in the chokehold complaints had 6.9 misconduct complaints each. The median was 6 complaints each. Together they had a total number of 3,845 CCRB complaints. By comparison, the identified officers (N=13,603) who had a CCRB complaint but were not involved in any chokehold incident during the period from January 2009 through June 2014 had an average complaint history of 3.8 complaints each. The median was 3 complaints each.

When comparing these findings to the complaint history of all officers in the current roster, the differences were even more significant. Based on the information available to the CCRB, the Police Department had a roster of 34,834 officers as of June 30, 2014. Of these 34,834 officers, 14,191 officers had no prior complaint activity, or 40.7% of the entire force. There were 20,643 officers with one or more complaints: 7,145 officers had one complaint (20.5%) and 13,498 officers had two or more complaints (38.7%). Including those members who did not have a complaint, the active members of the service had, on average, 1.9 complaints each.

Chart 2.16: History of CCRB complaints for officers with chokehold complaints, January 2009 – June 2014



Number of Complaints	Number of Officers	Number of Total Complaints	Percentage	Cumulative Percentage
1	43	43	1.1%	1.1%
2	76	152	4.0%	5.1%
3	57	171	4.4%	9.5%
4	54	216	5.6%	15.1%
5	42	210	5.5%	20.6%
6	32	192	5.0%	25.6%

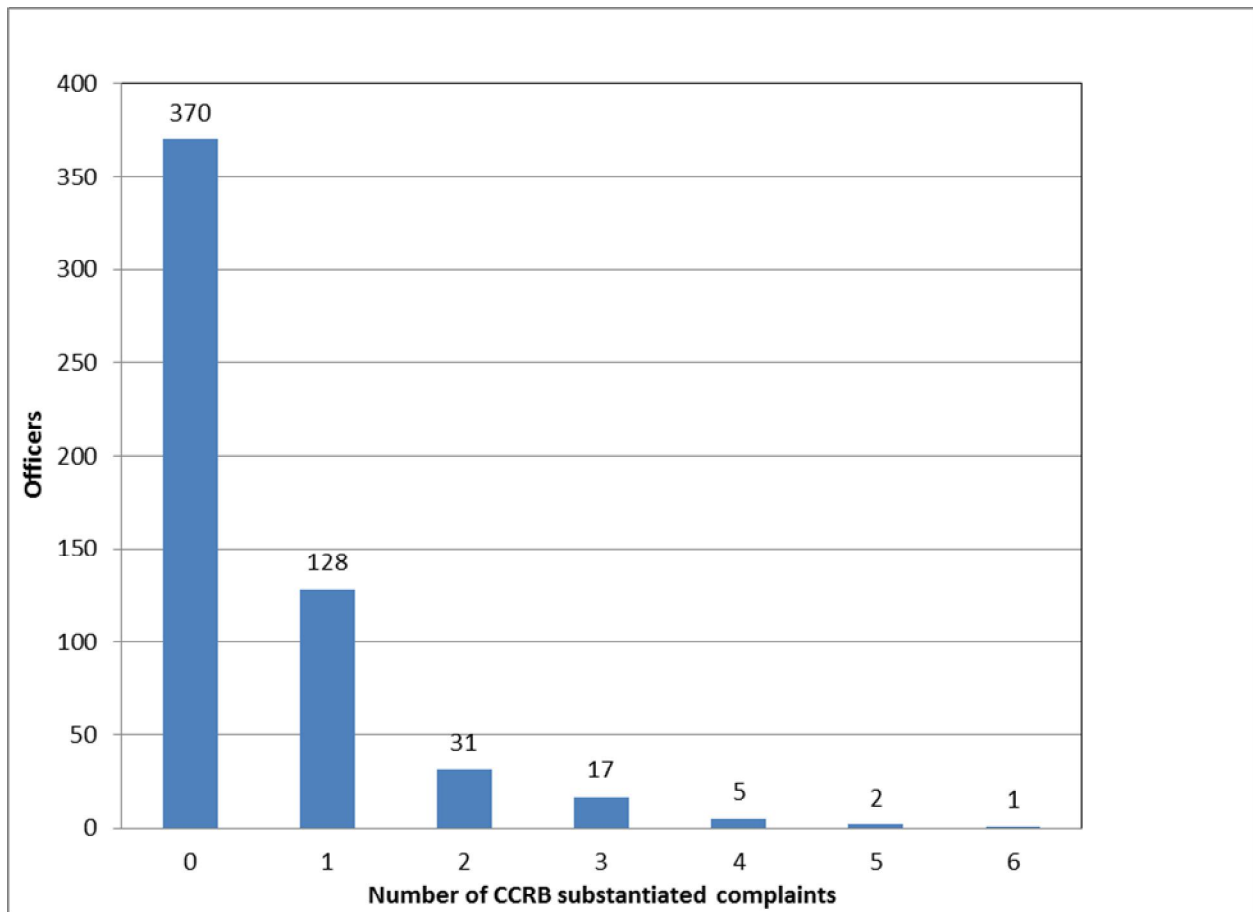
7	43	301	7.8%	33.4%
8	43	344	8.9%	42.4%
9	27	243	6.3%	48.7%
10	19	190	4.9%	53.6%
11	23	253	6.6%	60.2%
12	20	240	6.2%	66.4%
13	15	195	5.1%	71.5%
14	13	182	4.7%	76.3%
15	8	120	3.1%	79.4%
16	1	16	0.4%	79.8%
17	10	170	4.4%	84.2%
18	6	108	2.8%	87.0%
19	2	38	1.0%	88.0%
20	5	100	2.6%	90.6%
21	1	21	0.5%	91.2%
22	6	132	3.4%	94.6%
24	5	120	3.1%	97.7%
26	1	26	0.7%	98.4%
29	1	29	0.8%	99.1%
33	1	33	0.9%	100.0%
<hr/>				
Total	554	3,845	100%	100%

Chart 2.17 shows that 33% of the identified officers involved in a chokehold complaint (N=184) had a complaint history of one or more substantiated complaints, with 25 officers having a history of three or more substantiated complaints. On average, the 554 identified officers involved in the chokehold incidents had an average of .5 substantiated complaints each. Together they had a total number of 277 substantiated complaints. Two thirds of identified officers did not have a substantiated complaint.

By comparison, 18% of the identified officers who had a CCRB complaint but were not involved in any chokehold incident from January 2009 through June 2014 had a complaint history of one or more substantiated complaints. They had had an average of .22 substantiated complaints each.

When comparing these findings to the complaint history of all officers on the current roster, excluding the active 496 officers involved in a chokehold complaint from 2009 through June 2014, the active members of the service had an average of .17 substantiated complaints each with 15% of officers having a complaint history of one or more substantiated complaints.<sup>56</sup>

Chart 2.17 Number of CCRB substantiated complaints for officers with chokehold complaints, January 2009 – June 2014



<sup>56</sup> Of the 554 officers involved in a chokehold incident from January 2009 through June 2014, 496 were members of the service on June 30, 2014 and 58 were no longer members of the service.



## Practical Application of the Descriptive Statistics

### Measuring the Prevalence of the Use of Force Generally and Chokehold Incidents Particularly: A Data and Fact Driven Model to Reduce Chokehold Incidents

One of our goals is to propose a statistical model to measure the prevalence of chokehold incidents. To that end, the report discusses alternative statistical models for measuring statistical prevalence in the use of chokeholds. However, prior to discussing these proposals, it is important to put this type of quantitative discussion in its proper policy perspective.

*The Violent Crime Control and Law Enforcement Act of 1994 created the National Police Use of Force Database. Since then, the National Institute of Justice, the Bureau of Justice Statistics, the International Association of Chiefs of Police and several scholars have issued reports documenting the use of force nationally and locally.<sup>57</sup> Several studies have also emphasized that some form of uniform national reporting is desirable and feasible, at least for certain types of force that most departments already record in one way or another.<sup>58</sup>*

From a statistical perspective, these reports consistently demonstrate that a small percentage of police-public interactions - less than 2% or 3% - involve use of force and even less include claims of excessive force. As a recent report from the International Association of Chiefs of Police (IACP) put it, "these statistics suggest that use of force by police is infrequent and that inappropriate use of force or negative force related outcome are relatively rare events."<sup>59</sup>

However, the real issue is not how frequent the use of force is, but rather the impact these "rare [statistical] events" have and, more importantly, whether or not there is a performance target to further reduce its frequency. Discussions about frequency of events are sterile without an accompanying vision or strategy for improvement. As Professor Kenneth Adams identified with great precision, "[R]egardless of how prevalence is measured, the use of force by police, whether excessive or not, is, from a

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<sup>57</sup> Lawrence Greenfel, Patrick Langan, and Steven Smith, "Police Use of Force: Collection of National Data" November 1997, NCJ-165040.

<sup>58</sup> See: Anthony M. Pate and Lorie A. Fridell, "Toward the Uniform Reporting of Police Use of Force: Results of a National Survey," *Criminal Justice Review* 20.2 (Autumn, 1995) 123-145.

<sup>59</sup> International Association of Chiefs of Police and the U.S. Department of Justice's Community Oriented Policing Services (COPS), "Emerging Use of Force Issues: Balancing Public and Officer Safety," March 2012.

statistician's point of view, an infrequent event. From a police department's or community's point of view, however, one cataclysmic abuse of force can preempt addressing other crucial problems."<sup>60</sup>

Professor Adams' statement makes a simple but important point: a single "cataclysmic" incident of police violence has the potential to damage the reputation of a department while substantially eroding community support for it. The misconduct of police officers is not acceptable merely because it is statistically infrequent. The public demands that police departments set targets to reduce improper, less than professional, police behavior and to actively manage their problem-prone officers.

In this report, we measure the prevalence of chokehold incidents for two reasons. The first is to set a baseline, a point of reference, from which to evaluate progress moving forward.

The second is to provide a tool that can help the NYPD to reduce misconduct. This report recognizes that, in all organizations and human endeavors, there is always some potential for misconduct, even in the best-run organizations under the best-built policies and training programs. But the goal is to set a performance target where misconduct is almost non-existent: a "Vision Zero" for police misconduct. We propose a data and fact-driven process to reduce misconduct and increase public satisfaction.

#### *Common Models to Measure Use of Force Prevalence*

One way to measure prevalence is to focus on police-citizen contacts. When the use of force is viewed in relation to calls for service, the proportion of force incidents is extremely small.

A different strategy to measure use of force prevalence is to focus on contacts that involve a greater potential for force. An arrest is an example of such a contact.

During a recent testimony before the City Council, Police Commissioner William J. Bratton used this metric to document what he believed "to be an extraordinary record of restraint by New York City police officers in the performance of their duties." He displayed a chart that showed "the frequency with which force has been used in arrest situations since 1992." As he stated:

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<sup>60</sup> Kenneth Adams, Kenneth Adams, "Measuring the Prevalence of Abuse of Force," in William A. Geller and Hans Toch, eds., *Police Violence: Understanding and Controlling Police Abuse of Force* (New Haven, CT: Yale University Press, 1996): 52-93, 81.

“Officers were resorting to force in 8.5% of arrests back then. By 2004, that percentage had fallen to about 4.6%. This year [2014] it is running at 1.9%, the lowest rate since we’ve been keeping records. We’re making 98 out of every 100 arrests without reportable use of force.”<sup>61</sup>

From 2009 to 2013, based on information provided to the CCRB by the Police Department, the Police Department arrested 2,001,552 people, which is an average of 400,310 people per year.<sup>62</sup> The data available indicate that there were .57 reported chokehold incidents in the form of a complaint filed for every thousand arrests in 2009; .49 in 2010; .38 in 2011; .40 in 2012; and .51 in 2013. Put differently, there were approximately .05 chokehold incidents for every 100 arrests (or 1 for every 2,000 arrests).

One of the limitations of using arrest data is that, although there is a strong relation between arrest and the presence of allegations of improper use of force, there are a significant number of non-arrest scenarios where force is still alleged. In analyzing all cases closed during the time period of this study, the CCRB found that there was an allegation of force pleaded in in 36% of complaints involving neither arrest nor summons. There were also allegations of force in 12% of complaints involving summonses. Use of force was pleaded in 82% of complaints involving arrest.

There is also a way to measure prevalence by looking at the relationship between arrest and the use of chokeholds. Although most arrests do not involve a resisting individual, there are situations where individuals resist and police officers charge those individuals with resisting arrest. The CCRB does not have this information available but a recent news report indicated that “the NYPD makes roughly 13,500 busts a year for resisting arrest.”<sup>63</sup>

Based on this data, there were approximately 1.4 chokehold complaints for every hundred arrests where the police were trying to make an arrest and the suspect resisted. Also, in reviewing a sample of 53 fully investigated cases, the CCRB found that in approximately 6 out 10 chokehold incidents the officer asserted, either in the charges against the civilian or during a CCRB interview, that the civilian resisted arrest during the encounter.

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<sup>61</sup> Police Commissioner William J. Bratton, “Statement of Police Commissioner William J. Bratton Before the New York City Council Public Safety Committee,” September 8, 2014.

<sup>62</sup> Civilian Complaint Review Board, “Annual Status Report: January-December 2013,” March 2014, 6.

<sup>63</sup> Philip Messing, Kirtan Conely and Daniel Prendergast, “Only a fraction of arrest resisters are prosecuted,” New York Post August 15, 2014.

Academic studies corroborate that this situation, resisting arrest, is where the use of force is most likely to occur. For example, a comprehensive study on the use of force nationally from the National Institute of Justice found that that “use of force typically occurs when police are trying to make an arrest and the suspect is resisting.”<sup>64</sup>

There is also another way to measure how prevalent the use of force is. Different research studies show that “the rate of violent incidents for a group of officers is much higher than comparable rates based on arrests or police-citizen encounters.”<sup>65</sup> In 1986, for example, a study of the NYPD found that, on average, 10 complaints of excessive force are filed per 100 officers per year.<sup>66</sup> From June 2009 through June 2014, the CCRB data shows there were 8 complaints of excessive force filed per 100 officers per year.

During the time period of the study, when compared to the number of officers on the roster, there was a rate of .54 reported chokehold incidents per 100 officers per year. When compared to the identified officers who received a complaint, there was a rate of 3.9 reported chokehold incidents per 100 officers with complaints per year.

There is another approach which is also helpful in determining prevalence: internal benchmarking of chokehold use. Rather than using measurements that emphasize external benchmarking (i.e., police-civilian contacts, arrests, use of force by officer) for the decision to use force; a different option is to use internal benchmarking for the decision to use force, in particular a chokehold.<sup>67</sup>

Since, as noted in charts 2.16 and 2.17, the prevalence of chokeholds is attributable to a few problem-prone officers, external benchmarking may not be useful to detect the problem as it does not identify potential problem officers. One idea is to compare officers’ use of force decisions with decisions made by other officers in similar situations and thus create an internal benchmark from which to identify outliers.

The problem with this approach is that, because using a chokehold is a prohibited practice, officers will not report the use of chokeholds in the same way in which they

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<sup>64</sup> National Institute of Justice-Bureau of Justice Statistics, “Use of Force by Police: Overview of National and Local Data,” October 1999, NCJ 176330, viii.

<sup>65</sup> Kenneth Adams, Op. Cit., 62.

<sup>66</sup> New York City Police Department, “Nationwide Survey of Civilian Complaint Systems,” January 1986.

<sup>67</sup> See: Walker, Samuel, “Searching for the Denominator: Problems with Police Traffic Stop Data and an Early Warning System Solution,” *Justice Research and Policy*, 3.2 (2001): 63–95; Greg Ridgeway, “Analysis of Racial Disparities in the New York Police Department’s Stop, Question, and Frisk Practices,” Rand Corporation, 2007, 21ff.

report use of force or report stop-and-frisk encounters. Such an approach is likely to lead to substantial underreporting.

### *The CCRB Model*

The CCRB proposes its own model of prevalence, which is based on the relation between chokehold complaints and force complaints. From the outset, we recognize that any model of prevalence that relies on complaints has two shortcomings. First, it overcounts the use of force because not all complaints are found to have merit; and, second, it undercounts excessive force relative to surveys of citizens because not all people who experience excessive force file a complaint. Bearing that in mind, however, this report suggests that, when using complaint data to measure the prevalence of chokehold incidents, the best methodology is to compare the number of chokehold complaints filed as a percentage of total force complaints received. This method is a hybrid between internal and external benchmark methodologies: it allows the incorporation of external input while comparing officers' use of force decisions with decisions made by other officers in similar situations and thereby identifying problem officers.

As noted earlier, Charts 2.3 and 2.4 show that chokehold complaints gradually increased as a percentage of total force complaints from 2001 through January 2014 except for two periods, calendar year 2003 and the 2011-2012 period. The rate of reported chokehold incidents per 100 force complaints per year has increased from 3.8 chokehold reports per 100 force complaints in 2001 to 7.6 chokehold reports per 100 force complaints from January through June 2014.

## **Identifying Chokehold-Prone Officers**

There is evidence on the use of force that can be accepted with substantial or moderate confidence. It is known with a substantial amount of confidence that “police use force infrequently;” that “police use of force typically occurs at the lower end of the force spectrum, involving grabbing, pushing or shoving;” that “when injuries occur as a result of the use of force, they are likely to be minor.”<sup>68</sup> In addition, “another research finding that can be accepted with a substantial degree of confidence is that use of force typically occurs when police are trying to make an arrest and the suspect is resisting.”<sup>69</sup>

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<sup>68</sup> National Institute of Justice-Bureau of Justice Statistics, “Use of Force by Police: Overview of National and Local Data,” October 1999, NCJ 176330, vii-viii.

<sup>69</sup> National Institute of Justice-Bureau of Justice Statistics, *Ibid.*, viii.

There are two reasons that all of these facts do not completely address the issue of excessive force. First, they miss the issue of how reasonable or proportional the officer's behavior was to the action of the civilian. Second, although the use of deadly force is not a typical situation resulting from the police use of force, it arouses profound public concern.

There are three facts that are helpful in our analysis. First, consistent with the data available on subject officers, "use of force appears to be unrelated to an officer's personal characteristics." Second, "a small proportion of officers are disproportionately involved in use-of-force incidents." Third, "use of force is more likely to occur when police are dealing with persons under the influence of alcohol or drugs or with mentally ill individuals."<sup>70</sup> The first two are consistent with the findings of this study described in the subject officer information section of this chapter and the data available in the appendix to Chapter 2.

As William Terrill and John McCluskey found, "systemic research on police misconduct suggests that most citizen complaints are generated by a handful of officers."<sup>71</sup> Walker, Alpert and Kenney wrote that, "it has become a truism among police chiefs that 10 percent of their officers cause 90 percent of the problems."<sup>72</sup> CCRB complaint data shows that 9% of current members of service have six or more complaints and have received 43% of all complaints filed against current members of service.<sup>73</sup>

Terrill and McCluskey found that, when observing and comparing officers with relatively high complaint rates to those with relatively low complaint rates, significant differences were found. Those officers in the high rate or problem group were more likely to use physical force than their non-problem-prone counterparts. They were also more likely to engage in other behavior such as proactive stop and frisk activity and arrests.

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<sup>70</sup> National Institute of Justice-Bureau of Justice Statistics, *Ibid.*, viii.

<sup>71</sup> William Terrill and John McCluskey, "Citizen Complaints and Problem Officers: Examining Officer Behavior," *Journal of Criminal Justice* 30 (2002) 143-155, 143. See also: Steven G. Brandl, Meghan Stroshine and James Frank, "Who are the Complaint-Prone Officers? An examination of the Relationship between Police Officer's Attributes, Arrest Activity, Assignment, and Citizens' Complaints about Excessive Force." *Journal of Criminal Justice* 29 (2001) 521-529.

<sup>72</sup> Samuel Walker, Geoffrey Alpert, and Dennis Kenney, "Early Warning Systems: Responding to the Problem Prone Officer," *National Institute of Justice: Research in Brief*, July 2001, 1.

<sup>73</sup> This finding is consistent with other research; *Journal of Criminal Justice* 30 (2002) 143-155, 143.

<sup>73</sup> In studying a small Police Department in the Southeast, Lersch and Mieczkowski found that "a small group of 37 officers, or about 7 percent of the sworn personnel, account for over one-third of the total number of complaints filed over the three year period of analysis." Kim Micheller Lersch and Tom Mieczkowski, "Who Are the Problem-Prone Officers? An Analysis of Citizen Complaints," *American Journal of Police* 14.3 (1996) 23-44.

Kim Michelle Lersch and Tom Mieczkowski provide a model to identify problem-prone officers.<sup>74</sup> Their model emphasizes officer characteristics (race, gender, age and tenure), complaint characteristics (complaint type, contact type, number and proportion of substantiated complaints), and citizen characteristics (race).

### *The CCRB Model*

This study has discussed those characteristics in the descriptive section. We determined that an analysis of chokehold problem-prone officers should focus on three characteristics of officers with a complaint history: propensity to use force as measured by the number of force complaints filed against an officer, propensity to arrest as measured by history of complaints in which there was an arrest, and propensity to use a proactive type of contact with civilians as measured by history of complaints of stop and frisk, strip search, vehicle stop and search, and premises entered.

The first factor is the propensity for officers with chokehold complaints to be involved in other use of force incidents and to be the subjects of CCRB force complaints. Officers involved in chokehold incidents (N= 554) were involved in 2,164 complaints of force, an average of 3.9 force complaints per officer. When compared to all other identified officers involved with a CCRB force complaint at any time (N=32,824), the average was 2.2 force complaints per officer.

Table 2.18: History of force complaints by officers with chokehold incidents

Number of Force Complaints in Officer's History	Number of Officers	Number of Total Force Complaints	Percentage	Cumulative Percentage
1	119	119	5.5%	5.5%
2	117	234	10.8%	16.3%
3	81	243	11.2%	27.5%
4	62	248	11.5%	39.0%
5	49	245	11.3%	50.3%
6	27	162	7.5%	57.8%
7	28	196	9.1%	66.9%

<sup>74</sup> Kim Micheller Lersch and Tom Mieczkowski, "Who Are the Problem-prone Officers? An Analysis of Citizen Complaints," *American Journal of Police* 14.3 (1996) 23-44.

8	23	184	8.5%	75.4%
9	12	108	5.0%	80.4%
10	14	140	6.5%	86.8%
11	6	66	3.0%	89.9%
12	6	72	3.3%	93.2%
13	5	65	3.0%	96.2%
15	2	30	1.4%	97.6%
16	1	16	0.7%	98.3%
17	1	17	0.8%	99.1%
19	1	19	0.9%	100%
<hr/>				
Total	554	2,164	100%	100%

The difference in the distribution of complaints was significant between these two groups: 78.5% of officers in the chokehold group had two or more force complaints while 49.3% of officers in the *non*-chokehold group had two or more force complaints. Furthermore, 31.6% of officers in the chokehold group had five or more force complaints while 9.3% of officers in the *non*-chokehold group had five or more force complaints.

This is an important finding. The fact that the ‘officers involved in chokehold group were significantly more likely to use force against a suspect than “officers not involved in chokeholds’ should not be easily dismissed. This indicates that officers with chokehold allegations filed against them are resorting to force more often than officers without a chokehold complaint, as measured by force allegations. In conducting a similar type of study, Professors Terrill and McCluskey advanced two possible reasons for this type of finding:

“It is possible that the identified problem officers represent two distinct groups. The first could be those who are unable to master the use of persuasion and negotiation and to quickly resort to force. The second could be those who are ‘gung-ho’ and produce complaints because they are overtly productive and fail to adopt an appropriate exit strategy to leave the citizen satisfied with their interaction.”<sup>75</sup>

<sup>75</sup> William Terrill and John McCluskey, “Citizen Complaints and Problem Officers: Examining Officer Behavior,” *Journal of Criminal Justice* 30 (2002) 143-155, 143.



The second factor is the propensity for officers with chokehold complaints to be the subjects of CCRB complaints involving arrests. The data shows that 93% of officers (N=516) involved in chokehold incidents had a complaint stemming from an arrest. These officers were involved in 1,934 arrests that prompted a complaint, an average of 3.7 complaints involving an arrest per officer (3.5 if we include officers with no arrest complaints). When compared to all other identified officers in a CCRB complaint involving an arrest at any time (N=22,067), these officers had an average of 1.7 complaints involving an arrest per officer. Approximately one half of all identified officers (N=46,249) with CCRB complaints (52.3%) had no complaint involving arrest.

Table 2.19: History of arrest complaints by officers with chokehold incidents

Number of Arrest Complaints in Officer's History	Number of Officers	Number of Total Arrest Complaints	Percentage	Cumulative Percentage
0	38	0	0.0%	0.0%
1	129	129	6.7%	6.7%
2	92	184	9.5%	16.2%
3	81	243	12.6%	28.7%
4	59	236	12.2%	41.0%
5	49	245	12.7%	53.6%
6	32	192	9.9%	63.5%
7	22	154	8.0%	71.5%
8	15	120	6.2%	77.7%
9	11	99	5.1%	82.8%
10	8	80	4.1%	87.0%
11	2	22	1.1%	88.1%
12	6	72	3.7%	91.8%
13	1	13	0.7%	92.5%
14	3	42	2.2%	94.7%
15	3	45	2.3%	97.0%
18	1	18	0.9%	97.9%
19	1	19	1.0%	98.9%
21	1	21	1.1%	100%
<b>Total</b>	<b>554</b>	<b>1,934</b>	<b>100%</b>	<b>100%</b>

The difference in the distribution of complaints between these two groups was also significant: 75% of officers in the chokehold group had two or more arrest-related complaints, while 38.6% of officers in the non-chokehold group had two or more arrest-related complaints. Furthermore, 30% of officers in the chokehold group had five or more arrest-related complaints, while 4.9% of officers in the non-chokehold group had five or more arrest-related complaints.

The third factor is the propensity for officers with chokehold complaints to be involved in proactive types of contacts with civilians that led to CCRB complaints involving stop and frisk, strip-search, vehicle stop and search, and premises entered. The data show that 74% of officers (N=410) involved in chokehold incidents had a complaint stemming from a proactive type of contact. These officers were involved in 1,439 proactive contacts generating complaints, an average of 3.5 complaints involving a proactive contact per officer (2.6 if we include officers with no proactive contact complaints). When compared to all other identified officers involved in a CCRB complaint involving proactive contact at any time (N=14,725), these officers had an average of 1.8 complaints involving a proactive contact per officer. Approximately two thirds of all identified officers (N=46,249) with CCRB complaints (68%) had no complaint involving a proactive contact.

The difference in the distribution of complaints was also significant between these two groups: 70.2% of officers in the chokehold group had two or more proactive contact complaints while 37.8% of officers in the non-chokehold group had two or more proactive contact complaints. Furthermore, 27.1% of officers in the chokehold group had five or more proactive contact complaints while 5.7% of officers in the non-chokehold group had five or more proactive contact complaints.

Table 2.20: History of proactive contact complaints by officers with chokehold incidents

Number of Proactive Contact Complaints in Officer's History	Number of Officers	Number of Total Proactive Contact Complaints	Percentage	Cumulative Percentage
0	144	0	0.0%	0.0%
1	122	122	8.5%	8.5%
2	73	146	10.1%	18.6%

3	58	174	12.1%	30.7%
4	46	184	12.8%	43.5%
5	35	175	12.2%	55.7%
6	26	156	10.8%	66.5%
7	17	119	8.3%	74.8%
8	10	80	5.6%	80.3%
9	5	45	3.1%	83.5%
10	4	40	2.8%	86.2%
11	4	44	3.1%	89.3%
12	1	12	0.8%	90.1%
13	1	13	0.9%	91.0%
14	2	28	1.9%	93.0%
15	2	30	2.1%	95.1%
16	2	32	2.2%	97.3%
18	1	18	1.3%	98.5%
21	1	21	1.5%	100%
<b>Total</b>	<b>554</b>	<b>1,439</b>	<b>100%</b>	<b>100%</b>

## Predicting Chokehold Incidents

There is no robust model to predict factors present in chokehold incidents. This lack of a model arises because there are too many cases in which valuable complainant and officer information is missing. For example, approximately 40% of officers in chokehold incidents were not identified. One of the lessons learned from this research project is that more detailed data collection will help to develop better statistical models in the future that the CCRB can use for predictive purposes.

In the course of the research for this project, we developed a predictive model based on a regression analysis but the model had low predictive capacity (R Square = .055). The dependent variable was the presence of a chokehold. The independent variables were arrest; neither arrest nor summons; the presence or absence of a force allegation; the sum of all allegations; the presence or absence of an abuse of authority allegation; the average complaint history of the officers involved in the complaint; the average

substantiated complaint history of the officers involved in the complaint; and the number of officers identified as subject officers in the complaint. The constant was -0.014.

With no statistical significance attached to this finding, three factors were weak predictors of a chokehold complaint: the presence of an arrest, the presence of a force allegation, and the sum of all allegations (the greater the number of allegations in a complaint, the greater the chances of a chokehold complaint). Their values were very small and not statistically significant. The absence of an arrest or summons decreased the chances of a chokehold complaint to occur. With more than 40% of cases showing officer information missing, both the average complaint history and the average substantiated complaint history had no predictive effect.

## CHAPTER THREE

# **Police Department Discipline**

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This chapter examines, from both a policy and a legal perspective, whether and how the NYPD employed its disciplinary process to correct the behavior of officers who used chokeholds and committed misconduct. It concludes that over the past several years there was a systemic failure of the NYPD disciplinary process which resulted from the failure to define properly chokehold cases which, in turn, resulted in a virtually total failure to discipline chokehold violations.

The first two subsections of this chapter describe the NYPD's disciplinary process and contextualize the information gathered, highlighting four distinct periods of time in the Department's disciplinary responses to CCRB substantiated chokehold complaints. The main finding of these subsections is that, as administrative trial decisions interpreted the plain language of the Patrol Guide chokehold rule, the practical effects were two-fold: first, chokehold administrative prosecutions were less successful over time and, second, with less success, the Department declined to take chokehold cases to administrative trials resulting in the imposition of lesser levels of discipline. This trend continued until the commencement of proceedings by the CCRB's Administrative Prosecution Unit (APU).

These two subsections specifically address the barriers prosecutors faced in the administrative trial room in order to prove the substantiated findings of the CCRB investigations before administrative law judges. It also gives examples of how administrative decisions emasculated the plain language of the Patrol Guide chokehold rule.

The third subsection of this chapter addresses the question of whether there was appropriate discipline by the Police Department in the 10 cases where the Board found that officers used chokeholds from 2009 through June 2014. In assessing the "appropriateness" of the Department's actions, the criteria for evaluation are whether the public policy purposes and justifications underpinning any disciplinary system were applied in the cases of officers whose chokehold allegations were sustained. The traditional criteria are retribution, deterrence, incapacitation for the purpose of preventing future misconduct, rehabilitation, and the maintenance of good order and internal discipline within the Department.

## The Police Department's Disciplinary System and Chokeholds

While the CCRB has the authority to investigate complaints and determine if misconduct occurred, under the law only the Police Commissioner has the authority to impose discipline and decide the appropriate penalty.

Historically, when the Board substantiated a complaint and found that an officer committed misconduct, it forwarded the case to the NYPD for discipline, in most cases with a disciplinary recommendation. However, in 2012, the NYPD and the CCRB signed a Memorandum of Understanding (MOU) which conferred on the CCRB, with few exceptions, the power to prosecute substantiated cases where the Board recommended "charges and specifications." The APU received its first case of misconduct in April 2013 and it tried its first chokehold case in April 2014.

In conformity with the types of discipline that are imposed by the Police Commissioner, the Board has three recommendation options: Instructions, Command Discipline and Charges and Specifications. When the Board cannot make a determination on the appropriate level of penalty, the Board forwards the substantiated case with a "No Recommendation."

From 1998 through June 2014, the Board substantiated 32 allegations of chokehold.<sup>76</sup> In 31 cases, the Board recommended Charges and Specifications and in one case the Board recommended Command Discipline.<sup>77</sup> The Board never recommended Instructions.

"Instructions" is the mildest form of discipline. As the name implies, instructions are retraining on the procedures the officer should have followed during the encounter. Instructions are either handled by an officer's commanding officer, a form of informal training, or the officer is sent to the Police Academy for formal retraining.

"Command Discipline" is the intermediate form of discipline. An officer can be given a warning or lose up to 10 vacation days. The penalty is normally given at the command level by the commanding officer. The decision concerning the number of forfeited days

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<sup>76</sup> This is the period from the moment the Board began to capture the allegation of chokehold as a distinct force allegation to the cut off time for this study,

<sup>77</sup> Prior to 1998, chokehold allegations were pled under the generic category of "Force – Other." Since January 21, 2000, the CCRB's Complaint Tracking System captures the allegation of chokehold as a distinct allegation of force. Cases for 1998 and 1999 were identified through an old internal CCRB spreadsheet.

is based on the officer's disciplinary history and CCRB history, performance evaluations and the seriousness of the misconduct.

"Charges and Specifications" is the most serious form of discipline and can lead to prosecution at an administrative trial. When an officer was served with charges leveled by the CCRB, prior to the existence of the APU, the case was pleaded or tried by prosecutors of the NYPD's Department Advocate's Office (DAO) before the NYPD's Deputy Commissioner for Trials, an administrative law judge. If an officer is found guilty, punishment can be: a warning and admonishment, loss of vacation days, suspension without pay, a dismissal probation, or termination from the NYPD. The Police Commissioner retains the authority under all circumstances to decide the level and degree of discipline.

In addition to the work of Department prosecutors in drafting charges and prosecuting these cases, the other very important part of this process is the role of administrative law judges. Since the institution of the NYPD's absolute ban on chokeholds, the Department held 18 trials and there were 17 decisions – in one trial, the APU case tried in April 2014, the decision is pending. In all of these trials, the NYPD's Deputy Commissioner of Trials (DCT), and in rare occasions the NYC Office of Administrative Trials and Hearings (OATH) prior to 2002, made findings and issued opinions in chokehold cases.<sup>78</sup>

These decisions have created a body of administrative case law that has refined through interpretation the nature of the chokehold ban, from what constitutes sufficient proof of the application of a chokehold, to how to interpret the clause that a chokehold is any pressure "which may prevent or hinder breathing or reduce intake of air."

Some cases were decided on credibility grounds - with evidence presented by the Department's prosecutors being deemed insufficient due to inconsistencies in the complainant's testimony, or deemed sufficient when the prosecutors presented reliable, independent witnesses and medical evidence. In some of these cases, officers were found to have used restraints. But whether these neck and head restraints were chokeholds, under the definition of a chokehold as interpreted by the administrative trial judges, hinged on whether the civilian's breathing was restricted. The word "may" in the Patrol Guide definition was uniformly ignored. In a few instances, the courts determined officers used chokeholds but, instead of a finding that a chokehold was inflicted, the officers were found guilty only of "excessive force."

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<sup>78</sup> OATH has also decided chokehold cases against correction officers, whose rules also ban the use of chokeholds.

Here are a few examples of the pre-2009 trial decisions:

*I. Department of Correction v. Robinson, OATH Index No. 560/93 (ALJ Tompkins) (1993)*

This Department of Corrections' case was decided in June 1993, four months before the NYPD absolute ban on chokeholds, but is often cited as a reference.

Although a preponderance of evidence showed that the respondent grabbed an inmate by the throat, the correction officer was nevertheless found not guilty of using a chokehold, banned under Department of Correction rules.

Citing the lack of an operational definition for chokehold under Department of Correction's rules, Administrative Law Judge (ALJ) Tompkins relied upon the definition of the word "choke" contained in Webster's Dictionary and defined chokeholds as "any hold of the throat which would block one's breath." Since there was no evidence that the respondent restricted the inmate's breathing, he was found not to have used an impermissible chokehold. At the outset, then, of the creation of administrative precedent, the key word—"would"—was ignored in the chokehold definition.

*II. NYPD v. Boertlein, OATH Index No. 311-312/98 (ALJ Fleischhacker) (1998)*

The evidence showed that the respondent used a chokehold against the complainant, who had been trying to evade officers responding to an unlawful eviction claim. ALJ Fleischhacker cited the unembellished testimony of an employee at a restaurant owned by the complainant, who stated that the officer followed the complainant into the restaurant, grabbed him by the neck and took him to the ground.

In view of the lack of injury to the complainant along with the officer's consistently positive performance evaluations and an absence of prior disciplinary history, ALJ Fleischhacker recommended a 5-day suspension, which was upheld by Police Commissioner Howard Safir. Whether breathing was inhibited was not discussed at all. The focus of the decision was the lack of injury to the complainant.

*III. NYPD v. Scott, OATH Index No. 1327/00 (ALJ McFaul) (2000)*

The evidence showed that the respondent applied a chokehold to the complainant after he allegedly attempted to flee from officers as they were preparing to arrest him for public urination. The complainant did not describe the chokehold in any detail except to say that, during the chokehold, he lost consciousness.



Based primarily upon the complainant's loss of consciousness as a result of the hold and the circumstances under which the hold was applied, ALJ McFaul concluded that the officer had used an impermissible chokehold against the complainant, along with other unnecessary force, and recommended a 30-day suspension. Police Commissioner Bernard Kerik reduced the penalty to a 15-day suspension for the officer, who had been a police officer for 18 months at the time of the incident. In this case, the loss of capacity to breathe and loss of consciousness was the basis for the decision.

*IV. NYPD v. Cumberbatch, DCT #83273/07 (ADCT DePeyster) (2008)*

The complainant testified that, while standing at the counter inside a restaurant, he was grabbed in a "yoke hold" from behind and slammed against a wall. While he was against the wall, a second officer came through the restaurant's door and grabbed him in the neck area. Both officers, the complainant said, then threw him to the ground and started kicking and stomping on him.

The officer who allegedly used the chokehold denied grabbing the complainant in the neck or throat area and denied holding him in a "yoke hold." He admitted grabbing the complainant by the jaw after allegedly observing him put a small bag of heroin in his mouth and swallow it.

ADCT DePeyster found the officer not guilty. Inconsistencies regarding the complainant's prior criminal history and past drug use prompted DePeyster to declare the complainant's testimony implausible. By contrast, the officer was found credible after consistently denying that he ever used a chokehold or any unnecessary force on the complainant and supplying the court with supporting police documents. On the crucial issue of the definition of chokehold the administrative judge was applying, this case is silent.

Several other cases, described below in the sections that follow, expand on this fundamental definitional problem which resulted in the failure to apply the Patrol Guide rule properly over a period of more than a decade and the inescapable conclusion that officers were either not disciplined or were under-disciplined, in chokehold case

## **Analysis of Discipline: Four Distinct Periods**

To better understand the chokehold disciplinary record of the Police Department, this report delineates four distinct periods in the Department's treatment of substantiated chokehold cases. The first period is from the beginning of the ban to 2002. The second period is from 2003 to 2008, the year before the scope of this study. And the time period of the study, from 2009 through June 2014, is divided into two periods: the period from January 2009 through May 2013 before the implementation of the CCRB's APU, and the period from April 2013 to June 2014 after the implementation of the APU.

### Relative Success in the Prosecution of Chokehold Misconduct: The Period from 1993 through 2002

It is impossible to understand the disciplinary process from 2009 through June 2014 without reviewing the period prior to 2009. Since we do not have reliable information for cases from 1993 to 1997, the earlier years of the CCRB as an independent agency, we have examined the pre-2009 years as two distinct periods: 1998-2002 and 2003-2008. The first period is defined by the fact that the Department went to trial in chokehold cases with some relative success. The second period is defined by the fact that the Department prosecuted these cases with no success in the trial room.

During the 1998-2002 period, the CCRB substantiated a chokehold allegation in 12 cases. The Department pursued charges and specifications in 11 of those cases. The CCRB submitted one case after the statute of limitations (SOL) expired and the Department closed it as such. Of the 11 cases in which the Department pursued charges, an officer was found guilty in 5 cases – 3 officers were found guilty after trial, and 2 officers pled guilty before trial. In 6 cases, the officers were found not guilty after trial.

The Police Department pursued discipline in 92% of cases. The rate at which the Department brought Charges and Specifications was also 92%. The discipline rate was 45%. The "guilty after trial" rate was 33%. There were two pleas.

On the issue of how to proceed with chokehold cases, there was overall agreement between the CCRB and the DAO. The CCRB recommended Charges and Specifications and in all cases the Department prosecutors pursued Charges, except for the SOL case, and it did so with relative success.

## The Period from 2003 through 2008: No Success in the Prosecution of Chokehold Misconduct

During the period from 2003 through 2008, the CCRB substantiated 10 cases with a penalty recommendation of Charges. The Department pursued Charges and Specifications in 9 of those cases and imposed a Command Discipline against one officer. Of the nine cases in which the Department pursued charges, the officer was found not guilty or the charges were dismissed in 8 instances. The officer was found guilty in only one case. There were no guilty pleas.

The Police Department pursued discipline in 100% of cases. The rate at which the Department brought Charges and Specifications was 90%. However, both the discipline rate and the “guilty after trial” rate declined significantly. The discipline rate was 20%. The “guilty after trial” rate was 11%.

The overall agreement between the CCRB and the Department prosecutors continued on how to proceed with chokehold cases. The CCRB recommended Charges and Specifications and in all cases the Department pursued Charges, except for one case where the Department opted for Command Discipline. The main change during this period was that the Department had less success in the trial room and the discipline rate and the guilty after trial rate declined from 45% to 20% and from 33% to 11%, respectively.

For the purpose of this review, the two most relevant cases of this period are: *NYPD v DeLaCruz* (2008) and *NYPD v Bucher* (2005).<sup>79</sup> The first was not, strictly speaking, categorized as a chokehold case; the second was categorized as a chokehold case.

### *I. NYPD v DeLaCruz, Case No. 82622/07, ADCT DePeyster (2008)*

This case raised the fundamental policy questions about the treatment of force incidents in which force is exerted to the throat. Based on the CCRB investigative report, the basic description of the incident is as follows:

“[The subject officer] approached [the complainant], who was leaning with his back against the tail of his vehicle, and thrust his right forearm against [the complainant’s] throat, although this action did not restrict [the complainant’s] breathing.” Two witness of

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<sup>79</sup> Both cases are in the agency drive dedicated to Investigations under the title OATH and DCT administrative case law, section for Force, under the Chokehold folder. They are available to all investigators for case reference and training purposes.

the incident alleged that the complainant's breathing was restricted, but the complainant did not allege this.

Although the investigative report stated that the subject officer "forced his forearm against [the complainant's] throat," the CCRB pled this allegation as a generic "use of physical force" allegation rather than as a chokehold allegation. The CCRB pleading language said, "[the subject officer] used physical force (pushed/shoved/threw) against [the complainant]." At the conclusion of the investigation, the Board substantiated the allegation of physical force and forwarded the case to the Department for discipline.

In the disposition of charges, specification #1, the Police Department listed the charge as the officer "used excessive force in that he thrust his forearm against the throat of an individual known to this Department." It cited PG 203-11, Page 1, Paragraph 2 – Force. No chokehold was alleged under PG 203-11, Page 1, Par. 5.

During the trial, the officer denied using any force against the complainant during the incident, claiming he touched only his forearm to place handcuffs on him. A sergeant, who participated in the stop, also denied that any force was used against the complainant. A third officer, a detective, testified that he did not recall the incident, which took place two years before the trial, even though he had several conversations with the respondent and the sergeant about the incident prior to trial.

ADCT DePeyster found the three civilian witnesses - none of whom had ever been arrested - credible. Minor differences in their testimony, ADCT DePeyster said, did nothing to lessen the value of their testimony and could be explained by each having focused upon different things during the incident.

During the trial, the ADCT DePeyster found that the complainant "was never aggressive, that he did not engage in any furtive movements and that he did not use any force against the officer." The NYPD judge also found that the subject officer "placed his forearm at [the complainant's] throat" and used excessive force in that "he thrust his forearm against [the complainant's] throat."

In this case, ADCT DePeyster found the respondent guilty of using excessive force and never described the act of forcefully placing his forearm against the complainant's neck as a chokehold. ADCT DePeyster's description was that "[T]he Respondent is charged with using excessive force in that he thrust his forearm against [the complainant's] throat. I concur."

The Respondent was found guilty of having used excessive force and he forfeited ten vacation days.

This case specifically raises two important policy and practical questions. The first question is the application of the definition of chokehold in the Patrol Guide. There is no question that in this case the officer put forceful pressure to the throat as “he thrust his forearm against the complainant’s throat,” and that this action should have been pled as a chokehold. However, the CCRB investigator believed that, because the complainant did not affirmatively allege restriction of breathing (although two witnesses did) and “this action did not restrict [the complainant’s] breathing,” the allegation did not meet the departmental definition of a chokehold. Thus at this point in time, at least some investigators and some CCRB panels had already acquiesced to the less restrictive definition of chokehold that apparently eliminated the word “may” from the Patrol Guide definition.

The second reason why this case is relevant from a policy perspective is because it raises concerns about the language the Department uses in prosecuting these incidents and the purpose of that usage. In this case, the departmental specifications in the Charges did not mention the term “chokehold” but rather defined the specifications as the subject officer “used excessive force in that he thrust his forearm against the throat of an individual.” This is also the case in *NYPD v Cumberbatch* (2008), a case with a CCRB chokehold allegation pled as such, where the specifications read, the subject officer “did grab and apply pressure to the throat of a person known to this Department without sufficient legal authority.” Similarly, in *NYPD v Bucher* (2005), another case pled as a chokehold allegation by the CCRB, the Department’s language was “the subject officer did wrongfully and without just cause use physical force against an individual.” Thus, even in cases in which the CCRB properly defined a chokehold pursuant to the Patrol Guide definition, the Department’s prosecutors redefined the chokehold allegation to constitute generic excessive force.

The issue is not one of semantics. It goes beyond that because it calls into question the NYPD decision to prosecute these “chokehold” cases merely under the generic use of physical force provision (PG 203-11, Page 1, Par. 2 – Force) rather than the concrete language of the chokehold provision (PG 203-11, Page 1, Par. 5 – Force). Paragraph 2 of the use of force policy provides a choice between authority to use force and accountability that is relative and reviewable with respect to the appropriate force minimally necessary to restrain an arrestee. Paragraph 5—chokehold—is a flat prohibition which gives the officer no latitude.

The tensions inherent in these two issues persist even after the inception of the APU. In the course of preparing this report, several members of staff were interviewed, including members of the Administrative Prosecution Unit (APU) who are currently prosecuting chokehold cases. As one of them noted:

“My search of previous cases involving specific allegations of a chokehold revealed that, all respondents in the cases that I searched had been found **not guilty** of that particular [chokehold] allegation. In speaking with [the Chief Prosecutor and Deputy Executive Director for the APU] about this while trying to come up with a reasonable penalty offer, I was informed that in addition to the lack of guilty verdicts in these cases, there is also a lack of plea precedent because the Department chooses to handle “chokehold cases” as if they were general allegations of “force”. I was further cautioned that I should be prepared for the possibility that the defense attorney on my case may reach out to me offering to accept the recommended penalty of 15 days’ vacation forfeiture on the condition that I amend the charges to indicate that [the subject officer] used “force” as opposed to using the word “chokehold.””

## II. *NYPD v Bucher*, Case No. 80216/04 (2005)

The second relevant case from this period is *NYPD v Bucher* (2005). This case exemplifies: a) how difficult it was to prove a chokehold charge in the Department’s trial room before the Deputy Commissioner of Trials (DCT) during the 2003-2008 period; b) how the question of whether there was actual restriction of breathing during the chokehold is a recurrent issue; and c) how the administrative court’s decision to dissect the intention of the officer seems more consistent with the outdated good faith/bad faith, “shock the conscience” standard than the current Supreme Court’s “objectively reasonable” standard.

In *Bucher*, the administrative law judge held that, although contact with the throat or windpipe may have occurred as the subject officer “grabbed [the complainant] from behind and around the head,” based on the subject officer’s own account of the incident, there was “insufficient proof that,” as a former CCRB Executive Director noted in summarizing the decision, “the respondent’s contact with civilian’s neck was intentional, prolonged, or designed to affect breathing.”<sup>80</sup>

In this case, the subject officer “was charged with placing [the complainant] in a chokehold.”

The complainant testified that he was placed in a chokehold by the respondent for 10-15 seconds after the subject officer and another officer confronted him and several friends on suspicion of smoking marijuana in a public place. His testimony was corroborated by an eyewitness to the incident. Both the complainant and the witness said during their CCRB interviews that the complainant’s breathing was restricted by the chokehold.

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<sup>80</sup> Executive Director Florence Finkle, “Note on *NYPD v Bucher*,” Internal CCRB Document, 2005,

The officer and his partner denied that he placed the complainant in a chokehold. The subject officer explained that he “used force to restrain [the complainant] after [the complainant] made what he believed to be a threatening movement.” The subject officer “admitted that his arm might have come in contact with [the complainant’s] throat during the restraining process.” The civilian’s so-called threatening move was that “when the Respondent ordered [the complainant] to stand up, he slipped in the mud and his hand jerked.” The officer was standing right behind the victim.

The judge reasoned that, from the officer’s perspective, it made sense that the subject officer “instinctively” grabbed the complainant “around the head” and “restrained him until he believed the situation was under control.” The judge also noted that “the longest the Respondent kept [the complainant] in that position was 15 seconds” and that there was no evidence that the subject officer “acted with the intent to cut off [the complainant’s] air supply.”

From a policy perspective, the judge’s decision was problematic for three reasons. First, the emphasis on the intention of the officer deflected from the issue posed: the use of more force than the circumstances reasonably required, in particular the use of a flatly prohibited lethal act of force.

Second, the decision provided a partial reading of the policy clause pertaining to breathing and it neglected the fact that the policy also banned the *potential* restriction of breathing. Furthermore, the decision put little emphasis on the “pressure” clause of the chokehold policy and heavy emphasis on the “restriction of breathing” clause without recognizing the “may” in that clause. The underlying assertion of the decision that the restriction of breathing must be intentional, prolonged and with the specific intent of cutting off the air supply effectively turns the Department’s policy on its head.

Third, the decision confirmed that the NYPD’s much broader definition of chokeholds would not be applied by administrative courts. Thereafter, whether it would be reasonable for the Civilian Complaint Review Board to adopt the limited definition of chokeholds applied by the administrative courts or the broad definition contained in Section 203-11 of the NYPD Patrol Guide was a matter of continuing debate within the CCRB and, most likely, the NYPD. The issue is relevant, as a practical matter, because, while every case where an officer was found guilty did not include an explicit finding that the complainant’s breathing was restricted, there were no cases where an officer was found guilty of using a chokehold with no evidence of breathing restriction. Certainly, the Timoney definition of “staying the hell away from the neck,” has never been enforced.

There is no question that this pattern of rulings had an effect on the CCRB and its investigators as they sought to make sense of “the intention to restrict breathing” standard contained in trial decisions in chokehold cases. There are two case examples from CCRB investigations that can be used to discuss the implications of these decisions.

In one case, where the complainant believed the chokehold was intentional, the investigation determined that the subject officer’s intent when he made contact with the complainant’s throat, a fact that was corroborated by witness testimony as well as by the testimony of two other officers, could not be determined. The investigation found that, “although the Patrol Guide prohibits any pressure which may hinder breathing, in *NYPD v. Bucher* the court found that incidental contact with a person’s throat will not be considered misconduct if the officer had no intent to cut off the person’s air supply.” In making the finding of lack of intentionality, the investigation in this case relied on the fact that there was no evidence to suggest that the complainant’s breathing was affected in any way. In other words, the chokehold was not intentional because the complainant was able to breathe without restriction through the alleged action. Put another way, if the officer had wanted to place the victim in a chokehold, he would have not been able to breathe.

The Board unsubstantiated the allegation of chokehold in that case.

In another case, all three officers denied the allegation that they wrapped their arms around the complainant’s neck, while all civilian witnesses in the case consistently corroborated the complainant’s assertion. One of the officers recalled that another officer tried to place the complainant in a “bear hug” from behind, lost his grip, causing his arm to slide up the complainant’s body towards his neck. Another officer also recalled that it was possible that his hand slipped up to the complainant’s neck while the complainant was struggling with the other two officers in an attempt to flee. However, all three officers denied that any of them intentionally tried to choke the complainant.

Two witnesses claimed that the officers made contact with the complainant’s neck. One of the witness stated that the complainant’s eyes “were rolling back into his head, that he wasn’t saying anything, and that he looked like he was having trouble breathing.” The other witness stated that the complainant “was breathing quickly, but that he was screaming at the same time, which suggests that he could breathe.”

The investigation determined that, despite all of these accounts, there was no evidence that the identified subject officers “intentionally acted with intent to cut off the complainant’s air supply.” The investigation cites *NYPD v Bucher*. The investigation found that “the complainant claimed that he had difficulty breathing, but he never



claimed that his breathing supply was cut off or that he sustained injury or pain to his neck.”

The Board unsubstantiated the allegation of chokehold.

As will be further discussed in Chapter Four, the practical effect of these decisions of the administrative judges was to skew CCRB investigations away from the plain language of the Patrol Guide chokehold rule.

These two cases show the effect of the approach taken by the Department in *Bucher* because they prompt investigators to measure the “intentions” of the officer rather than to measure alleged actions from the standard of an “objectively reasonable” person as to whether pressure to the neck “may” restrict breathing, consistent with the Patrol Guide standard.

Given the standard applied in Departmental trials – focusing on an officer’s intention to disrupt breathing rather than the potentially lethal nature of the act and its prohibited status – it is not surprising that the discipline rate and the guilty after trial rate declined so precipitously. The reaction to this decline provides insight into the Department’s behavior in the next period, 2009 through March 2013.

#### The Period from 2009 through March 2013: The Department Stops Taking Cases to Trial in Chokehold Incidents

During this time period, the Board substantiated 7 chokehold cases. When the Police Department disposed of those 7 allegations, however, the Department did not serve Charges and Specifications in a single case. The Department imposed one Command Discipline “B” on one officer; it gave instructions or re-training in 3 instances; it declined to prosecute 2 chokehold allegations against 2 officers. Charges were filed in one case as the officer was no longer a member of the service.<sup>81</sup>

The Police Department pursued discipline in two-thirds of the cases (66%) as compared to 100% from 2003 to 2008. The rate at which the Department brought Charges and Specifications was 0% as opposed to 90% from 2003 to 2008. The discipline rate was 66%, up from 20% in the 2003-2008 period. It is not possible to calculate the “guilty after trial” rate because there were no trials.

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<sup>81</sup> Rates are calculated excluding the “Filed” case.

Three characteristics define this period: the decision to stop pursuing Charges and Specifications in chokehold cases; the decision not to pursue discipline in some chokehold cases; the decision to give instructions to officers for a conduct which is flatly prohibited. These three elements are consistent with the behavior of the Department Advocate's Office during this time period for all cases of misconduct forwarded by the CCRB for discipline.

As reported in Chart 31 of the CCRB's 2013 Annual Report, the Department sought Charges and Specifications in 11% of substantiated CCRB misconduct cases (including the cases under the APU pilot program and the Second Seating program); it declined to prosecute 24% of cases; and, it gave instructions to 44% of officers facing discipline.

### The Period from April 2013 through June 2014: The Return of Trials for Chokehold Incidents

April 2014 represents the return of chokehold cases to the Department's trial room and coincides with the implementation of the CCRB's Administrative Prosecution Unit. There were three substantiated cases that were referred to the APU. These three cases are pending disposition with one trial completed, one trial scheduled and one trial to be scheduled. In all three cases, the CCRB served Charges and Specifications against the officers involved in the chokehold complaints substantiated by the Board.

The next section reviews the decisions for these two periods (2009 through March 2013 and April 2013 through June 2014).

## **Qualitative Analysis of Discipline: The 10 Substantiated Cases and the Disciplinary Process**

This section discusses the basic facts pertaining to the 10 chokehold cases substantiated from 2009 through June 2014 and addresses the Department's disciplinary decisions. It also discusses whether there was appropriate discipline by the Police Department based on the criteria for evaluation highlighted in the introduction: the maintenance of good order and rigid internal discipline within the Department, retribution, deterrence, rehabilitation, and incapacitation for the purpose of preventing future misconduct.

With one exception, in each chokehold case the Board recommended the most serious discipline - Charges and Specifications. As noted earlier, the Department refused to proceed with Charges and Specifications in all seven cases. With the implementation of the APU, the CCRB prosecutors have pursued Charges in the other three cases returning to the pattern of prosecution that governed the discipline of chokehold cases prior to 2009.

This section is organized by the actual form of discipline the Department imposed. In no case were Charges – the most serious form of discipline - pursued.

### One Case Resulting in Command Discipline

Two officers reported to a domestic dispute incident in an apartment building. When they entered the apartment the situation was defined as “relatively” calm and they filled in paperwork and questioned people who were there about the incident. The complainant, who lived in the building, and other residents were in the hallway discussing the incident. Although the complainant was not involved in the domestic dispute, one of the officers questioned him because the officer found him “irate and combative.” The officer and the complainant got into an argument in the hallway and it was there that the alleged chokehold occurred.

According to the complainant the officer asked him to “shut the fuck up” and grabbed his neck from behind and walked him down the hallway. The officer said he was arresting the complainant for the domestic violence incident and, when the complainant questioned the officer’s actions, the officer told him again to “shut the fuck up.” The officer then said, “you don’t know how to shut the fuck up,” and placed both hands on the man’s neck, using his thumbs to squeeze the complainant’s Adam’s apple, restricting his breathing. The complainant was then arrested and given a summons for disorderly conduct.

The officer’s account of what happened was entirely different. The officer said the complainant was inside the apartment and that he suspected him of being involved in the domestic dispute and wanted to question him. The situation escalated after they exited the apartment. The officer said the complainant put “his hands up in fists in front of his chest, squared off, as if he was a boxer, giving the officer the impression that he wanted to hit him.” At that point, the officer grabbed the complainant by his shirt, turned him against the wall and placed him in handcuffs to restrain and arrest him. The officer specifically denied placing the complainant in a chokehold, or using any sort of physical force that would have restricted his breathing.

Two independent witnesses corroborated the complainant's account of the officer grabbing his neck and using his thumbs to press the area around the Adam's apple. One of the witnesses stated that he observed the action from approximately twelve feet away, stating that "he had that chokehold ... That's an illegal chokehold and I know this; my son is a law enforcement officer."

The Board found that based on the preponderance of the evidence, the officer was in direct violation of the Patrol Guide and used a chokehold. The Board also substantiated a discourtesy allegation against the officer for his rudeness to three people.

The complainant did not receive medical attention and did not file a Notice of Claim against the City. The CCRB could not determine the disposition of the disorderly conduct summons.

There are two policy implications here. First, the officers went to a domestic dispute call and by the time they arrived, the situation was, in their own words "relatively" calm. Yet, by the time the officers left the scene there had been an escalation of hostilities to the point where an officer used prohibited force against one person and was disrespectful and discourteous to three other people.

Second, the decision by the Department not to try the case but rather to refer it to the command level for the commanding officer to decide the appropriate loss of vacation days meant that the facts of the case would never be tried in a public forum where the officer and the Department might have learned that there was a more reasonable way to handle this type of encounter and that the use of force was unnecessary.

In August 2009, the Department disciplined the officer for a substantiated chokehold with a Command Discipline B, meaning the officer faced a warning or loss of up to 10 vacation days.

### Three Cases Resulting in Instructions

Instructions is the mildest form of discipline. Instructions implies that the officers are retrained on the procedures the officers should have followed during the encounter. This form of discipline is often handled at the precinct, by a commanding officer, though sometimes, the subject officer is sent to the Police Academy for retraining. In these cases, we do not have information about the forum where the formal or informal training was conducted.

I.

In the first case, the complainant was rapping with friends in a public space. Officers in a patrol car drove by three times. During his rap, the complainant said, “what the police looking at?” which the officers overheard. They got out of their car and stopped and questioned the complainant. The Board substantiated an abuse of authority allegation for an improper stop because there was no reasonable suspicion that the complainant was committing, had committed or was about to commit a crime.

According to the police report, the complainant was acting disorderly when “a struggle ensued and [the complainant] was placed under arrest.” The Board found that rapping (or even cursing at an officer) was not disorderly conduct absent additional factors which did not exist in this incident.

During his CCRB interview, the subject officer stated that the struggle started because the complainant pushed him, prompting him to place him in a “headlock.” The officer said that the complainant’s breathing was not restricted; however, the complainant stated that it was. The complainant alleged that the headlock restricted his ability to breathe for approximately one minute.

CCRB’s analysis of the incident focused on the officer’s own admission that he used a “headlock” after the complainant pushed him. Considering that there were numerous other options available to the officer other than placing the complainant in a “headlock,” the CCRB determined that the use of force was excessive. More importantly, the CCRB substantiated the chokehold allegation, determining that putting a person in a “headlock,” was the type of action defined by the chokehold ban when it states that it that neck restraints that “may prevent or hinder” a person’s ability to breathe are prohibited.

The complainant was arrested and charged with disorderly conduct. The CCRB does not know the disposition of that charge. The complainant received medical assistance the day after the incident. The medical report states that the complainant was diagnosed “with a contusion to his head, with tenderness noted to the left parietal region.” The complainant did not file a Notice of Claim.

The case raises questions about this officer’s interpretation of the chokehold policy. The officer did not think he had placed the complainant in a chokehold because he did not think the “headlock” restricted the civilian’s breathing. Given that the details of Departmental retraining are not shared with the CCRB, we have no information about what specific instruction the officer received concerning the chokehold policy as well as the stop-and-frisk policy.

The Department's disciplinary decision to require Instructions was in January 2011.

The second case where Instructions were imposed presents a similar issue regarding the officer's interpretation of what constitutes a chokehold.

II.

Officers were patrolling a NYCHA development and approached six people outside the building to ask if they were residents. Most of them said they were. The complainant provided identification and stated that he did not live in the building but was with friends who did. After the officers checked his ID an officer said, "[P]ut your hands behind your back. You have a warrant." At that point, the accounts differ about what happened.

According to the complainant, he did nothing to resist arrest and the officers slammed him to the ground. According to the officers, the complainant ran toward a pylon and resisted arrest. They radioed for assistance.

During his CCRB interview, the subject officer gave his version of events. He said he ran to the complainant and jumped on him. He wrapped his arm under the man's torso and put his weight on top of him to keep him from getting up. The man first tried to get up and then kept his arm under him, preventing the officer from being able to handcuff him. The subject officer said he was on the man's back and placed him in what he defined as both a "body lock" and a "face lock." He described the "face lock" as putting his arms underneath the complainant and across his torso and face while he was on top of him. The officer acknowledged that his arm would have been across the complainant's neck at some point. The officer kept this hold on the complainant until additional units arrived.

The officer admits that during this time the alleged complainant "went limp." The officer stated that he believed the complainant going limp was a method of resisting. When additional officers arrived, he released the complainant from the hold.

The facts of this case are not in dispute. The subject officer admitted to putting his arm around the complainant's neck, which caused the complainant, by the officer's own admission, to "go limp." The officer continued his hold even though he was on top of the complainant's back and he was in control.

The Board substantiated an abuse of authority allegation for an improper stop as the officers did not have reasonable suspicion to stop the complainant. The Board also

substantiated the chokehold allegation based on the officer's own description of a "face lock" and the complainant's "going limp."

The complainant was arrested for trespass, tampering with physical evidence, criminal possession of a controlled substance in the seventh degree, resisting arrest and obstruction of governmental administration. The criminal case was still open at the time the Board closed this case. The complainant received medical assistance. The medical treatment of prisoner report notes a possible fractured arm and dislocated shoulder. At a local hospital, he was diagnosed with "abrasions, contusions and a closed head injury." The broken arm was noted as the result of a prior incident. The complainant did not file a Notice of Claim against the City.

Here again the incident raises question concerning the training officers received in the use of force and locks in the neck and throat area. Training concerning a subject of force "going limp" is also implicated. In the Department's "escalating scale of force" guidelines, it is noted that the condition defined as "minor physical resistance, such as grappling, going limp, or pulling or pushing away" requires an appropriate force response, which is defined as "use compliance techniques, such as wrestling holds and grips designed to physically overpower subjects or to inflict physical pain, which end when the technique is stopped and cause no lasting injury." It appears that in this case the subject officer did not recognize the victim's "going limp" as the likely response to being choked.

Given that details of Departmental retraining are not shared with the CCRB, we have no information about what specific instructions the officer may have received concerning elements of the chokehold policy, as well as the stop-and-frisk policy.

The Department's disciplinary decision to require Instructions was in June 2012.

In the third case where the discipline was instructions, the CCRB had strong physical evidence that the chokehold occurred.

III.

The complainant was pulling his van out of a parking space when a patrol car flashing its lights stopped him. The officers told him to get out of his vehicle and asked for his driver's license, registration, hack license, and the van's keys. The officers had by then determined the complainant to be driving an illegal for-hire vehicle based on speaking to one of his passengers. The officer threatened to confiscate the vehicle because it was a "dollar van" and threatened to arrest the driver if he did not provide the keys. The driver denied that it was a "dollar van" and threw the keys to a friend who run away with

them. At that point, the situation escalated and when the officers attempted to arrest him, the driver confronted the officers and resisted arrest. These facts are not in dispute.

The officers were exonerated by the Board for the use of physical force and pepper spray after wrestling with the driver while trying to place him under arrest.

However, one of the officers also used a chokehold during the struggle. Two photographs of the incident clearly show an officer with his arm around the complainant's neck. The first photograph shows the officer holding the complainant around the neck using his right forearm and elbow while the complainant is seated on the pavement. The other photograph shows the officer holding the complainant around his neck using his right wrist and hand. The officer denied that his "intention" was to choke the complainant.

Based on the photographic evidence, the Board substantiated the chokehold allegation.

The complainant was arrested for obstruction of governmental administration after he was found to be operating an illegal for hire vehicle. He was also arrested for resisting arrest, criminal nuisance and disorderly conduct. He pled guilty to disorderly conduct and was released after time served. He was also issued a summons for driving a for-hire vehicle without a license. The CCRB does not know the disposition of that summons. The complainant's medical records show a primary diagnosis of "muscular pain stemming from assault."

There was no question that the complainant was belligerent and resisted arrest, and as a result, the Board exonerated the officer's use of physical force and pepper spray to subdue the civilian. However there was strong photographic evidence that one of the officers placed the complainant in a chokehold. In the other cases, which lacked documentary evidence, the CCRB heavily relied on the officers' own description of a technique which they seemed to think was not a chokehold. Despite the strong photographic evidence in this case, the Department rejected the Board's recommendation that the subject officer be given the most serious level of discipline and only imposed instructions.

The Department's decision to require Instructions was in March 2012.



## Two Cases Deemed “Department Unable to Prosecute”

In the following two cases the Department decided not to pursue discipline of any kind, a determination it designates as Department Unable to Prosecute (DUP).

I.

A public school student had an argument about a disciplinary matter with the school’s principal and the situation escalated. As the student left the principal’s office and began to walk down the hallway, the principal ordered a school safety officer and a police officer to stop the student. The student resisted the officer’s order to stop and pushed the police officer at least three times. To gain compliance with the order to stop, the officer pushed the student against the wall – an action that the Board exonerated.

The student escaped from the officer who had been trying to hold her by her wrists. At that point, the officer allegedly grabbed the student by the front of the neck with her right hand.

The student said that the officer squeezed her throat for two or three minutes.

The incident was captured on video and the investigation heavily relied on the video rather than on the statements of the complainant, witnesses and subject officer. Based on the video footage, the Board determined that the officer used a chokehold, grasping the student’s neck for four or five seconds. The Board substantiated the chokehold allegation and forwarded the case to the Police Department for discipline. The Department gave no reason to the CCRB for its declination to prosecute this case.

The student received a school suspension. She was also criminally charged with harassment, resisting arrest and disorderly conduct. She pled guilty to disorderly conduct and was sentenced to time served. The complainant reported to a local hospital the next day and the medical report noted that her neck was “tilted to left” and that she had “mild swelling around her eyelids and tenderness around her forehead.” The complainant filed a Notice of Claim with the City.

In July 2009, the Department’s decided not to pursue any discipline in this case

II.

The second substantiated chokehold that the Department declined to prosecute took place at a precinct station house. The civilian was arrested for robbery with a deadly weapon and was handcuffed by one hand to a metal pipe, when he began “banging his head against the gate,” according to the subject officer, who said he asked the man to calm down. The man gave the officer “the finger,” and cursed at him.

What occurred next became the subject of the civilian complaint. During his CCRB interview, the subject officer said that as he and another officer tried to handcuff the complainant’s two hands, he resisted and kicked one of the officers. At that point, the subject officer said he “put his body weight on [the complainant] and used a “bear hug” to reach around the alleged complainant. The officer denied that he placed the complainant in a chokehold at any point. He also denied that the complainant complained of not being able to breathe.

There was another arrestee in the room, unconnected to the complainant in any way, who gave a different version of events. He said that after the complainant cursed at the officer, he went behind the complainant and “grabbed him by his neck and started choking him.” At that point, a second officer entered the room and hit the complainant in the ribs and stomach area while the other officer was choking him. Then two other officers entered the room and handcuffed the complainant’s feet.

The Board found that, based on the officer’s admission that he put his hands around the complainant from behind in a “bear hug” as well as the statements of the independent witness, the officer had used a chokehold as defined by the Patrol Guide. Based on the medical records and the independent testimony of the witness, the Board also substantiated an allegation of force against the other officer for punching the complainant in the head and face while he was in handcuffs.

The complainant received medical assistance and was transported to a local hospital. The medical records show “anterior dislocation of the temporomandibular joint [jaw bone] on the right.” The complainant did not file a Notice of Claim.

In August 2012, the Department’s decided not to pursue any discipline in this case.

The Department informed the CCRB that there was an officer identification problem and that this issue of identification prevented departmental prosecutors from moving forward with any discipline.

## One Case Closed as “Filed”

In this case, there was no discipline imposed as the officer was no longer a member of the service.

Police responded to a 911 call stemming from a crowd of noisy teenagers in a store. Two young men, in their mid-twenties were leaving the store when a police van pulled up and six officers got out. One officer asked the complainant for identification, which he provided and he told the officer he had nothing to do with the teenagers. Another officer grabbed the complainant by the arm and said they'd received a 911 call. The complainant again explained that he was not involved. He then tried to pull his arm away from the officer. The officer told the complainant to calm down, to which the complainant responded, “no, you calm down.” At that point that the situation escalated. The officer stated, “I am not saying you did anything wrong but I'm not done with you yet.”

During his CCRB interview the officer said that when the complainant tried to pull his arm away, he then “forcefully twisted the [complainant]’s arm behind his back and pushed him face and chest first into the wall of the store.” Then he handcuffed him and wrote him a ticket for disorderly conduct.

Two independent witnesses corroborated the complainant’s account that the officer placed his forearm on the complainant’s throat after pushing him against the storefront. In his CCRB interview, the complainant stated that he felt his air constricted.

The Board found that, based on the preponderance of the evidence, the officer was in direct violation of the Patrol Guide prohibition regarding chokeholds. The officer was no longer a member of the service by the time the Department received the case from the CCRB.

The complainant’s summons for disorderly conduct was dismissed. He did not receive medical assistance, nor did he file a Notice of Claim with the City.

The Department’s decision to close the cases as “Filed” was in December 2009. The Board forwarded the case for discipline in August 2009, eight and half months after the incident occurred.

### Three Cases with the CCRB's Administrative Prosecution Unit

Since the inception of the APU, three substantiated cases involving chokehold allegations were referred to Administrative Prosecution Unit where they were assigned to a CCRB prosecutor for prosecution. One was already tried in April 2014 and is pending the decision of the Police Commissioner. The other two cases are being currently prosecuted. We only describe the case for which the trial has concluded.

Two officers were working anti-crime in an unmarked police vehicle, in a conditions area known for robberies, car brake-ins and drug dealing. The complainants were two young men riding their bicycles on the street. The officers followed them for three or four blocks as they pedaled slowly past parked vehicles. The officers stated that the two changed direction when they saw the officers and then went into a deli, which is a known drug dealing location. The officers observed the complainants leave the store and ride their bicycles on the sidewalk, and that's when the incident began. The officers approached the complainants and told them to stop and get off their bicycles. The Stop and Frisk Report indicated that the complainants were stopped for suspicion of criminal possession of a weapon and were frisked under suspicion of having committed a violent crime.

The second officer stated that at the time he approached complainant #2, who complained of the chokehold, the complainant placed his hands inside his pockets. The officer ordered him repeatedly to remove his hands from his pockets and the complainant became argumentative and refused. The officer stated that, when he approached the complainant, the complainant pushed him and began to wrestle with the officer. The first officer came to his assistance and helped wrestle the complainant down to the ground.

Once on the ground, the complainant said that the officer placed him in a chokehold. The complainant described the chokehold as the officer as having the complainant's throat in the bend of his inner elbow. His breathing was allegedly restricted and he was barely able to say anything. The complainant fought the chokehold but the officer squeezed harder each time the complainant said or did anything. The other officer punched the complainant while he was still in a chokehold. The officer who performed the chokehold pushed the complainant's face against the concrete and then put his knee on the complainant's head.

The subject officer accused of the chokehold stated that he held the complainant by his shoulders, that he was forcibly on the complainant with his weight, but that he never

placed the complainant in a chokehold. After the other officer punched the complainant's upper body area, the officers were able to place him in handcuffs.

There was an independent witness but he had a limited opportunity to observe the incident.

Although there was neither video nor independent corroboration, the Board substantiated the case on the basis of the complainants' consistent statements and the officer's inconsistent testimony.

The primary complainant was arrested and charged with resisting arrest, two counts of disorderly conduct, and Administrative Code 19-176(C) Bicycle Operation On Sidewalks Prohibited. The criminal case was adjourned in contemplation of dismissal and was eventually dismissed.

The complainant filed a Notice of Claim with the City of New York. That case is still pending. The complainant was treated at a local hospital. He had abrasions on his wrists and back and abdominal pain.

The present case was tried by an attorney of the CCRB's Administrative Prosecution Unit on April 28, 2014 and is currently awaiting decision by an Assistant Deputy Commissioner of Trials. The recommended penalties for the officer who committed the chokehold is the forfeiture of twenty vacation days.

The APU is prosecuting two other cases. There is video evidence in one case and there are independent witnesses in the other case. Given that these cases are scheduled for trial, this report does not include any information that could interfere with the scheduled proceedings. In both situations the complainants were arrested and charged with resisting arrest.

In evaluating the Department's disciplinary response, we offer five criteria for assessing how the NYPD employed its disciplinary process to discipline and correct the behavior of officers who committed misconduct and used chokeholds. The criteria are retribution, deterrence, incapacitation for the purpose of preventing future misconduct, rehabilitation, and the maintenance of good order and discipline within the Department.<sup>82</sup>

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<sup>82</sup> See: Mitchell N. Berman, "Punishment and Justification," University of Texas Law, Public Law Research Paper No. 129, December 15, 2006; Paul H. Robinson, "Crime, Punishment, and Prevention," *The Public Interest* 142 (Winter, 2001): 61-71.

Prior to the evaluation, it is important to clarify three facts. The first fact is that 4 out of the 6 officers (except for the officer who was no longer a member of the service) were disciplined. This means that the Department did not contest the CCRB finding of misconduct and the alleged act of misconduct occurred. The second fact is that, although the chokehold occurred, in these four cases the officers received the lesser forms of discipline - Instructions or Command Discipline. The third fact is that the Department made the determination in two cases that the CCRB investigation did not meet the standard of proof before the case went to trial. In these two cases, the DAO prosecutors declined to prosecute the substantiated misconduct rather than sort out the facts in the trial room.

The first criterion of evaluation is retribution. With respect to retribution, the interest is in seeing that the offender gets his or her "just desserts." The severity of the appropriate punishment necessarily depends on the proportionality to be found within the system. However, an analysis of discipline from 2009 to 2013 finds that the Department imposed penalties associated with Charges and Specifications in 210 misconduct allegations as well as 30 forms of Other Misconduct Noted (OMN) such as failures to prepare appropriate paperwork. Of the 210 misconduct allegations in which the officer was found guilty or pled guilty to the Charges and Specifications, generally, 44 allegations involved excessive force and 166 involved other forms of misconduct such as abuse of authority, discourtesy, and offensive language. The Department also imposed Command Discipline, which is more severe than Instructions, in 369 allegations.

These facts show that there is certainly no clear or scaled standard for retribution, or punishment, at least when it comes to chokehold violations: Department discipline does not appear to follow a matrix proportional to the action linked to the degree of severity of the alleged act. It is difficult to imagine why, for example, an officer could lose 10 vacation days for refusal to provide name and shield number or for discourtesy, but an officer could not get a similar or greater punishment for a chokehold.

As to deterrence, there is neither individual information nor conclusive information in the aggregate to suggest that the actions of the Department in these chokehold cases had a deterrent effect. The CCRB needs to conduct further analysis on the deterrence of disciplinary outcomes for all cases generally and chokehold allegations particularly. On the surface, it would appear that the definitional confusion and distortion, repeatedly described in this report, render any deterrent effect on chokehold misconduct ephemeral. In addition, there is no evidence that officers within the Department are informed of the results of discipline of other unnamed officers.

To date, the only evidence that we have is an in-house analysis of cases disposed of by the Department from January 2006 through December 2008. The study compared

three groups: officers who received Instructions, officers whose cases the Department declined to prosecute and cases with Command Discipline or Charges and Specifications, regardless of whether the officer was found guilty or not guilty. The preliminary analysis found that 40% of officers who were given Instructions received a new CCRB complaint after the Department's decision to require Instructions, while 30% of officers who were given Command Discipline or higher levels of discipline received a new CCRB complaint after the discipline. This finding would suggest that officers responded to higher levels of discipline. However, the analysis also found that 36% of officers whose cases were closed as DUP received an additional CCRB complaint after that action, contradicting, in part, this finding.

As to incapacitation, rehabilitation and the maintenance of the good order and discipline in the Department, we have the same methodological limitations that we found in assessing deterrence. We also lack data available to the Department about the disciplinary history of officers beyond CCRB complaints.

There is, however, evidence from Chapter Two that, in general, officers with chokehold complaints have both greater levels of CCRB complaints, force complaints and CCRB substantiated complaints. It would be important for the Department and the CCRB to create ongoing mechanisms of evaluation that allow both agencies to determine how the discipline imposed measures with respect to supporting the policies underlying the need for discipline.

## **Conclusion**

Since 1993, chokeholds have been banned, ostensibly without exception by the New York City Police Department. The comprehensive and unambiguous nature of the ban is expressed in NYPD Patrol Guide Section 203-11:

“Members of the New York City Police Department will NOT use chokeholds. A chokehold shall include, but is not limited to, any pressure to the throat or windpipe, which may prevent or hinder breathing or reduce intake of air.”

The broad definition of chokeholds is readily apparent from the language quoted above. Unlike the administrative courts such as the Office of Administrative Trials and Hearings and the Department's own administrative trial courts, which have required some evidence of intentionality or actual breathing restriction to find a chokehold occurred, the Patrol Guide proscribes as a chokehold any pressure to the throat/windpipe that creates the mere possibility of breathing restriction.

That the NYPD has placed a prophylactic definition upon chokeholds, far more protective than that applied by administrative courts, raises a critical question: whether, for the sake of pragmatism, the Civilian Complaint Review Board is forced to adopt the limited definition of chokeholds applied by the administrative courts rather than the broader, far more protective definition contained in Section 203-11 of the NYPD Patrol Guide. This will be further discussed in Chapter Four.

Additionally, although the Patrol Guide ban is broadly inclusive of holds which include breathing restriction and the possibility thereof, it is under-inclusive in one important respect – the absence of any articulated or specific reference to vascular or carotid holds, which cut off the blood supply to the brain through pressure to the blood vessels in the neck. Plainly, the Patrol Guide definition in Section 203-11 prohibits carotid holds because such maneuvers apply pressure to the neck which “may” inhibit breathing. However, a specific prohibition that contemplates proscription of carotid holds seems appropriate and consistent with NYPD policy.

The NYPD’s ban on chokeholds, which appears absolute on its face, nevertheless does not provide sufficient clarity for effective application in misconduct cases for two primary reasons. In a series of decisions, the administrative courts have sought to provide an operational definition. And the consequences of these decisions have been counter-productive. Second, the analysis of the different periods provide a clear picture of the evolution within the Department from 1993 to 2013: from vigorous and often successful prosecution of all chokehold cases, to vigorous but unsuccessful prosecution, to a refusal to use the disciplinary process to create the conditions for individual and collective deterrence.



## **Audit of Investigative Practices**

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This chapter sheds light on the CCRB's investigative procedures and methodologies. It delineates internal patterns and practices that not only evaluate the past performance of the CCRB but also position the Board to conceive and implement reforms that will in turn augment reform in police-community relations. The audit is divided into three key areas.

The first is an analysis of the CCRB's performance and efficiency in investigating chokeholds with a particular emphasis on timeliness. Timeliness is important for two reasons. First, it is important to look at the past to determine whether the people who complained to the CCRB, and the police officers who were the subjects of these complaints, were able to get a prompt, fair hearing. Second, it is important to look at the future for the CCRB to determine if systems are in place to identify the most serious and well-documented complaints at the outset. An analysis of timeliness in investigating chokehold allegations contributes to the identification of barriers the agency faces to deliver justice, so that people who are victims of abuse can get their complaints addressed immediately and officers who did not commit misconduct are exonerated quickly.

The second is a review of investigator training and practices concerning chokeholds. It includes an assessment of the intake and allegation pleading process. This review is important because it shows that the criteria for reviewing what was classified as a chokehold varied in the past because there was a lack of uniformity. But it is also important because it shows that defining with precision any category of misconduct, in particular those allegations deserving intense scrutiny such as the serious use of force, is an essential task that the Board must undertake. This issue is very important for training purposes.

The third key area is a qualitative review of chokehold cases that the Board did not substantiate and the challenges the Board faced to make affirmative findings. It is a mistake to evaluate any police oversight investigative agency by its substantiation rate. It is more appropriate to look at the agency from the perspective of its affirmative findings, so-called findings on the merits. These are cases where the agency can say, within the preponderance of evidence standard, that the allegation was substantiated,

exonerated or unfounded. A high rate of unsubstantiated cases -those not proven either way- can raise flags about various elements of the investigative process.

## **Efficiency: The Time It Takes to Resolve a Chokehold Complaint**

Through its database, the CCRB measures the number of days it takes to investigate a complaint from the date it is received to the date a panel of the Board makes a finding. The CCRB distinguishes between the time it takes to complete a full investigation and the time it takes to close a case that is truncated, meaning not fully investigated.

From 2009 through June 2014, the average number of days to complete a full investigation of a chokehold incident was 369 days. The median time was also 369 days. By comparison, the average number of days it took to fully investigate a non-chokehold case was 327 days.

By year, the average number of days it took to complete a full investigation of a chokehold incident fluctuated: 417 days in 2009; 340 days in 2010; 311 days in 2011; 370 days in 2012; 415 days in 2013; and 350 days from January through June 2014.

The time to complete a truncated case was drastically lower. The average number of days to close a chokehold case that was categorized as not fully investigated or truncated was 128 days. By comparison, the average number of days to close a non-chokehold case in this category was 106 days.

The number of days it takes for a chokehold investigation varied by the disposition of the case. The Board conducted an average substantiated chokehold investigation in 414 days. It took the CCRB an average of 374 days to investigate an unsubstantiated allegation, 349 days to find the allegation unfounded, and 411 days to close the allegation as officer unidentified.

Under the New York State Civil Service Law, officers who are subjects of CCRB investigations must be disciplined or served with disciplinary charges and specifications within 18 months of the date of the incident. The only exception to the statute of limitation occurs when the alleged misconduct by the officer constitutes a crime.<sup>83</sup>

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<sup>83</sup> NYPD currently applies Civil Service Law sec. 75(4) to its disciplinary cases: "Notwithstanding any other provision of law, no removal or disciplinary proceeding shall be commenced more than eighteen months after the occurrence of the alleged incompetency or misconduct complained of and described in the charges or, in the case of a state employee who is designated managerial or confidential under article fourteen of this chapter, more than one year after the occurrence of the alleged incompetency or

Given this statutory provision, the CCRB also measures the number of days it takes to investigate a complaint from the date the incident occurred to the date a panel of the Board makes a finding. The average number of days to fully investigate a chokehold incident was 386 days from the date the incident occurred.

Of the 520 fully investigated chokehold allegations, 51 allegations were closed 18 months after the date of incident (10%). Of the 608 not fully investigated allegations, 7 allegations were closed 18 months after the date of incident (1%).

There are four key phases in an investigation: a) from the day the case is received to the first civilian interview; b) from the first civilian interview to the first officer interview; c) from the officer interview to the moment the case is assigned to a Board panel; and d) from the moment the case is assigned to the actual date when the panel meets. This report analyzes performance by phase.

The first phase is from the moment a complainant makes contact with the CCRB to file a complaint to the moment of the first in-person interview. If the person files the complaint in person with the CCRB, the complaint and the in-person interview occur the same date. However, most complaints are filed by phone, online, by mail or with the Police Department, so there is a gap between the day the CCRB receives the complaint and the date of the first in-person interview.

In 540 cases, the CCRB conducted interviews to obtain in-person, verified statements.<sup>84</sup> In the remaining 542 cases, the CCRB was not able to conduct an interview because the complaint truncated as complaint withdrawn, complainant and/or victim uncooperative, complainant and/or victim unavailable, and victim unidentified.<sup>85</sup>

The first in-person interview was conducted on average 32 days after the person filed the complaint. By looking at the frequency distribution, the median interview was 21 days. In addition, from the date the complaint was received, 67% of interviews were

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misconduct complained of and described in the charges, provided, however, that such limitations shall not apply where the incompetency or misconduct complained of and described in the charges would, if proved in a court of appropriate jurisdiction, constitute a crime.”

<sup>84</sup> The CCRB conducted 540 civilian interviews. In 10 cases the civilian did not cooperate with the investigation after the interview and before interviewing the officer and in 2 cases the officer was no longer a member of the service.

<sup>85</sup> From January 2009 through June 2014, the CCRB investigated and disposed of 1,082 cases involving 1,128 chokehold allegations. An individual case may contain one or more allegations of chokehold. By case disposition, the Board fully investigated 525 cases and truncated 557 cases. In these 525 cases, there was a small number of allegations that were closed with truncated dispositions. This explains the discrepancy between 525 fully investigated cases and 520 fully investigated allegations.

conducted within the first 30 days and 89% of interviews were conducted within the first 60 days.

Given that there is often a gap between the date the incident occurred and the date the complaint is filed, on average the first in-person interview was conducted 48 days from the date the incident occurred. The median was 28 days.

There were only 12 cases where the officer was not interviewed after the civilian gave a verified statement: 10 truncated cases and 2 cases in which the officer was no longer a member of the service. In all other cases, the officers were interviewed after the civilian provided a verified statement.

The first officer interview was conducted, on average, 153 days after the person filed the complaint. This means that, on average, the first officer interview was conducted approximately 5 months after the first civilian interview.

When comparing the date of the first civilian interview to the date of the first officer interview, the data shows that 20% of first officer interviews occurred within 60 days of the first civilian interview; 58.5% within 120 days; 80% within 180 days; and 89% within 240 days.

The time in between the complainant interview and the officer interview is normally dedicated to interviewing other complainants and witnesses and gathering police documents and other forms of evidence.

The average officer interview (regardless of whether it was the first or the last) was conducted 212 days after the person filed the complaint. By looking at the frequency distribution, the median for officer interviews was 191 days. In addition, from the date the complaint was received, 24% of officer interviews were conducted within the first 120 days, 65% of officer interviews were conducted within the first 240 days, and 89% of officer interviews were conducted within the first 365 days.

The Investigations Division submitted cases for Board panel review, on average, 317 days after the civilian filed the complaint. From the average first officer interview to the moment the case was forwarded to the Case Management Unit (CMU) for assignment to a panel, it took an average of 164 days, or five months. From the moment a case is forwarded to CMU to the actual panel meeting, it took an average of 52 days.

The CCRB conducted a total of 881 complainant interviews in 540 cases. The average number of interviews per case was 1.6 interviews.

The CCRB also conducted a total of 2,470 officer interviews in 528 cases. The average number of interviews was 4.7 interviews per case. In approximately 40% of cases, the CCRB interviewed three or fewer officers; in 40% of cases, the CCRB interviewed four to six officers; and in 20% of cases, the CCRB interviewed seven or more officers.

The CCRB interviewed 193 other civilian witnesses in connection with 114 cases.

In addition to these investigative actions, the audit also looked at other investigative actions to determine how effectively a case moved through the system.

The audit also examined the information in the Investigative Case Plans (ICP) and compliance with supervisory instructions in the case plan. These plans are normally prepared within three days after the first civilian interview is done. The audit found that ICP plans were prepared for 98% of required cases.

In examining the role of lawyer reviews, the report found that 25 cases were reviewed by agency attorneys.

The CCRB issued 1,020 subpoenas in 424 cases.

Current deficiencies in our database prevent us from computing the number of records requested, in particular records requested from the Police Department, and the length of time to obtain them.

From a qualitative point of view, chokehold cases that were not truncated were thoroughly investigated; however, it is likely that if investigations had been accelerated, fewer cases would have been truncated.

## **Investigative Practices and Training of Investigators**

### Statistical Analysis of the Agency's Uniformity in Chokehold Incidents

In meeting with members of staff in preparing this report, a stark theme emerged: from 2009-2014, the agency did not uniformly analyze chokehold incidents. As a seasoned supervisor with different assignments in the agency best put it, "The interpretation of what constitutes a chokehold varies from investigator to investigator, from team to team, and from team attorney to team attorney."

Staff members have noted that this lack of uniformity exists from the moment a civilian makes the initial contact with the CCRB, during the intake process, to the line of questioning that occurs during the in-person interview, to the decision on whether to qualify an incident as a chokehold allegation or some other use of force, to the analysis of whether the allegation constitutes misconduct.

This report put these perceptions to the test by conducting statistical analyses of group differences. These statistical techniques show team differences that are not explicable by chance or other factors and are statistically significant.

The rate at which teams fully investigate cases is one example where there is a lack of uniformity. The difference between the team with the highest full investigation rate, 59% and the team with the lowest rate, 40%, is 19 percentage points. When running a chi-square analysis on the frequencies for these teams, the difference between teams was statistically significant at the 1% level.<sup>86</sup>

The same is applicable to the rate at which these teams unsubstantiated or unfounded complaints. The difference between the team with the highest unsubstantiation rate, 62% and the team with the lowest rate, 37%, was 25 percentage points.

The difference between the team with the highest unfounded rate, 46% and the team with the lowest rate, 20%, was 26 percentage points. When running a chi-square analysis on the frequencies for this group, the difference is statistically significant at the 1% level.

The difference was not statistically significant for the team frequencies for substantiated cases. There are differences but they are not statistically significant. There is a team that substantiated 4.5% of its cases while a team substantiated 0%.

In terms of frequency, a team substantiated 4 chokehold cases out of 89 fully investigated allegations, and another team did not substantiate any chokehold allegation after fully investigating 85 allegations.

Finally, there was a team for which chokeholds were 2.7% of all its cases while there was a team for which chokeholds were 3.9% of all its cases. When running a chi-square analysis on the frequencies for these teams, the difference between teams was statistically significant at the 1% level. This means that there is strong evidence that teams do not have the same approach during the process of taking complaints, in particular, chokehold incidents.

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<sup>86</sup> Statistically significant at the 1% level means there is a one percent chance that the result was accidental.

Although the statistics on investigative staff show inconsistencies in approach, Board panels - that are ultimately responsible for the determination of findings – do not show differences that are statistically significant.

Excluding the most recent members of the Board, among current members the rate at which they unfounded cases varied from 35% to 41% by Board member. The rate at which they unsubstantiated cases showed greater variation from 38% to 51%.<sup>87</sup> There are some Board members who substantiated more cases than other members but statistical analyses did not find (statistical) significance in these variations.

The Board panels rarely disagreed with the chokehold recommendation of the investigator. But they did on 14 occasions, 9 full investigations and 5 truncation dispositions.

The following example shows the importance of the Board review process. In one case, the investigator wrote the following before recommending that the chokehold allegation be unfounded:

“The [complainant] alleged that upon catching up to him, an officer placed him in a chokehold, causing his breathing to be restricted. The officer had apparently placed his right arm around [the complainant’s] neck, and held that position for about 4 to 5 seconds.

A witness recalled that after running down the block, she observed an officer grab [the complainant] by securing the crook of his arm around [the complainant’s] neck, and then slam [the complainant] into a neighbor’s fence. The witness saw [the complainant’s] eyes popping out, and heard him scream, “Why are you doing this? You’re hurting me.”

Another witness stated that she saw the officer grab onto [the complainant’s] back and smash his face against the fence. However, she never observed the officer grab onto [the complainant’s] neck(...)

When brought to [a local hospital] for a checkup, the physician found no injuries to [the complainant’s] neck.

A chokehold, in which the complainant’s breathing is restricted, is a substantial use of force and easily discernible from other types. That the first witness did not observe the officer place his arm around [the complainant’s] neck makes it doubtful whether a chokehold occurred. Furthermore, the witness’s own statement that she heard [the complainant] screaming “Why are you doing this?”

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<sup>87</sup> Recent Board members were defined as those who have reviewed 75 or fewer chokehold allegations compared to more senior members who averaged 150 allegations reviewed per Board member.

You're hurting me," questions the extent of the chokehold as the complainant's ability to scream negates the possibility that his breathing was restricted."

In response, two Board members disagreed with the analysis. One of them wrote, "not sure if chokehold did not happen" and they voted to unsubstantiate the allegation.

From these statistical findings and a review of the closing report such as the above, it is clear that a more precise definition and uniform approach is needed within the Investigations Division of the CCRB.

There is no greater area of inconsistency than the interplay between the pressure test and the breathing test, as earlier described earlier in Chapter One of this report. For some investigators, a chokehold exists if and only if breathing is restricted. For other investigators, it is the presence of pressure regardless of whether breathing is restricted that matters.

There are also other elements in the evaluation and assessment of a chokehold incident that are treated differently, such as whether the chokehold must be intentional, prolonged, or with the intention of cutting off air. In some instances, the investigative report discusses not whether there was restriction of air, but rather if the intensity of restriction was enough to qualify as a chokehold because the person was able to talk throughout the alleged incident or the investigator made the determination that the chokehold was not done with enough intensity or pressure to be an actual chokehold.

Notably, though closing reports frequently specifically cite the Patrol Guide prohibition incorporating the "may" restrict breathing standard, few investigators follow the rule in practice when they plead their cases.

### Analysis of Investigator's Training in Chokehold Incidents

Before entering into the detailed analysis of these inconsistencies across investigative teams, it is important to discuss the training CCRB investigators receive pertaining to the analysis of chokehold incidents by focusing on two elements: the CCRB manual and the in-house training.

One source of information for the investigative staff to evaluate chokehold claims is the out-dated Investigative Manual which is currently going through a full and complete evaluation and revision.



Chokehold incidents are covered in Chapter Eight of the outdated Investigative Manual, which is entitled “Drafting Allegations – Pleading Language and Applicable Patrol Guide Procedures.” On page 344, the manual states the following regarding the pleading of chokehold:

“Chokehold - Pleading language

‘OFFICER used a chokehold against VICTIM.’

Applicable Patrol Guide procedure(s) and other legal standards:

The applicable Patrol Guide procedure is 203-11 (use of force), which bans the use of chokeholds.”

The current section of the manual does not include a basic definition of what a chokehold is, nor does it provide guidance on how to investigate or analyze a chokehold allegation. In discussing this matter with members of staff involved in the drafting of the new manual, it was noted that the section on chokehold has been flagged as needing further elaboration and discussion.

The other source of information for investigators is the CCRB’s in-house investigative training, which is developed and structured by the CCRB’s Director of Training in collaboration with other senior members of staff. All investigators go through this mandatory in-house training when joining the agency.

Chokehold incidents are discussed during use of force training. Training staff uses a Powerpoint presentation highlighting the most relevant and up-to-date information. This presentation is also made available to the investigators after the training is completed for post-training support.

The training staff also uses several videos taken from actual CCRB cases, past and present, to better describe and analyze the Department’s use of force policy and training. In particular, there is a video clip of a chokehold case, which depicts actions by an officer which were pleaded as a chokehold and substantiated by the Board.

In discussions for the preparation of this report, the training staff reported that, because chokeholds have been banned by the NYPD since 1993, training regarding chokeholds has often focused on a short discussion of the Departmental definition of chokeholds. The training has also reviewed two additional practices - sitting or standing on a subject's chest and maintaining and transporting a subject in a face down position after

the subject has been restrained - that are discouraged and prohibited, respectively, by the Department.

The training staff also emphasized that agency training discussions have often focused on the proper pleading of chokehold allegations, specifically, whether a civilian must allege restriction of breathing in order for the CCRB investigator to plead a chokehold allegation.

For instance, there are some reports, not corroborated by any documentation, that at a meeting of investigative staff in 2009, two or more CCRB investigative teams vied for their respective interpretations of the definition of a chokehold. Lawyers at that meeting interpreted the chokehold standard as that adopted at the NYPD trial room, opining that chokeholds should be pleaded at the CCRB only if there was an alleged actual interference with breathing, as opposed to holds that *potentially* interfered with breathing. In all likelihood, this interpretation, as well as the factors previously described, is responsible for a failure to classify chokehold cases under the Patrol Guide standard and a significant undercount of chokehold complaints.

#### Intake and Pleading Processes: Findings

This audit documents examples of the lack of uniformity within the agency stemming from the qualitative review of cases. This auditing review process focuses first on inconsistencies during the intake process when complainants contact with the agency and provide a basic description of the incident. This initial description of the incident is normally included in the narrative section of the database and investigators are trained to enter the statement *verbatim* and without alterations.

The report analyzed all the chokehold cases and the basic narrative for each case. It found that the terms “chokehold” or “choke hold” were found in the initial narratives of 425 of the 1,082 complaints investigated. There were additional terms that were used by the complainants, such as “the officer choked me.”

The report also examined the basic narrative in all cases not categorized or defined as chokehold incidents in this report. For the purpose of this audit, a case is categorized as a chokehold case or incident if a chokehold allegation is pleaded.

The staff created a computer query that examined every non-chokehold case and searched the database for three terms, “choke hold,” “chokehold,” and “choke.” (The

difference between a “chokehold” or a “choke hold” in our database is a matter of spelling preference among investigators).

The query found that there were more than 100 cases, not categorized as chokehold cases, where an individual complained that he or someone else was “choked.” In addition, it found that there were 33 cases where the individual complained that he or someone else was the complainant of a “chokehold” or a “choke hold” that were not categorized as chokehold incidents and did not contain an allegation of chokehold pleaded in the case.

Yet, in none of the 33 cases where the complainant affirmatively alleged that he or some else was placed in a “chokehold” was the allegation of chokehold pled. As a result, it was not computed in the database as a chokehold allegation. In all these 33 instances, the reference to the chokehold was very explicit.

In a small number of cases, the allegation of chokehold was not even discussed in the closing report even though the initial narrative clearly mentioned a chokehold. For example:

“On [date], [an officer] stopped the complainant after a foot pursuit. The complainant had a gun and the officer shot him in the right leg. A witness stated that she observed an officer punching and stomping on a male, identified as [name] by IAB, during an arrest. The witness also stated that the male was put in a chokehold.”

In most of these missed cases, the chokehold incident was discussed in the investigative report but not pleaded as an allegation even if the original narrative mentioned the chokehold. Thus, for example, in one case the original narrative provided by the complainant stated that the complainant was the subject of a chokehold:

“At the time and place of occurrence, ... [the complainant] attempted to go up the stairs when [two officers] grabbed him. [The complainant] responded by grabbing onto the railing and a physical struggle ensued. [An officer] grabbed [the complainant’s] arm and put him in a chokehold from behind. [The other officer] then struck him in the face with his forearm before pepper spraying him.”

However, the closing report reveals that the investigator made the determination not to plead the allegation:

*“Note Regarding Pleading Allegations*

[The complainant] alleged that he was placed in a headlock by [the subject officer]. However, his breathing was not restricted at any time and therefore a chokehold allegation was not pled.”

The audit has also analyzed inconsistencies in the decision of whether to qualify an incident as a chokehold allegation or some other use of force, as well as inconsistencies in the investigators’ analysis of the facts and whether the alleged use of force constituted misconduct.

Through a query of the database, the report examined all closing reports in all cases not categorized or defined as chokehold incidents in this report. The query examined every reference to the term “chokehold” or “choke hold” in non-chokehold cases. It eliminated the cases where the reference to the term chokehold was not relevant (for example, the term chokehold is mentioned in discussing the past CCRB history of the officer as opposed to the present alleged instance of misconduct). The query returned 245 cases, of which 156 have now been defined as chokehold cases after careful review.

The staff analyzed every single case. It found three patterns:

- a) the chokehold incident was not pled as an allegation in the investigative report and the investigator discusses reasons not to plead the allegation in the “allegation not pled” section of the investigative report;
- b) the chokehold incident is pled as a generic allegation of physical force; and
- c) the chokehold incident is discussed in the body of the investigative report but the investigator assesses the action as not deserving further consideration or does not consider the alleged action to meet the definition of a chokehold.

The following are case examples of each pattern. The first pattern was the most common, the second pattern was frequent, and the third pattern was the most infrequent.

***Pattern A*** – chokehold allegation by complainant is not pled by investigator:

Example 1:

“A chokehold allegation is not pleaded because [the complainant’s] breathing was not restricted as he was able to speak while the officer allegedly held him against the fence by the throat.”

Example 2:

[The complainant], when describing [the officer's] use of an asp against his neck, stated that he did not know if his breathing was affected. Because no choking or inability to breathe was alleged, no chokehold allegation has been pled regarding this incident. Rather, the use of the asp has been included in the force allegation."

Example 3:

[Two complainants] both alleged that an officer, identified via investigation as [name], restricted [the complainant's] breathing by placing his arm under and around [his] neck. Because [the complainant] could not be interviewed by the CCRB and did not attest to whether his breathing was restricted at any point during this incident, a chokehold allegation has therefore not been pleaded."

Example 4:

"It is undisputed that [an officer] made contact with [the complainant's] neck during this incident. However, [the complainant] stated that his breathing was not impaired by this contact. A chokehold allegation was therefore not pleaded in regards."

Example 5:

"Allegation not pleaded - [The complainant] noted that [an officer] wrapped his arm around his neck when he first approached him. However, [the complainant] indicated that his breathing was not completely restricted. [An independent witness] corroborated that [an officer] wrapped his arm around [the complainant's] neck, but noted that [the complainant] began screaming after this action."

**Pattern B** – chokehold allegation pled as generic physical force:

Example 1:

"[The complainant] alleged that [an officer] grabbed the back of his neck for approximately twenty seconds. While he alleged that his breathing was restricted, he also testified that he simultaneously yelled several statements to the officers, none of which was a complaint related to being choked. As [an officer] allegedly grabbed the back of [the complainant's] neck and not the front of it, and there is no evidence of restricted breathing, a physical force rather than a chokehold allegation is being pleaded."

Example 2:

“[The complainant] alleged that an officer “choked” him, using his right hand, two times, while inside the Precinct station house. The first choke lasted for about ten seconds and the second choke lasted for about five seconds. [The complainant] stated that his breathing was “not really” restricted because he held his breath for the duration of each choke. Since the complainant’s breathing was “not really” restricted and he did not breathe of his own volition, a physical force allegation will be pleaded instead of a chokehold allegation.”

Example 3:

“An allegation that [an officer] applied a chokehold to [the complainant] was not pleaded. [The complainant] stated that his head was pressed down into the snow and that he could not breathe for “two seconds.” Thus there was no indication that the officer intended to restrict his breathing. More in accordance with what the complainant alleged, an allegation that the officer pressed down his head was pleaded and addressed under a physical force allegation.”

Example 4:

“Although [the complainant] alleged that his breathing was restricted while he was positioned on the couch, his actions of crouching behind the couch and resisting arrest inadvertently resulted in this placement, and did not stem from an officer using a chokehold or purposefully restricting his breathing. Therefore, this allegation is not being pleaded separately and is subsumed into the force allegation analyzed below.”

Example 5:

“[Date], [an officer] filed this complaint on behalf of [the civilian] with IAB. IAB forwarded the complaint to the CCRB. [The complainant] stated that on [date and time], he was “choked” and searched by [an officer]. A physical force allegation was pleaded instead of a chokehold, as [the complainant] did not specify if his breathing had been restricted by this action.”

Example 6:

“[The complainant] alleged that [an officer] wrapped his right arm around [the complainant’s] neck in a chokehold for 30 seconds. However, [the complainant] affirmed that this did not restrict his breathing. As a result, [the officer’s] alleged wrapping of his

arm around [the complainant's] neck is not being pleaded as a separate chokehold allegation, but is subsumed by the general physical force allegation.

**Pattern C** - the chokehold incident is discussed in the body of the investigative report but the investigator decided that the action deserved no further consideration or does not consider the alleged action to meet the definition of a chokehold:

Example 1:

Discussion in the body of the complaint: “[an officer] approached [the complainant] while holding his front license plate and asked him whose license plate it was. [The complainant] stated that it was his front license plate, which matched his rear license plate. He stated that earlier that day he found that his front license plate was hanging loose by one screw, and rather than risk losing it, he removed it and placed it between the front passenger seat and the center console. PO1 stated that he searched the car because he saw the license plate. [The complainant] disputed that the license plate was visible in its location. [The complainant] looked towards the front of his vehicle and saw PO2 searching inside the front passenger seat. [The complainant] stated to PO1 that officers had no right to search his car. PO2 apparently heard [the complainant], because he ran to [the complainant] and grabbed him by the throat with his right hand, and squeezed, but not hard enough to obstruct breathing. Holding on to his neck, PO2 pushed [the complainant] back against the rear quarter panel of his car. PO2 stated, “Shut the fuck up. Shut the fuck up. Shut the fuck up. I do whatever I want to do.” PO2 released [the complainant] and returned to searching the car. (..) PO2 denied that any officer pushed [the complainant] against the trunk, place [the complainant] in a chokehold or, place their hands around his neck.”

Example 2:

Discussion in the body of the complaint: “Though complainant #1 and complainant #2 alleged that complainant #3 had been placed in a chokehold in their initial statements to IAB, they did not repeat this allegation to the CCRB and complainant #3 did not make this allegation [during her interview].”

Example 3:

Summary of complainant interview: “[The complainant] did not physically resist in any way. [The complainant] did not attempt to flee. After [the complainant] was placed in handcuffs, [two officers] tripped [the complainant] to the ground. [PO1] then lay on top of [the complainant] and punched him in the head with one hand and covered [the complainant's] mouth and nose with the other hand, restricting his breathing. [The

complainant] moved his face from side to side, attempting to extricate himself from [the officer's] hand. [The complainant] attempted to avoid the blows from [the officer] but he was handcuffed and was not successful.”

These examples illustrate, as do the cases described in the Appendix to this chapter, how lack of clarity about what investigators should plead, along with evidentiary ambiguities, lead to unsubstantiated complaints after a full investigation and presentation to Board panels. The value of these complaints for assessing the prevalence of chokeholds should not be underestimated. Their fact patterns reveal the common occurrence of officers in the course of arrests, all too often coming in contact with the throat.

### **Chokehold Incidents and the Lack of Evidence: The Rate at which Cases are Unsubstantiated**

Of the 520 allegations that the Board fully investigated, the Board unsubstantiated 240 allegations, or 46% of all fully investigated allegations. As we reported in Chart 2.8 of this report, the rate at which panels voted chokehold allegations to be “unsubstantiated” increased over time from 37.5% in 2009 to 61.4% in 2013. It slightly decreased to 58.6% for the period from January through June 2014. A case is unsubstantiated when the available evidence is insufficient to determine whether the officer committed misconduct.

Understanding the factors and patterns that may explain the rate at which a panel voted that evidence was insufficient to make a determination in a chokehold complaint has the potential to improve the quality of CCRB investigations.

For the purpose of expediency, the review focused on 43 cases where the Board substantiated at least one allegation of FADO misconduct but the allegation of chokehold was closed as unsubstantiated or had another investigative outcome. The emphasis of the review was the evidence available to the panel of the Board when making a determination.

This audit selected seven representative instances:

**Instance #1: Medical evidence documents the use of force but does not document the chokehold.**



In a certain case, the reason for the civilian-police encounter was a stop, which was exonerated by the Board, after officers observed the complainant engaging in actions indicative of a drug transaction. The complainant resisted arrest and the officer used force.

The complainant was charged with possession of a controlled substance in the fifth degree and resisting arrest. The disposition of charges was pending upon the conclusion of the investigation. The complainant received medical treatment at a local hospital. One of the officers also received medical treatment.

There were two allegations of force, a chokehold and a strike with a baton. The Board substantiated the baton strike to the head, which is classified by the Department as deadly physical force. The decision to substantiate the strike was based on medical records and witness corroboration. The decision not to substantiate the chokehold relied heavily on the fact that there were neither medical records nor witness corroboration for the alleged use of chokehold.

When the case was forwarded to the Department for discipline, the officer was found guilty of the strike after trial and forfeited 5 vacation days.

**Instance #2: During real-life situations that require the police to use crowd-control techniques involving multiple civilians, it may be difficult to identify the subject officer that allegedly committed the chokehold or to gain cooperation from a potential complainant who may have participated in the public disorder**

The civilian-police encounter began when two officers in a patrol car responded to a 50 call (a disorderly group). Six people were together when the police arrived. The police did not ask for identification and told the group to disperse.

As the group began to disperse, there was a discussion between a member of the group and a police officer. The Board substantiated as misconduct some of the comments made by the officer during this exchange. As the two officers returned to the car, the exchange of words continued between one of the officers and one individual. The officer exited the vehicle to give this person a summons. At that point, other responding officers arrived and family members of the group also arrived. When officers sought to arrest the individual who had the argument with the officer, members of the crowd began to physically interfere and various types of force were used by the police to regain control. The alleged chokehold was used in arresting one of the people in the crowd.

Following the procedures spelled out in Patrol Guide section 212-95, the police used physical force, pepper spray and nightsticks to “establish physical control of a subject resisting arrest and to protect self and another from unlawful use of force.” There were 10 allegations of force stemming from that encounter. The Board exonerated these alleged acts, except for the chokehold.

The officer who allegedly committed the chokehold could not be identified as the complainant did not provide a statement to the CCRB. No civilian was able to describe the officer who used the chokehold and no officer admitted to using it. It was undisputed that officers took this civilian to the ground but the method was unclear. There was no video footage.

The Board substantiated a discourtesy allegation against the officer who had the initial interaction with the group of six. The comments were deemed “gratuitous and demeaning” when the officer was requesting information and “nobody was out of control and a hostile crowd had yet to form.” The officer acknowledged having spoken discourteously to one of the members of this group of six prior to the use of force. Plus, there are indications that the officer’s discourtesy escalated tensions and made the situation more difficult for the responding officers.

The officer received a Command Discipline B.

### **Instance #3: The complainant provides multiple, and often inconsistent, accounts of the incident**

The complainant of the chokehold and his friends were standing in an alley behind a building. An unmarked vehicle drove up the alley and the complainant and others ran, saying that they thought that the occupants of the car were members of a known gang. The complainant stopped running and put his hands in the air when he realized they were the police. According to officers, the complainant was seen throwing away a zip lock bag of marijuana. The complainant alleged that officers “rushed him”, placed him on a vehicle, handcuffed him, and then slammed him on the ground where the officers began kicking him and accusing him of resisting. The complainant was arrested and taken to New York Hospital in Queens. None of his friends were arrested or issued summonses. The complainant was charged with resisting arrest, criminal trespass, criminal possession of marijuana, and disorderly conduct. He pled guilty to disorderly conduct, was conditionally discharged, and sentenced to seven days of community service.

The complainant alleged that while he was at the hospital with an officer, the officer choked him. He provided different accounts of the reason for the choke. First, he stated that the officer choked him because he asked him too many questions. However, in his

in-person statement he alleged that an officer choked him because he refused to answer the officer's questions. The investigation unfounded the chokehold based on the complainant's own inconsistent explanation for the events leading to the chokehold and the fact that the ambulance call report stated that the complainant was verbally attacking the officer throughout the transport to the hospital. The officer denied the chokehold.

The complainant's medical records state that he was diagnosed with a facial contusion and clavicle contusion.

The Board substantiated the improper stop. There were three physical force allegations which were closed as exonerated, four physical force allegations which were closed as unfounded. There was no notice of claim filed regarding the case.

**Instance #4: The quality and the type of the evidence provided matters in the determination of the cases: poor video or audio may be insufficient evidence**

Officers received a tip from a bouncer at a club that an individual with a weapon had entered the vehicle in which the complainants were riding. There were four occupants of the vehicle. When officers stopped the vehicle because they suspected an occupant of criminal possession of a weapon, the driver refused to exit the vehicle.

When he persisted in his refusal to exit the vehicle, the complainant alleged that the officer put his hands around his throat, exerting pressure without cutting off his air flow. The officer denied placing his hands around the neck. The complainant recorded the incident on his cell phone. The cell phone recording had audio but not video. In the audio, the complainant is "yelling about being choked."

The other three occupants of the vehicle all corroborated that an officer choked the complainant but provided varying accounts. They disagreed over whether the officer pressed his forearm or placed his open hands around the neck. The other officer denied seeing his partner choking the complainant.

The chokehold allegation was unsubstantiated.

The Board substantiated an allegation of abuse of authority for the officers' refused to provide a name and/or shield number. In this case, the investigator also made the determination that an officer "pulling an individual out of a car by their arms does not rise to the level of force investigated by the CCRB." A kitchen knife was recovered from the vehicle.

The Department declined to prosecute the case against the two officers

This case highlights how poor quality audio or video evidence may not be sufficient to document whether the officer placed a complainant in a chokehold or used a different form of physical force.

**Instance #5: A member of the service probably witnessed the misconduct but did not recall the incident during the CCRB interview**

The police-civilian encounter began when officers claim to have observed the civilian double park his vehicle and enter and exit a Clean Halls building. According to the civilian, he was back in his car and on his cell phone as several officers approached him and an officer asked him to “put your fucking phone down.” The CCRB identified six officers at the scene. As the man put the phone down and reached into his pocket to remove his driver’s license, the complainant said that the officer reached into the vehicle and grabbed onto the front center of the complainant’s throat with his right hand, choking him and pushing his neck so that his head was pressed backward against the head-rest. The complainant alleged that his breathing was obstructed for about five seconds, out of the ten seconds in total that the officer had his hand on his neck. He was then pulled from the vehicle. The subject officer told him, “when we ask you to get off the fucking phone, you get off the phone now.” Officers then proceeded to search the car.

The complainant was treated at a local medical center for pain to his throat, neck and back. There were no memo book entries from the officers recording the incident.

The investigation determined that, while there was sufficient evidence that an officer grabbed the complainant by his neck, or near the collar of his shirt, there was not significant evidence to conclude that “the officer’s action obstructed the complainant’s breathing.” It is on that basis that the investigation found the chokehold unsubstantiated. The investigation also found, based on independent witness testimony, that an officer grabbed the complainant either by the neck or by the collar of his shirt and pulled the complainant from his vehicle. The officers never articulated that the complainant was resisting or physically non-compliant. The subject officer denied that he pulled the complainant from the vehicle by either his neck or the collar of his shirt. All five officers could not recall the incident, or had a vague recollection.

The Board substantiated the stop, the frisk and search, the search of the vehicle, and the generic physical force. The chokehold was unsubstantiated. The Board recommended Charges. The Department closed the force and search of person

allegations as Department Unable to Prosecute. Instructions were issued for the remaining substantiated allegations

***Instance #6: There are no independent witnesses to corroborate the incident because all witnesses are complainants of police misconduct***

A married couple drove their car and double-parked in a residential area where several officers were involved in an undercover operation. They double-parked near an unmarked patrol car where plainclothes officers were tracking the actions of an undercover narcotics officer. After the officers learned that the undercover officer was on the move, an argument ensued between one of the supporting units and the couple. It is in dispute if the officers identified themselves as police officers.

After an officer entered the civilians' car and attempted to move the car forward, the wife positioned herself in front of the car to prevent the action. The wife was then struck with the vehicle two times. The husband who saw the interaction from the house came running and assaulted an officer. He was arrested for assault in the second and third degree.

The alleged chokehold occurred after the couple have been arrested and placed in the back of the unmarked car. The wife was the only civilian witness.

The Board substantiated the use of the vehicle as unnecessary force based on the injuries sustained by the wife and the account of independent witnesses. The Board unsubstantiated the chokehold because, as the officer denied its use, there were no independent means of corroboration.

***Instance #7: There are no independent witnesses to corroborate the incident because the incident was a one-on-one encounter***

The incident stemmed from a street encounter. Officers questioned two people and stopped a third one, the complainant, in regards to a shooting in the area that occurred 15 minutes prior to the stops.

According to the complainant, the chokehold occurred because he did not stop and respond to the officer's questions. When the complainant asked "what's the problem?" the subject officer responded by grabbing him.

The complainant alleged that an officer placed his thumb and finger around his throat and pushed him up against a fence. He also said that his breathing was cut off when

the officer grabbed him by the neck and that the officer kept his hand around the complainant's throat for ten minutes.

The officer denied the claim of placing the complainant in a chokehold or grabbing the complainant's neck. He stated that he pushed the complainant against the fence by putting his forearm against the complainant's chest.

The Board found the account of the complainant "implausible in regards to the length of time that [the subject officer] held his neck." In light of this account, the Board unfounded the chokehold allegation. Although the Board determined that the officer did not have reasonable suspicion to stop the civilian and substantiated the improper stop, questions remained about why the officer used force during the stop.

The officer received Instructions.

## **Recommendation**

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Before the main policy recommendation of this report is discussed, the CCRB would like to acknowledge and commend two key ongoing initiatives of the NYPD that have shaped our policy recommendations. First, Police Commissioner William Bratton has announced that the NYPD will begin an extensive new retraining program later this year involving guidelines and tactics for all non-firearms uses of force by NYPD Officers.

The first phase of this in-service retraining program will involve a three-day retraining program for all 20,000 Patrol Officers, Sergeants and Lieutenants primarily engaged in patrol supervision in the NYPD. The second phase will involve the remaining 16,000 officers receiving the same extensive three-day in-service retraining program. Thereafter, these 36,000 officers and all future officers will receive regular in-service retraining on the guidelines and tactics for non-firearms use of force (in addition to their regular in-service bi-annual firearms training). In addition, all new recruits will receive the same use of force training in the Police Academy as the current Officers will receive in this in-service retraining program. This training will, in part, focus on implementation of the chokehold regulation.

Second, Police Commissioner Bratton has instructed his senior leadership team to review all provisions of the current Patrol Guide about use of force, including the chokehold policy. The goal of that review is to make appropriate revisions to the existing provisions of the Patrol Guide so that clear guidance is given to all NYPD officers and the public about when and how officers will use various types of force to ensure their safety and the safety of the public. That review will be done in collaboration with the CCRB and other external stakeholders who have important interests in these policies and practices.

The CCRB strongly supports the retraining and Patrol Guide review initiatives the NYPD is undertaking at the direction of Police Commissioner Bratton. It is for this reason that the sole recommendation of this report is the creation of an NYPD-CCRB working group to collaborate to reduce chokehold incidents and enforce the chokehold ban. The work of this inter-agency group should focus on six key areas:

1. Redefining and expanding, if necessary, this particular prohibited use of force;
2. Enforcing the prohibition through appropriate and coordinated discipline;

3. Sharing strengthened data collection and analysis to create an early warning system that identifies officers, precincts and commands at risk;
4. Implementing new training protocols that mandate trainees learn the many different facets of a chokehold so they will be able to abide the prohibition;
5. Training officers to use alternative methods for restraining suspects; and
6. Requiring that NYPD administrative judges follow the Patrol Guide rule rather than undermining its clear prohibition, whether based on sympathy for officers in threatening situations or other reasons.

This is a “Vision Zero” action plan for chokeholds.<sup>88</sup>

The CCRB recognizes that the surest way to relegate this report’s important findings to the trash pile, or to gather dust behind a radiator, is to insist that the NYPD must do X, Y or Z. The only way to successfully address the chokehold (as well as all police misconduct issues) is through collaboration, creativity and understanding between the NYPD and the CCRB. An inter-agency working group, drawn from the experts at both agencies and outside sources, working in a non-political, non-bureaucratic and ego-minimizing environment, may actually address destructive, embedded cultural responses. Through data sharing, training, creative incentives and even-handed discipline, we may even save lives.

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<sup>88</sup> “The primary mission of government is to protect the public.” See Mayor de Blasio’s original “Vision Zero” Plan at <http://www.nyc.gov/html/visionzero/pages/home/home.html>



## **Appendix to Chapter 2: Descriptive Statistics**

This appendix examines available quantitative information that was not included in Chapter Two. Where the statistical information extracted from the database is incomplete, we rely on information gathered from a sample of 53 cases in which staff reviewed the entire case file.<sup>89</sup>

### **Descriptive Statistics**

#### **Complaint Activity**

From January 1, 2009 through June 30, 2014, members of the public filed 1,048 complaints involving chokehold allegations. The CCRB received 240 complaints in 2009; 207 in 2010; 157 in 2011; 157 in 2012; 179 in 2013; and 108 from January through June 2014.<sup>90</sup>

In Chapter Two, Chart 2.2 provided a detailed account of the specific five and a half years which are the focus of this study by looking at data gathered by six-month periods from January 2009 through June 2014.

Further analysis of Chart 2.2 shows that there was a period of low chokehold complaint activity concentrated in the period from January 2011 through June 2013. Prior to this period, from January 2009 through December 2010, the average number of chokehold complaints received was 112 chokehold complaints per each six-month period. It decreased to an average of 76 complaints per each six-month from January 2011 through June 2013. It finally increased to an average of 109.5 complaints per each six months from July 2013 through June 2014.

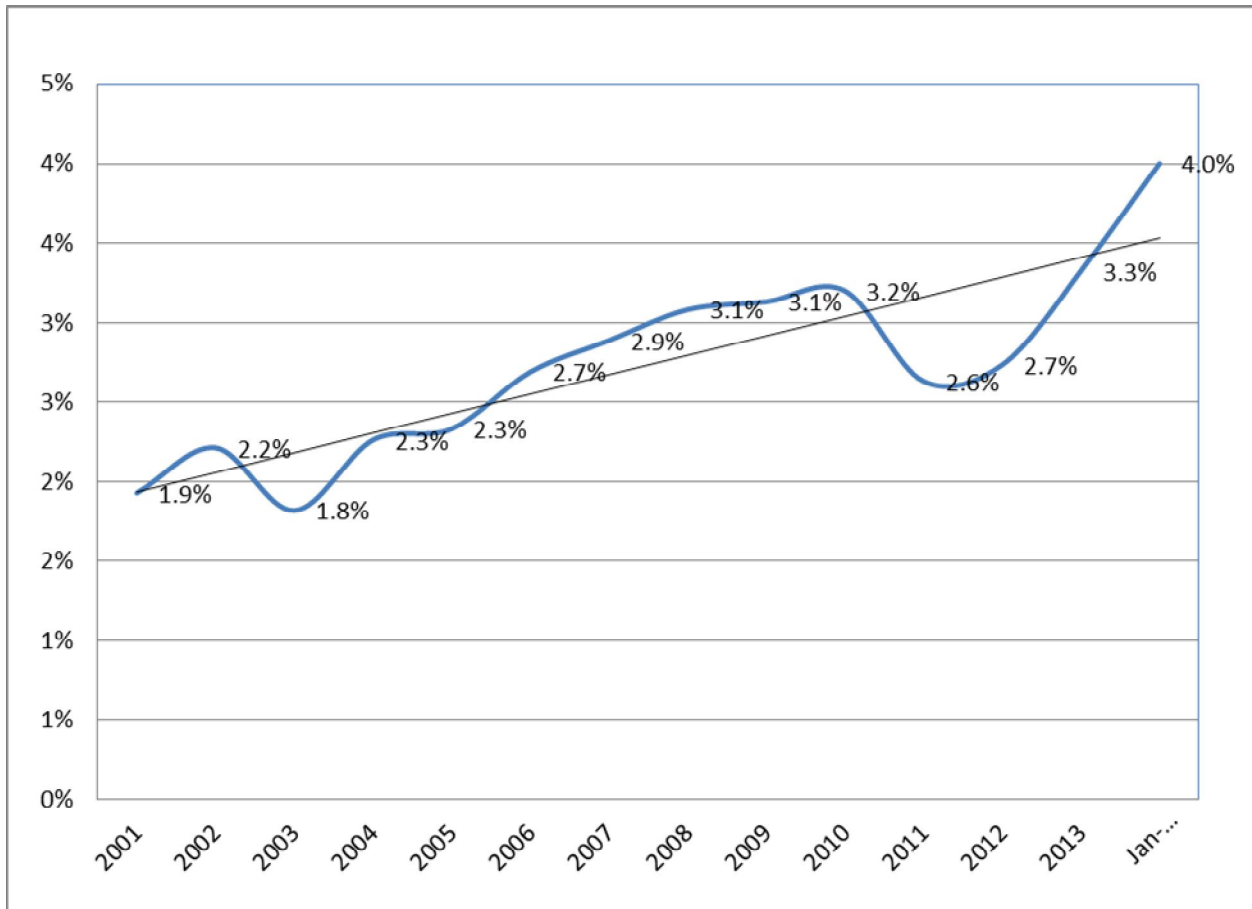
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<sup>89</sup> The CCRB database, known as Complaint Tracking System (CTS), is a live database and is constantly updated. On July 1, 2014, the CCRB took a snapshot of the entire database and stored it in a separate drive for the purpose of working on the mid-year report. For this study, the CCRB has used this “frozen” database.

<sup>90</sup> January through June 2014 data was updated on September 25, 2014 to reflect the most up-to-date complaint activity information available for 2014.

Chart 6.1 shows a similar pattern to Charts 2.3 and 2.4 of Chapter Two when the number of chokehold complaints received is compared to the number of total complaints filed. Chokehold complaints as a percentage of total complaints filed increased from 1.9% in 2001 to 4.0% from January through June 2014. It increased year after year, except for 2003 and the 2011-2012 period. The 4.0% from January through June, 2014, represents the highest proportion of chokeholds relative to all complaints since 2001.

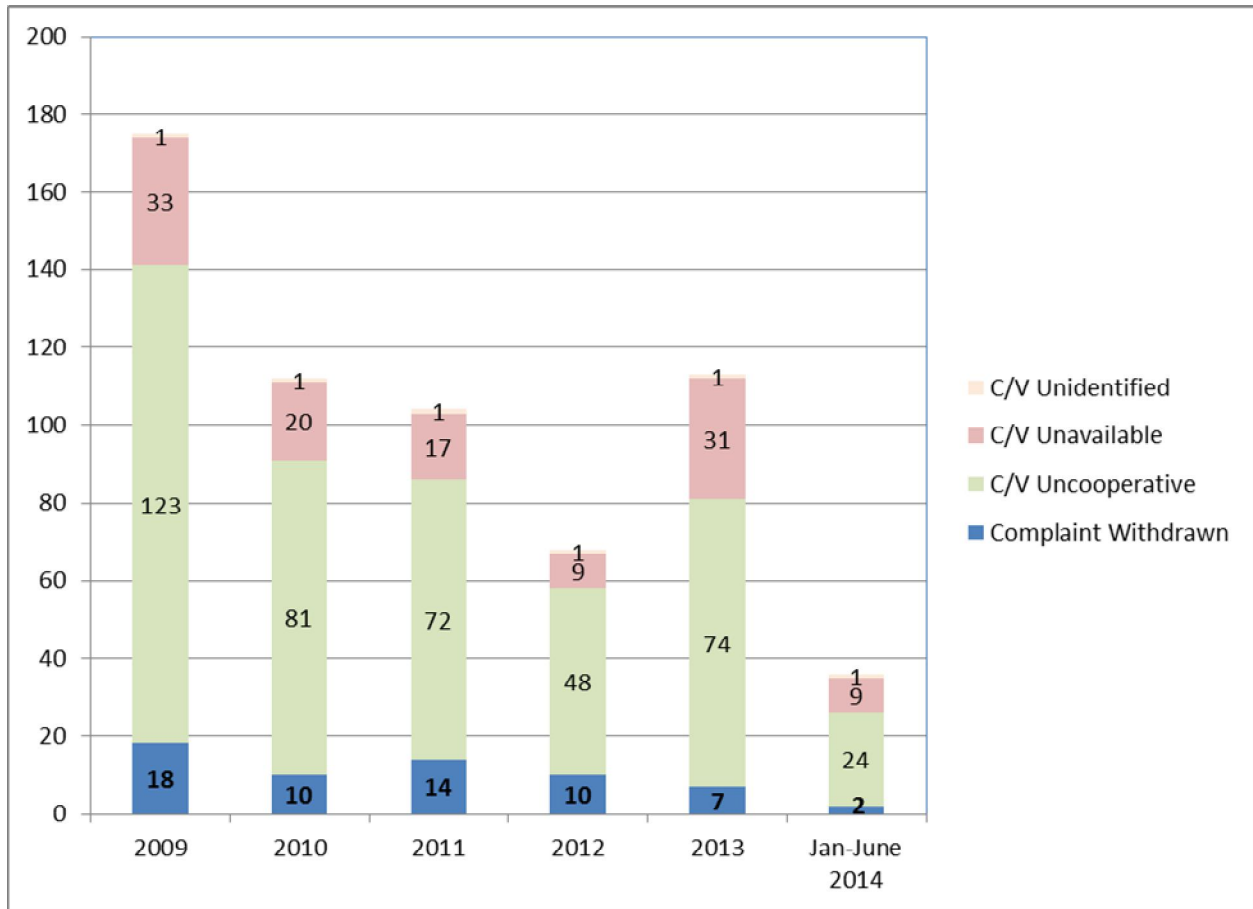
Chart 6.1: Chokehold complaints received as a percentage of total complaints received, with a trend line added, January 2009 – June 2014



## Disposition Activity

From January 2009 through June 2014, the CCRB investigated and disposed of 1,082 cases involving 1,128 chokehold allegations. The total number of fully investigated allegations was 520. During this period, 608 allegations could not be fully investigated. Chart 6.2 describes the number and disposition of allegations that were not fully investigated.<sup>91</sup>

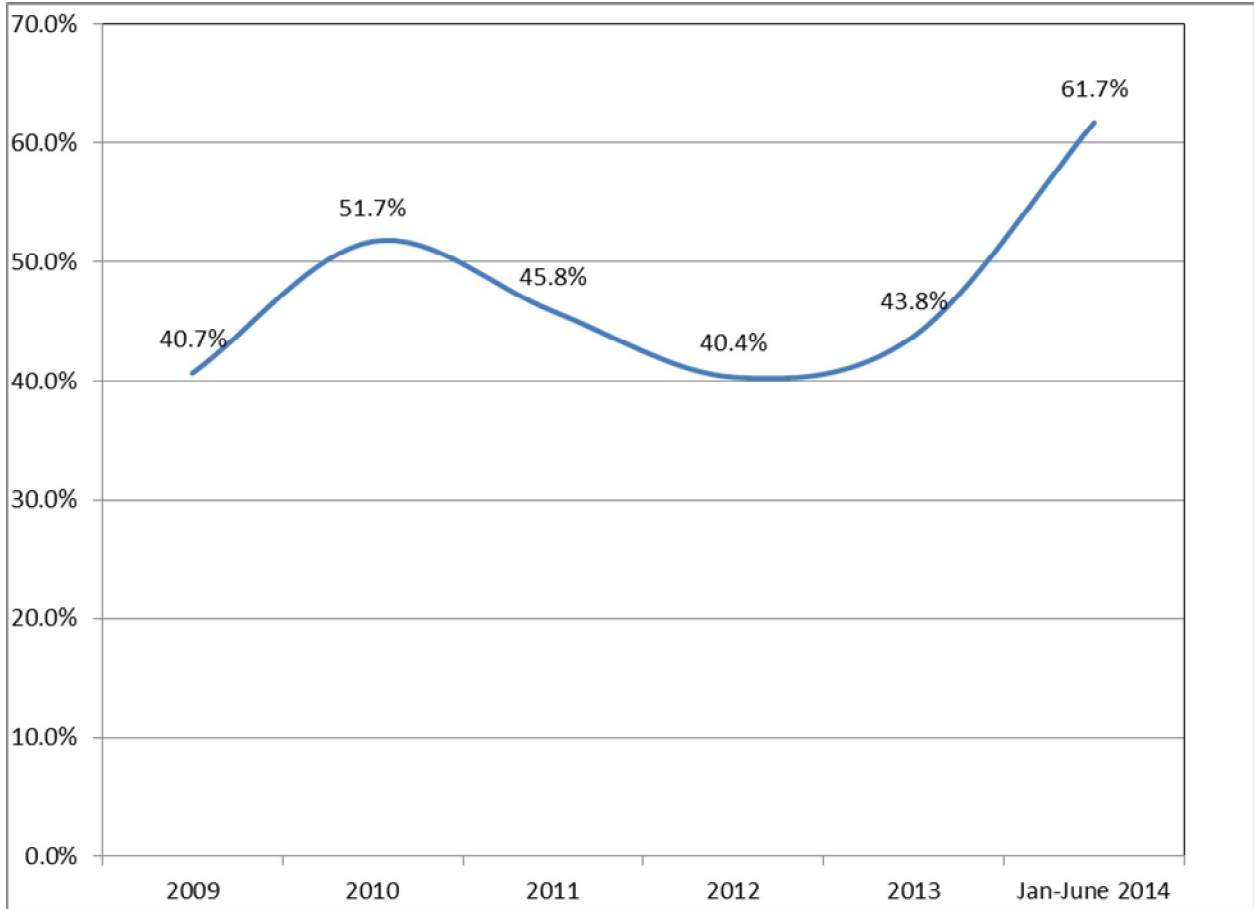
Chart 6.2: Disposition of not fully investigated allegations, January 2009 - June 2014



<sup>91</sup> No officer was exonerated for having committed a chokehold from 2009 through June 2014. Exoneration means that an officer was found to have committed the act alleged but the actions were determined to be lawful and proper by the Board. Since the Department bans chokeholds outright, none can ever be determined lawful and proper.

The rate at which chokehold allegations were fully investigated fluctuated from 40.4% in 2012 to 61.7% from January through June 2014. The average rate was 53.9%.

Chart 6.3: Rate at which chokehold cases are fully investigated, January 2009 - June 2014

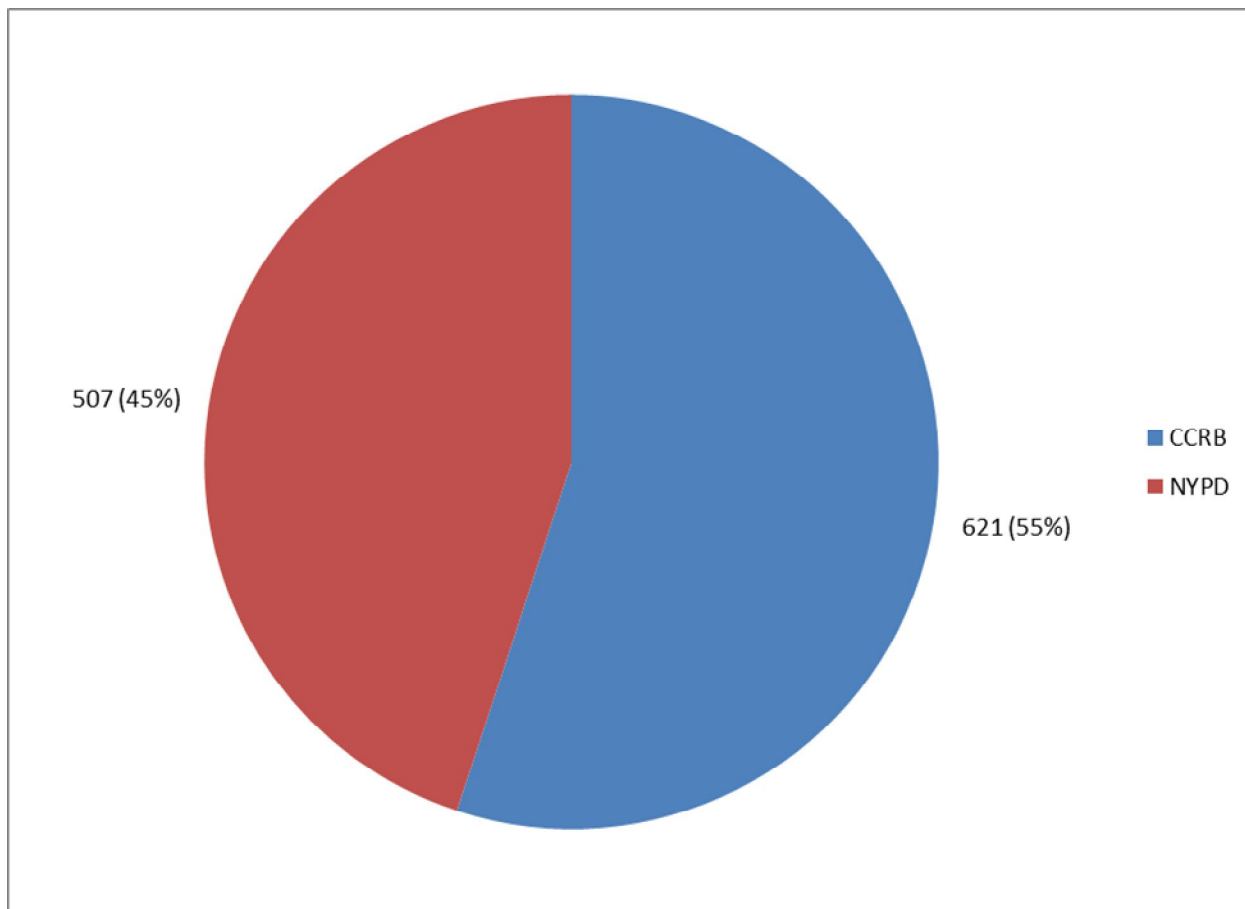


### Complaint and Incident Information

Chart 6.4 describes where the complaint was initially filed. A complaint can be filed with the CCRB directly or with the Police Department. If filed with the NYPD, the Department refers it to the CCRB based on joint protocols. This chart shows that, from January 2009 through June 2014, 55% of all chokehold allegations were filed directly with the CCRB and 45% of chokehold allegations were initially filed with the Police

Department and referred to the CCRB. During this period, 58% of all (non-chokehold) complaints were filed directly with the CCRB and 42% were filed with the Police Department.

Chart 6.4: Where chokehold complaints were initially filed, January 2009 - June 2014



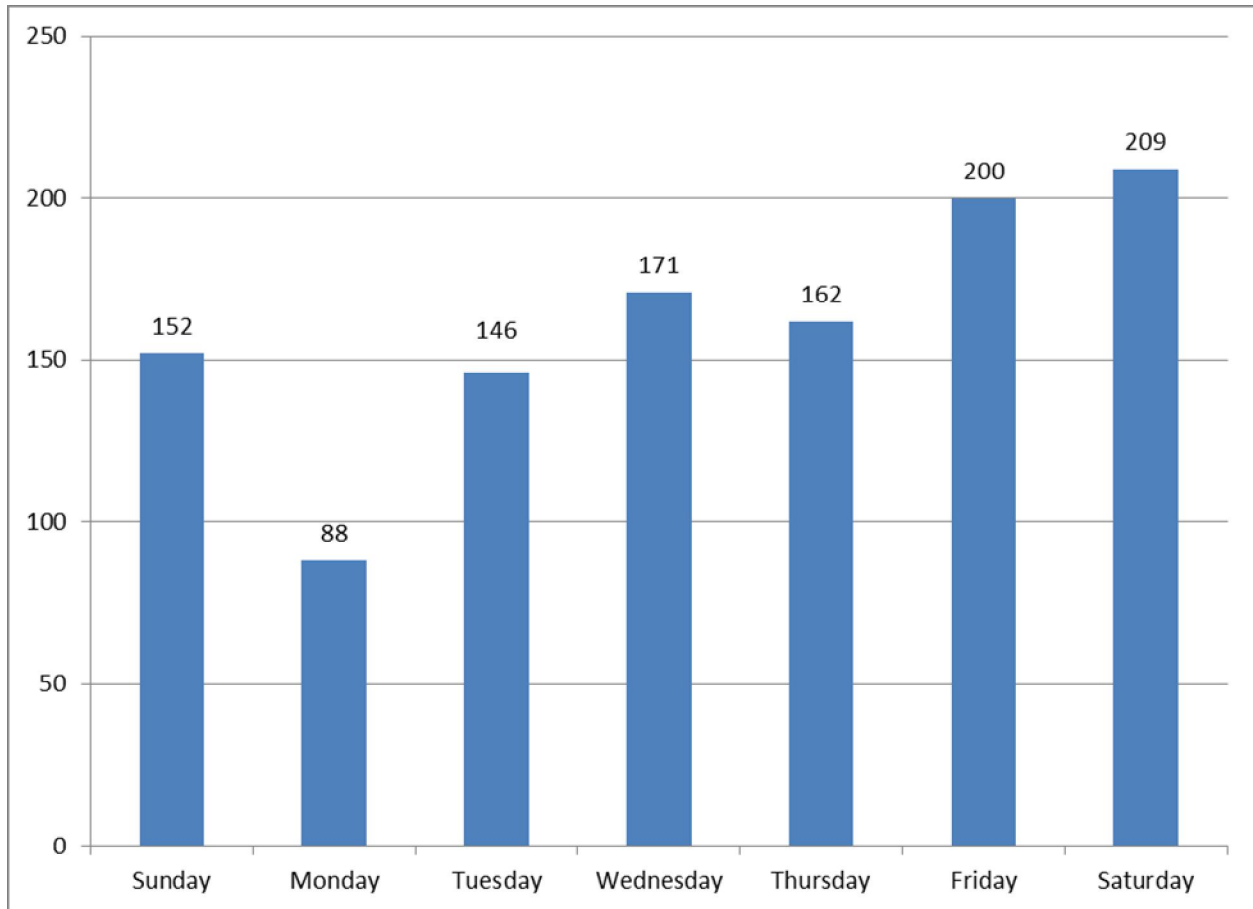
Based on the findings of a chi-squared test, the hypothesis that the Police Department would withhold and not transfer chokehold incidents to the CCRB is discarded. From a statistical perspective, the Police Department has referred chokehold cases that come to the attention of the Department within the values expected. There is no statistical evidence that the Department is not following established protocols and not forwarding chokehold complaints it receives.

Charts 6.5 through 6.8 analyze the dates and times of incident. Chart 6.8 shows the day of week where alleged chokehold incidents were most frequent. Chokehold

incidents were two times or higher more likely to occur on either on a Friday (200 incidents) or a Saturday (209 incidents) than on a Monday (88 incidents).

The available data shows that 36.3% of all chokehold complaints occurred on a Fridays and Saturdays. By comparison, for this period, 31.9% of all CCRB complaints were filed on Fridays and Saturdays.

Chart 6.5: Day of the week when alleged chokehold incidents occurred, January 2009 - June 2014

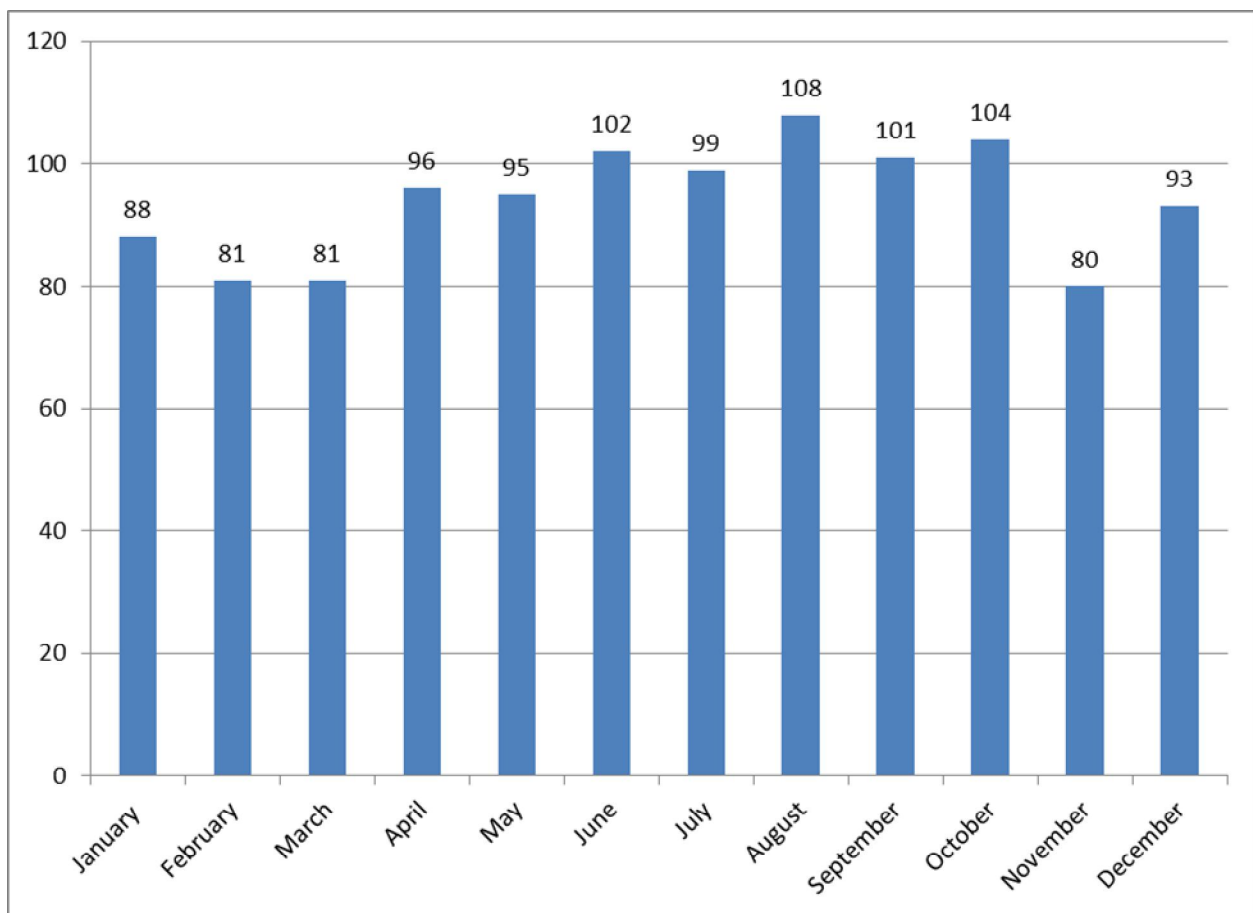


The study finds a strong correlation (.884, significant at the 0.01 level, 2-tailed) between the day of the week chokehold incidents occurred and the day of the week other complaints occurred, suggesting that chokehold incidents occurred when there was greater police activity that generated greater complaint activity generally.

There is also an indication that chokehold activity is slightly higher than statistically expected for Fridays and Saturdays and this finding deserves further consideration and discussion with the Police Department.

By month of incident, Chart 6.6 shows that alleged chokehold incidents were more frequent from June to October, with the highest activity level in August, than they were in the remaining months of the year. Alleged chokehold incidents were less frequent in February and March.

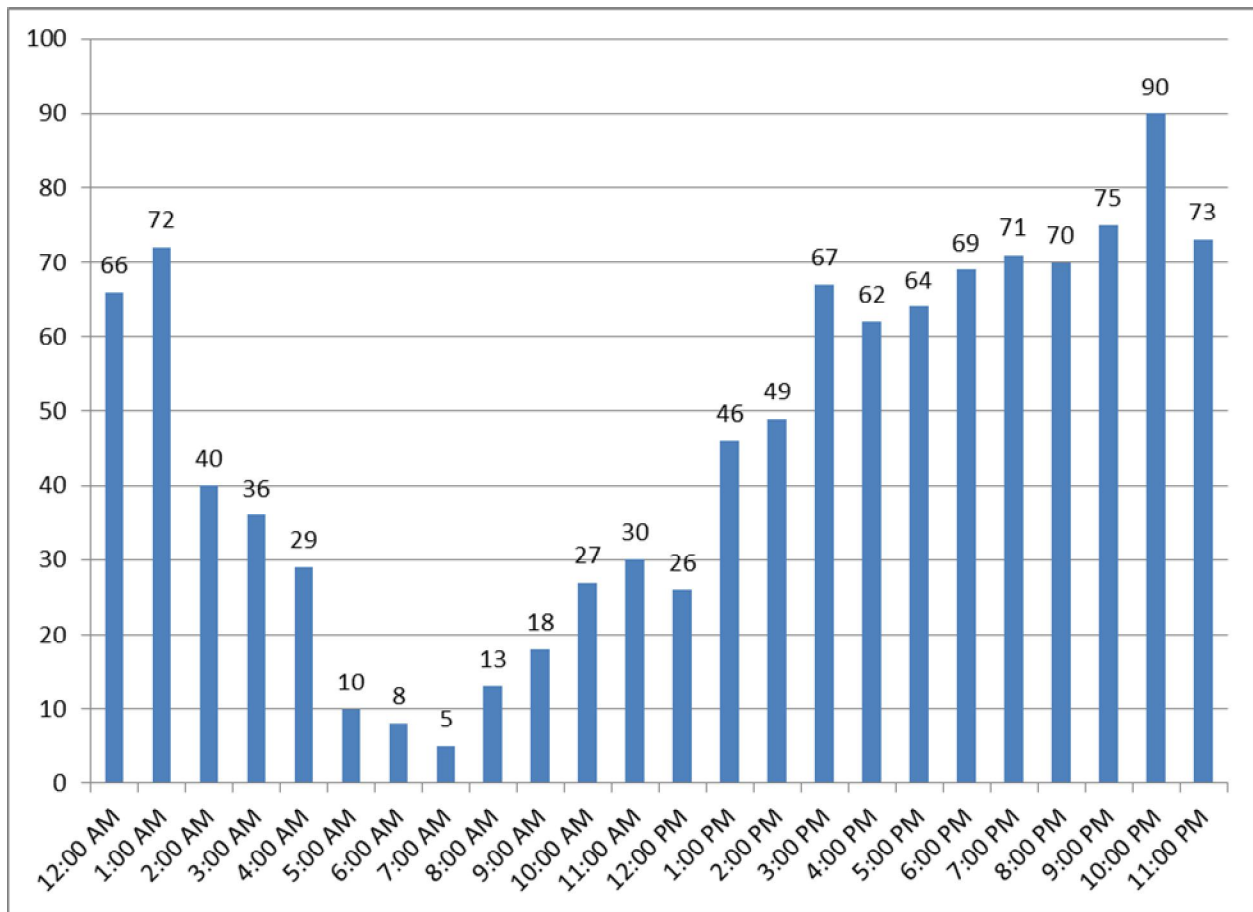
Chart 6.6: Month when alleged chokehold incidents occurred, January 2009 - June 2014



There is no correlation (.162) between the months chokehold incidents occurred and the months other complaints occurred. There is an indication that chokehold incidents are more likely to occur in the warmer than in the colder months of the year.

By the time of incident, Chart 6.10 shows that alleged chokehold incidents were most frequent between the hours of 7:00 PM and 2:00 AM. Chokehold incidents were the least frequent between the hours of 4:00 AM and 1:00 PM. The most frequent time of the day was between 10:00 PM and 10:59 PM with 90 chokehold incidents. The least frequent time was between 7:00 AM and 7:59 AM with 5 chokehold incidents. By comparison, 46.3% of all chokehold incidents occurred between 7:00 PM and 2:00 AM while 41.3% of all other complaints occurred within that time frame.

Chart 6.7: Time of the day when alleged chokehold incidents occurred, January 2009 - June 2014

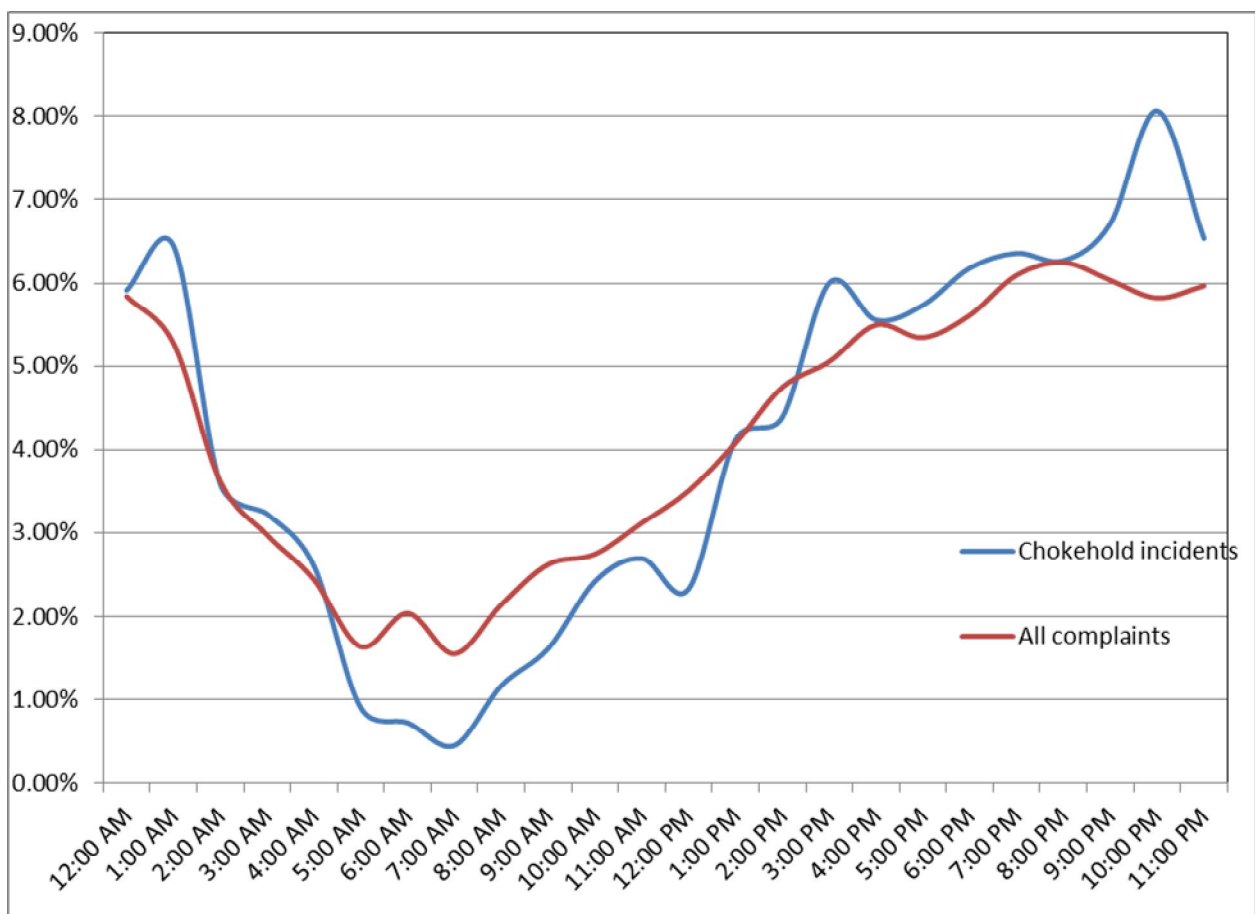




The study finds a strong correlation (.964, significant at the 0.01 level, 2-tailed) between the time chokehold incidents occurred and the time other complaints occurred suggesting that chokehold incidents occurred during the time of the day when there is greater police activity that generates complaint activity.

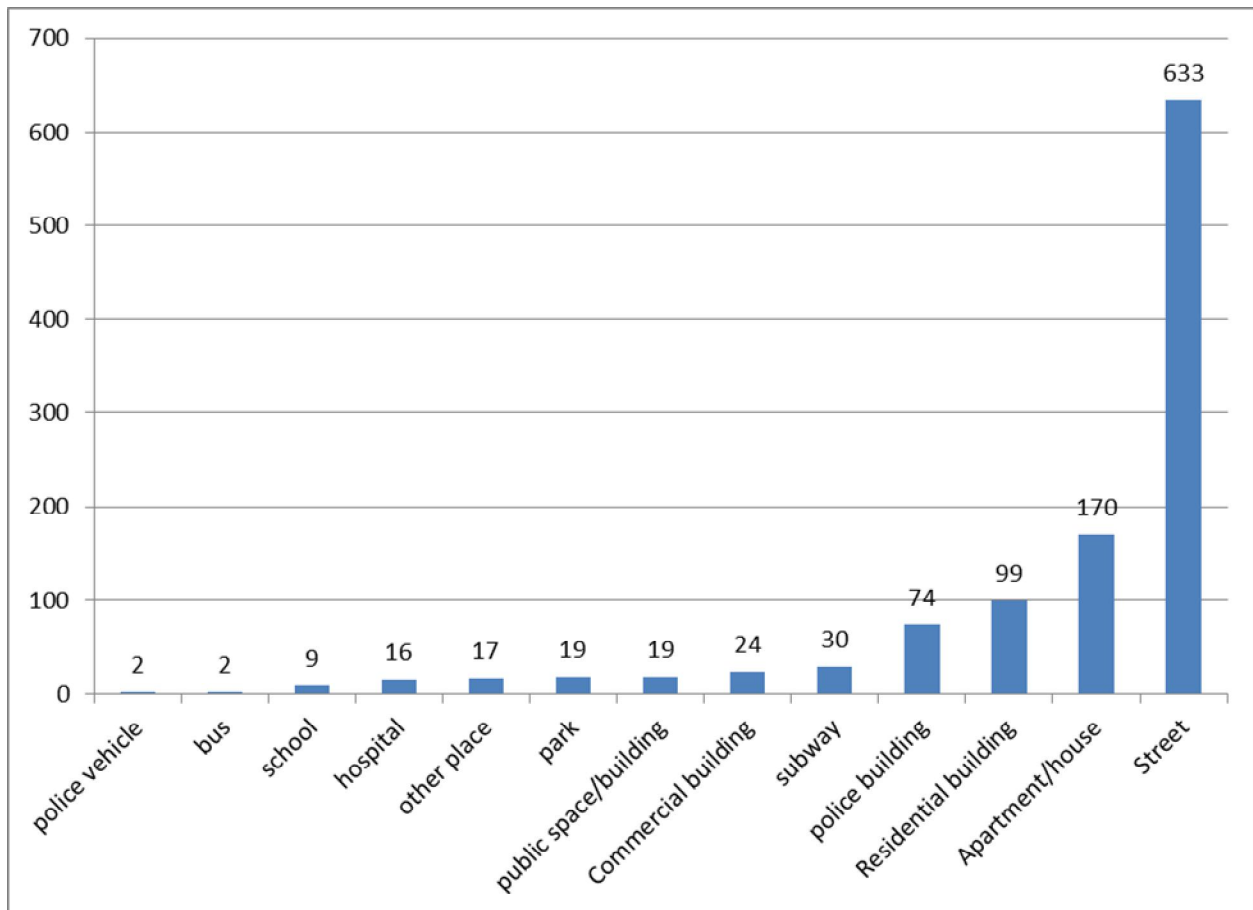
However, there is no clear statistical explanation as to why there are more alleged chokehold incidents between 10:00 PM and 10:59 PM, both in absolute terms and in relation to all complaints filed. (See Chart 6.8) This fact merits further discussion with the Police Department to compare these findings with enforcement activity and personnel deployment information.

Chart 6.8: Time of the day when alleged chokehold incidents occurred versus all incidents, January 2009 - June 2014



The location of the incident also shows a high correlation (.998, significant at the 0.01 level, 2-tailed) between chokehold complaints and other type of complaints. From January 2009 through June 2014, 56.1% of all chokehold incidents occurred on a street or highway, 23.8% in a house, apartment or residential building, and 6.6% occurred at a police building. (See Chart 6.9)

Chart 6.9: Location where alleged chokehold incidents occurred, January 2009 - June 2014



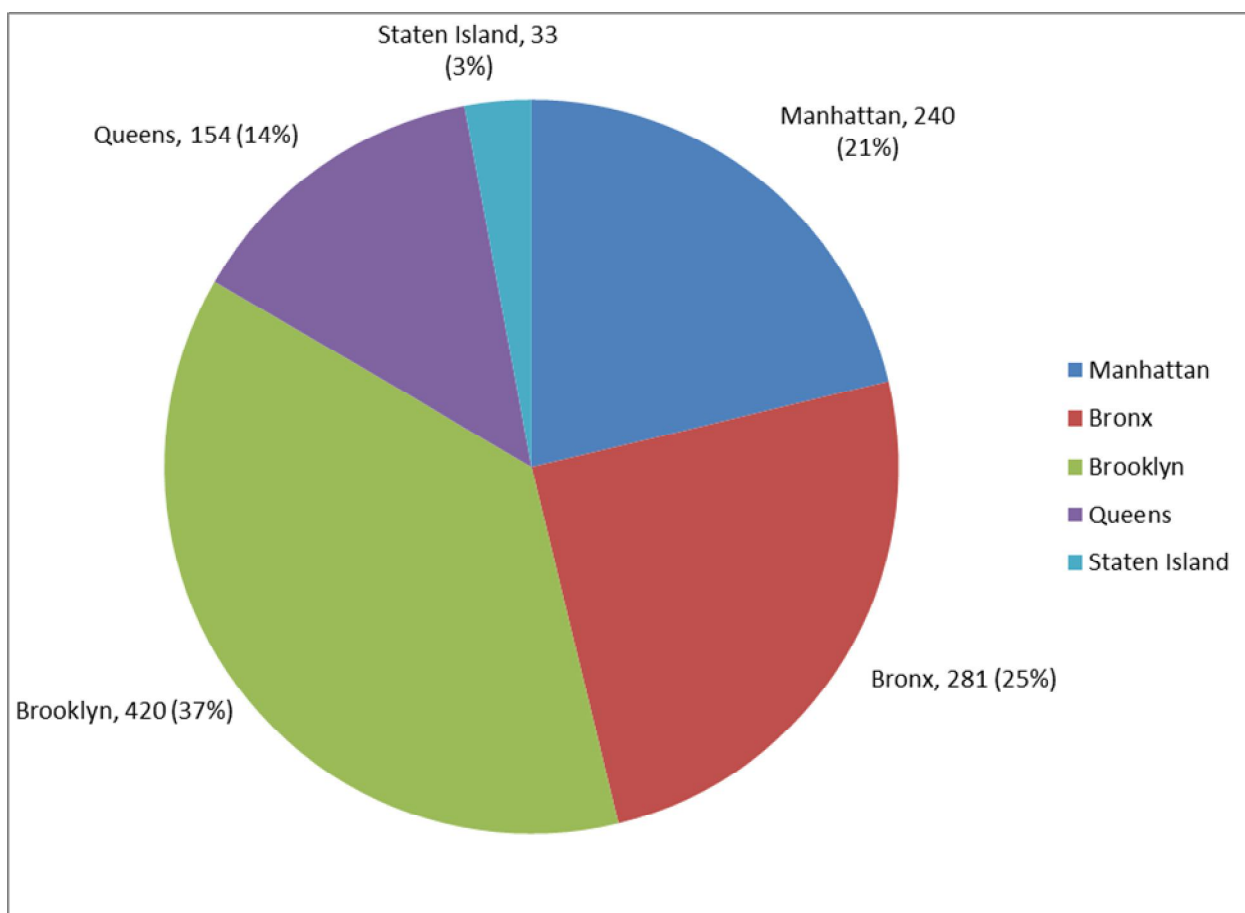
In Chart 6.10, we look at the borough of occurrence of the incident. It is important to distinguish between the borough of occurrence and the command assignment of the subject officers: one measures the geographic area where the complaint occurred, and the other the command to which the officer is assigned.

Chart 6.10 shows that Brooklyn had the most complaints filed within the confines of a borough, 34.4%, and also had the most chokehold complaints, 37.2%.

Manhattan had more complaints in general, 23%, than chokehold complaints, 21.3%; while the situation was the reverse in the Bronx with 23.5% of all complaints but 24.9% of all chokehold incidents.

Both Queens and Staten had a lower percentage of chokehold complaints than overall complaints, 13.7% vs. 15% for Queens and 2.9% vs. 4.2% for Staten Island

Chart 6.10: Borough where the alleged chokehold incidents occurred, January 2009 – June 2014



Based on the information available in our database, the primary apparent reason for the civilian-police contact or encounter in the examined chokehold cases was the police

officer suspected that a civilian committed a violation or a crime. There were 563 such incidents, or 50% of all chokehold cases. The other prevalent reasons were reports of a crime, dispute or domestic dispute with 138 incidents, or 12%.

Reports of gun possession, shots fired, or sale of narcotics were relatively uncommon with 26 incidents. The presence of chokehold incidents in execution of search, bench or arrest warrants was also uncommon. There were 18 such alleged incidents.

There were a myriad of other reasons with numbers in double or single digits such as parades, demonstrations, traffic accidents, civilian requested information from an officer, or civilian was at a precinct to file a crime complaint.

Chart 6.11: Reason listed for civilian-police contact, January 2009 – June 2014

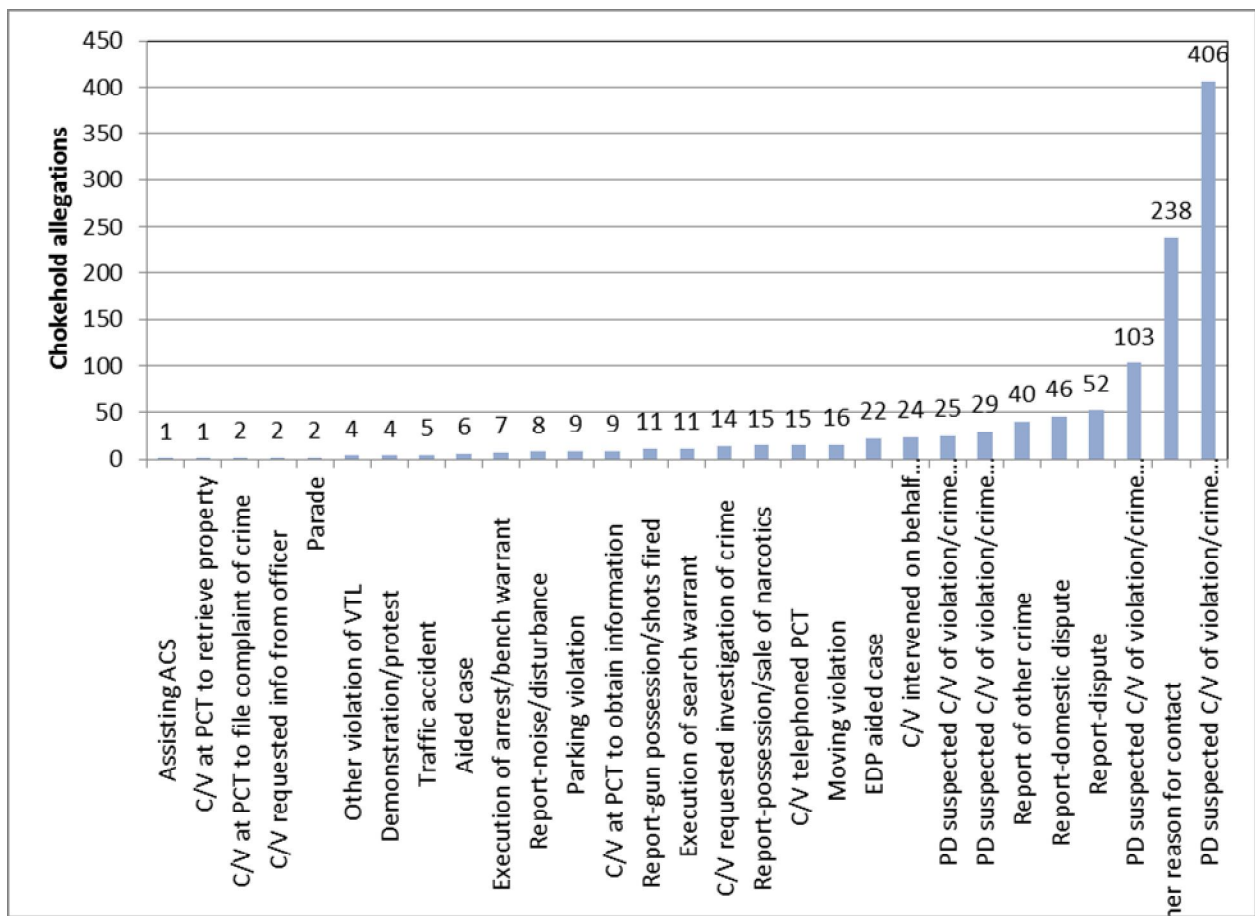
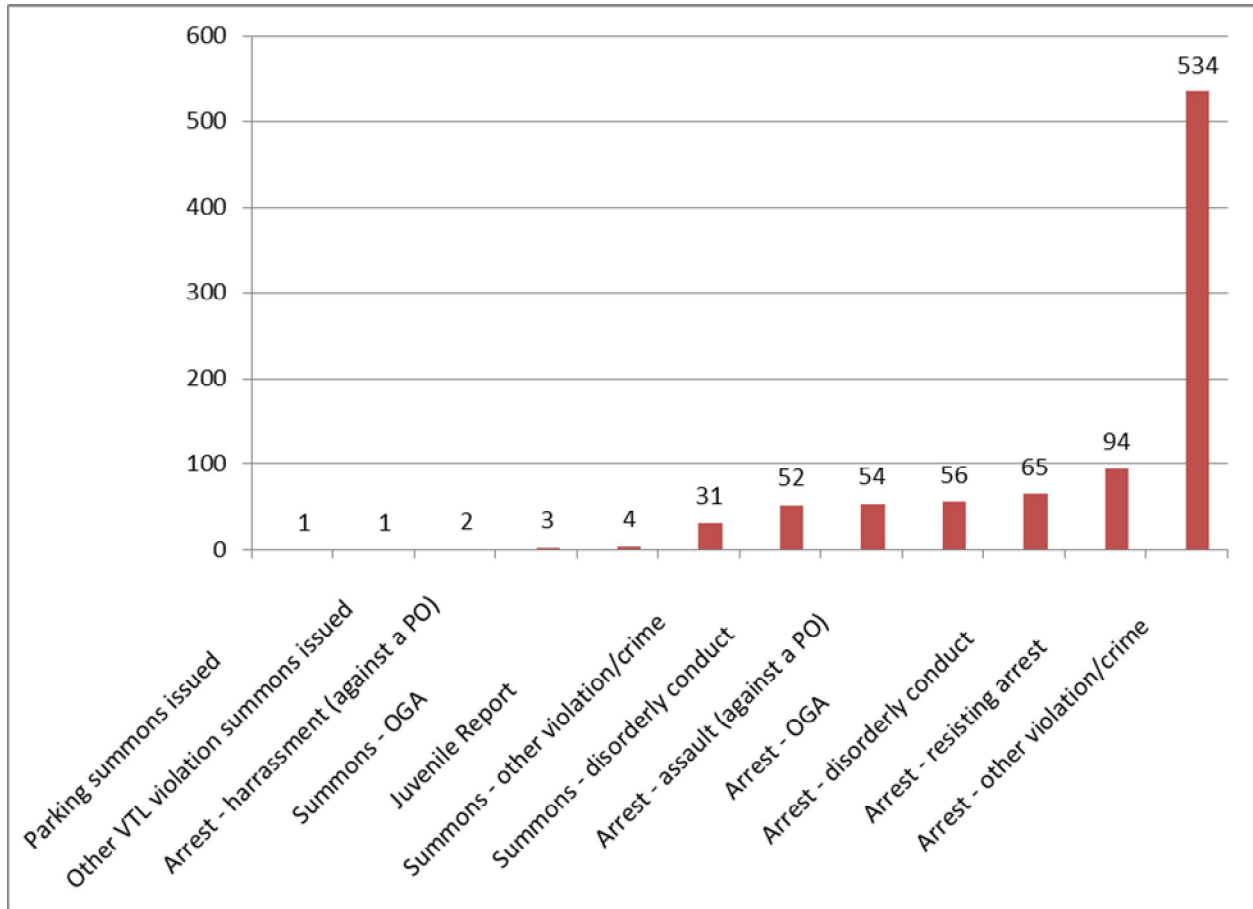


Chart 6.12 provides a detailed breakdown of the charges in all chokehold incidents as listed in the CCRB's database. The most frequent charges were arrests for a violation

or a crime in 534 chokehold incidents. There were also 94 incidents involving resisting arrest, 65 cases of arrest for disorderly conduct, 56 cases of arrest for obstruction of governmental authority (OGA), and 54 cases for assaulting an officer. The most frequent summons issued was a summons for disorderly conduct, with 52 incidents.<sup>92</sup>

Chart 6.12: Detailed charges and summonses information, January 2009 - June 2014



<sup>92</sup> In reviewing the case files in the chokehold incidents that are part of this study, it became evident that the CCRB needs to update its Complaint Tracking System (CTS) to better capture information about arrest reports and charges, including information about all charges present in the complaint, the charges associated with the specific complainant when multiple complainants exist, and, if available, the disposition of these charges. This information is available in the case file but is not always available in the database. The gathering of this information will generate more nuanced quantitative analysis which is needed for future research in this and other subjects.

In 6 instances out of 1,082 chokehold cases the complainant stated that she was the subject of racial profiling, or .5% of all chokehold incidents.

Charts 6.13 and 6.14 examine whether or not additional allegations were made, in particular allegations of force.

By looking at the type of allegation in these chokehold incidents, there were 1,994 additional allegations of force. They included 1,458 allegations of physical force (i.e., push, punch), 197 allegations of nightsticks or other objects used as clubs, 128 pepper spray, 78 gun pointed, 72 hit against inanimate object, 29 handcuffs too tight, 17 nonlethal restraining device (including TASER), 9 forms of force categorized as "other," 4 vehicle, 1 police shield, and 1 gun fired.

There were also 1,407 allegations of abuse of authority, including 209 allegations of threat of force, 71 refusals to obtain medical treatment, and 26 guns drawn. Furthermore, there were 846 allegations of discourtesy and offensive language.

The CCRB also noted 126 allegations of Other Misconduct Noted (OMN) that fall within the Police Department jurisdiction and were referred to the Department for discipline. There were 104 allegations of failure to prepare a memo book entry, 12 allegations of failure to produce stop-and-frisk report, 2 failures to document a strip search, 1 allegation of false official statement and 6 allegations of other misconduct.

Chart 6.13: Allegations of misconduct in chokehold cases, January 2009 – June 2014 (50 or more allegations)

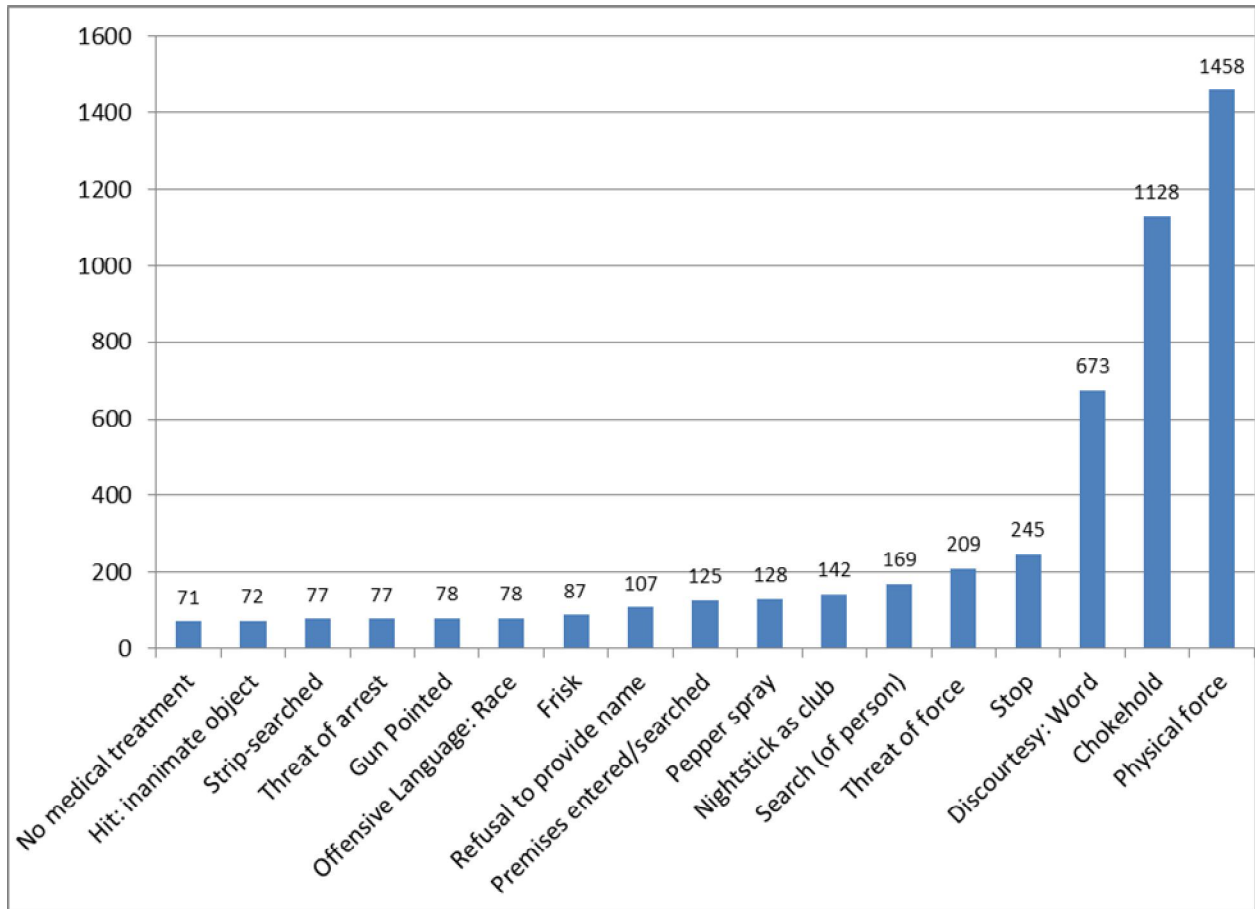


Chart 6.14: Allegations of misconduct in chokehold cases, January 2009 – June 2014 (49 or fewer allegations)

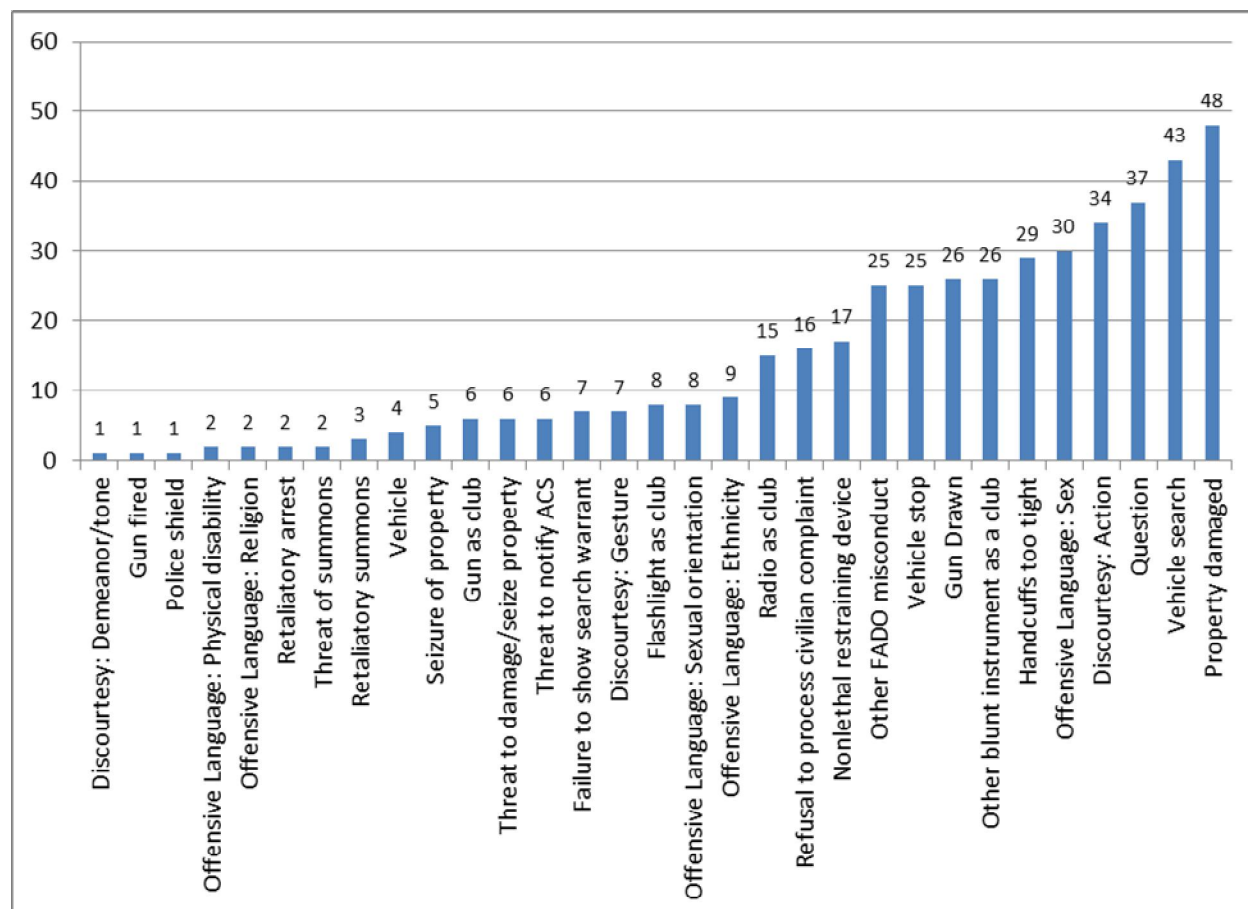


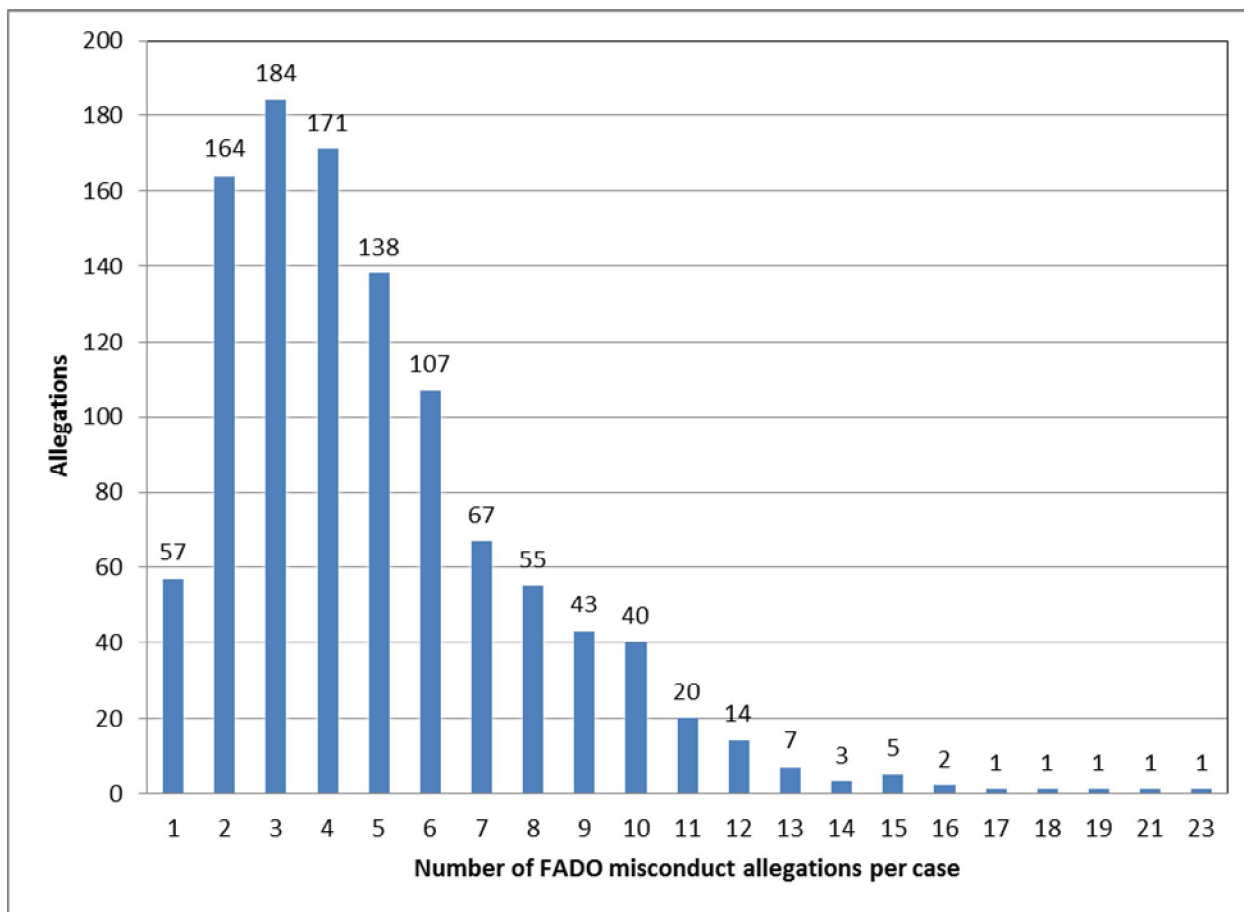
Chart 6.15 shows that the vast majority of chokehold incidents investigated involved multiple allegations.

The statistics show that an allegation of chokehold was the sole allegation made in 57 out of 1,082 cases. This was 5% of all chokehold complaints. In 43 out of these 57 cases, the case was truncated and a full investigation was not completed. In 14 cases a full investigation was conducted with the chokehold incident as the only act of alleged misconduct.



There were 1,025 investigations of chokehold incidents with multiple allegations, or 95% of all incidents. Approximately, two-thirds of these cases had four or more allegations and one-third of cases had six or more allegations.

Chart 6.15: Total allegations of misconduct in chokehold cases, January 2009 – June 2014

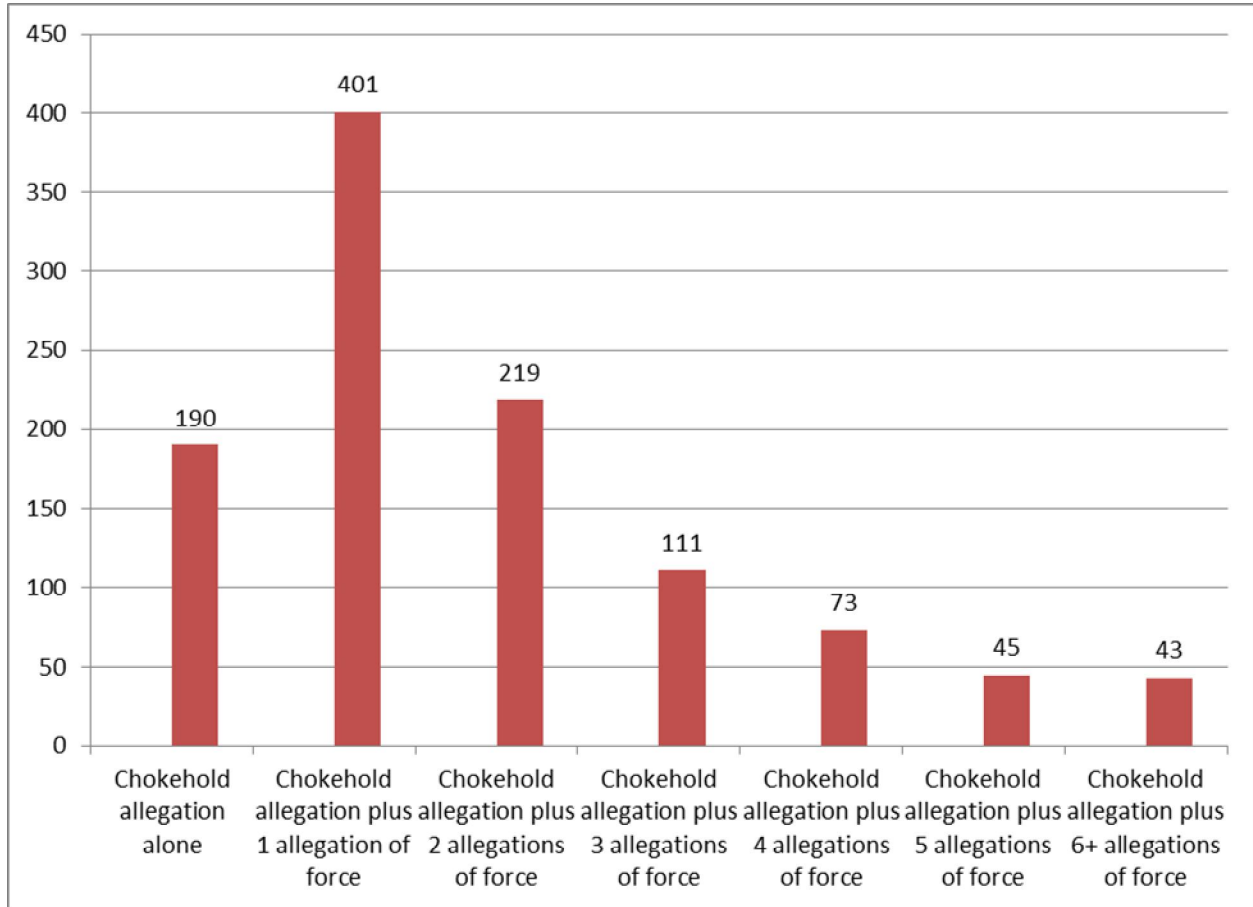


In 190 instances, a chokehold allegation was the only allegation of force pled in the complaint, or 17.5% of all chokehold cases. (Of these 190 cases, 72 cases were fully investigated and 118 cases were not fully investigated suggesting that additional allegations might have been added if a full investigation had been completed).

In 892 cases, 83.5% of chokehold incidents, additional force allegations were pled with the chokehold allegation. Of these 892 cases, there were 401 cases with one additional

force allegation (45%), 219 with two (24.6%), 111 with three (12.4%), 73 with four (8.2%), 45 with five (5.0%) and 43 with six or more additional force allegations (4.8%).

Chart 6.16: Number of force allegations in chokehold cases, January 2009 - June 2014



## Complainant's Information

From January 2009 through June 2014, the CCRB investigated and resolved 1,082 cases involving 1,128 chokehold allegations containing 1,147 complainants. There were rare cases in which the chokehold allegation contained two or more complainants and these allegations were not pled separately.<sup>93</sup> This demographic information is discussed in detail here.

There were 699 people who were listed in the database as “complainants/alleged victims” (meaning that they filed the complaint themselves) and 448 persons that were listed just as “alleged victims” (meaning that someone filed the complaint for them). In CCRB parlance, a complainant is the person who filed the complaint who can be anyone who witnesses or experiences alleged police misconduct while an alleged victim is the person who experienced the alleged act of misconduct regardless of whether s/he filed the complaint. In this report, we use the term complainant to refer to both categories.

Chart 6.17 shows that both males and females are complainants of alleged chokeholds but the frequency varies greatly by gender. There were 925 complainants who were male (83%) and 192 complainants who were female (17%). In 30 instances, the gender was unknown or not provided. When compared to demographic data for all complaints, 71% of complainants were male and 29% were female.

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<sup>93</sup> Allegations against two or more individuals should not be combined because allegations of misconduct involve the alleged actions of a particular officer against a particular complainant. If an officer chokes two civilians, they are two distinct acts of misconduct. This means that the number of total allegations was slightly undercounted.

Chart 6.17: Gender of complainants in chokehold incidents, January 2009 - June 2014

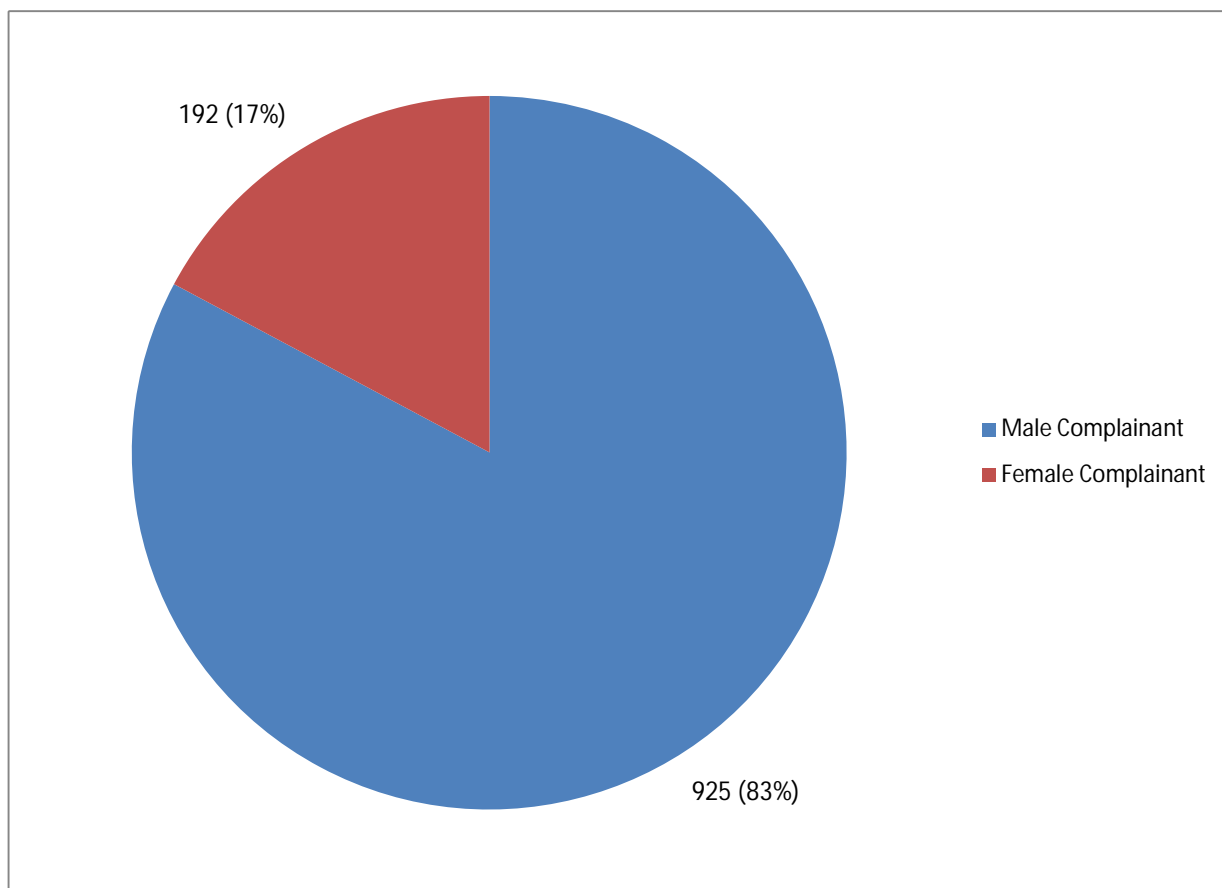


Chart 6.18 analyzes the relationship between chokehold incidents and the race and/or ethnicity of the complainants in chokehold incidents. The information about the complainant's race and/or ethnicity is from complainants' self-identification. This information was not provided to the CCRB in 245 instances. The chart shows that members of all racial and ethnic groups complained about alleged chokeholds but the frequency varies greatly by group.

Of the 902 instances in which the race and ethnicity information was available, there were 570 complainants who self-identified as black (63.2%), 231 as Hispanics (25.6%), 73 as whites (8.1%), 11 as Asians (1.2%), 1 as Native American (0.1%) and 16 as members of other races and/or ethnicities (1.8%). Data from all CCRB complaints show that 56.9% of all complainants were black, 25.8% were Hispanic, 12.3% were white,

2.3% were Asians, .2% were Native Americans and 2.5% were members of other racial and/or ethnic groups.

Chart 6.18: Race of complainants, January 2009 - June 2014

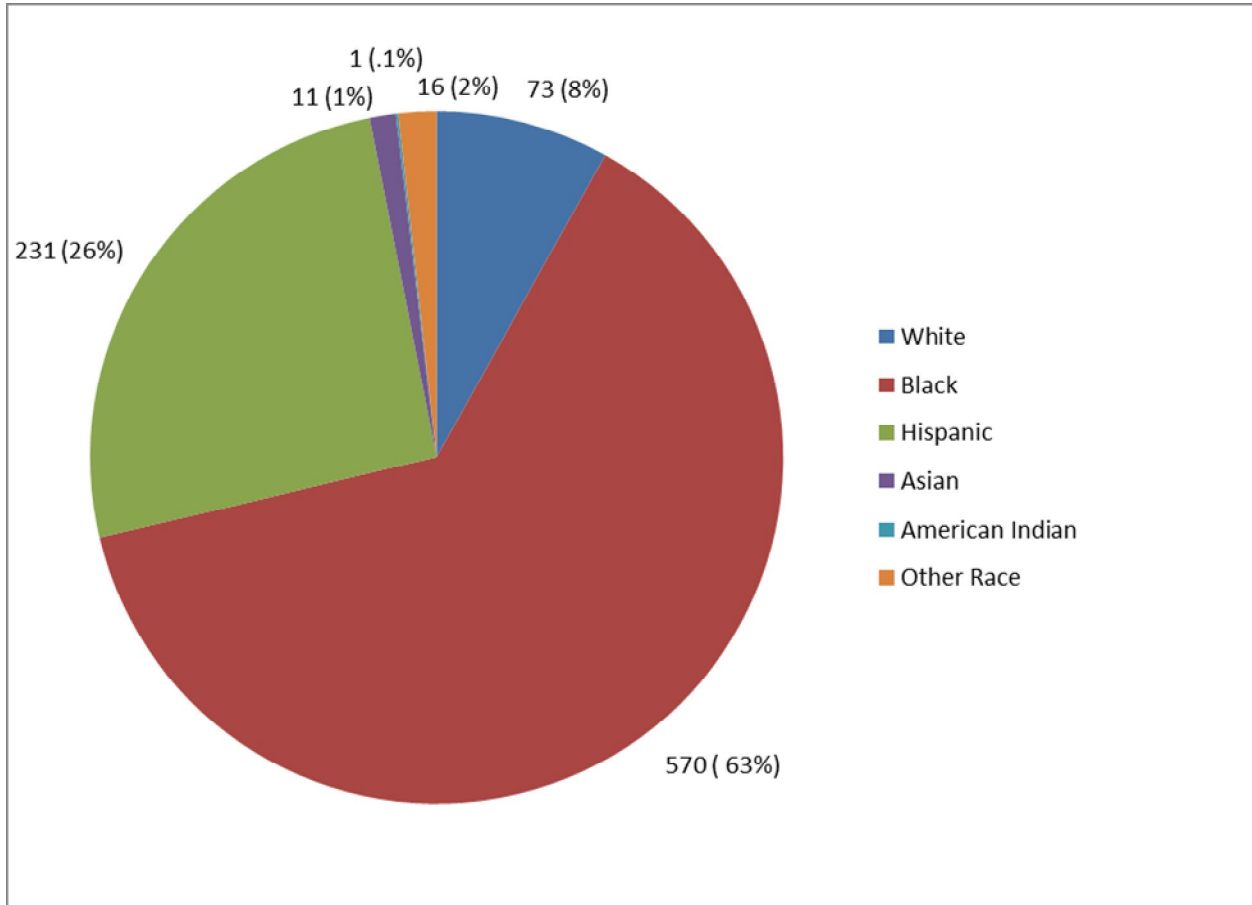
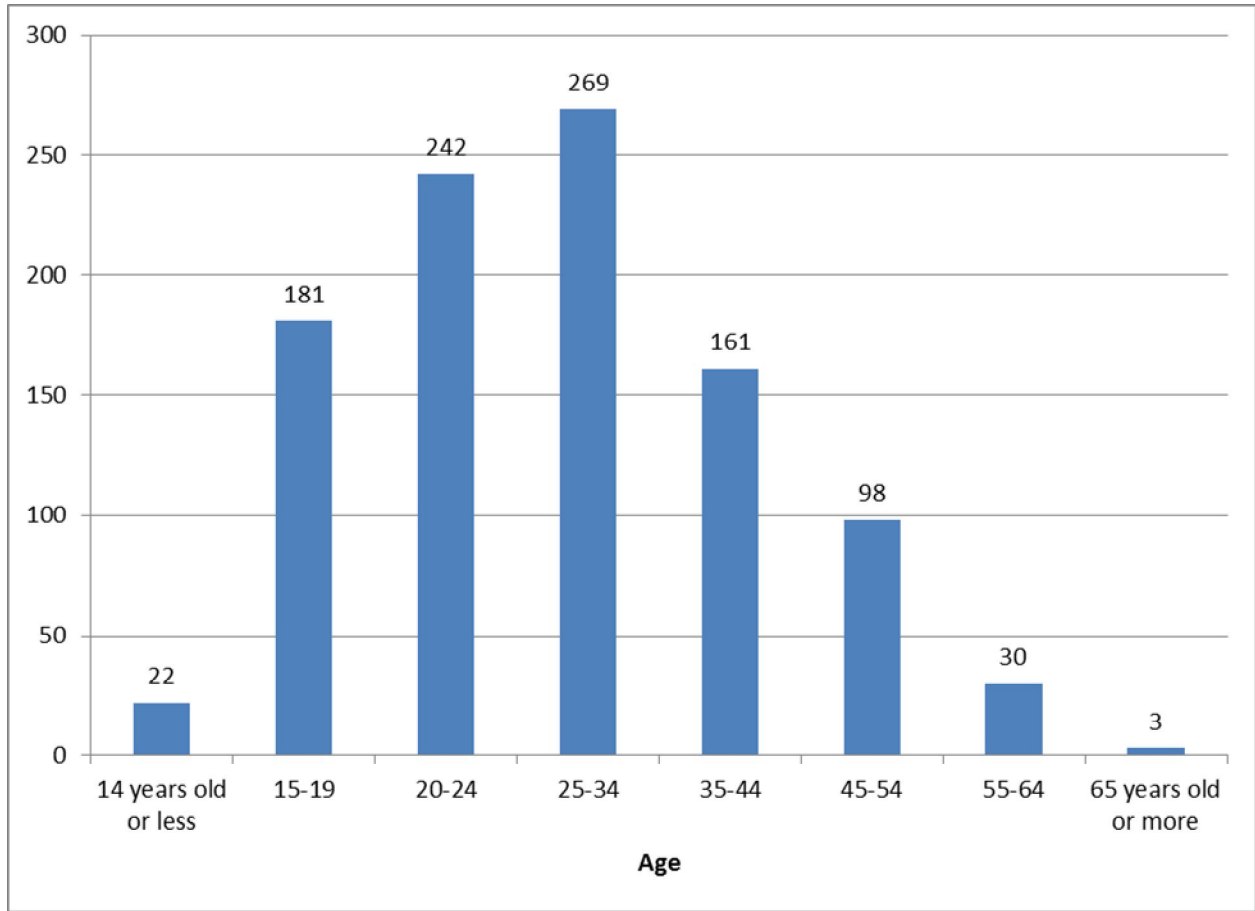


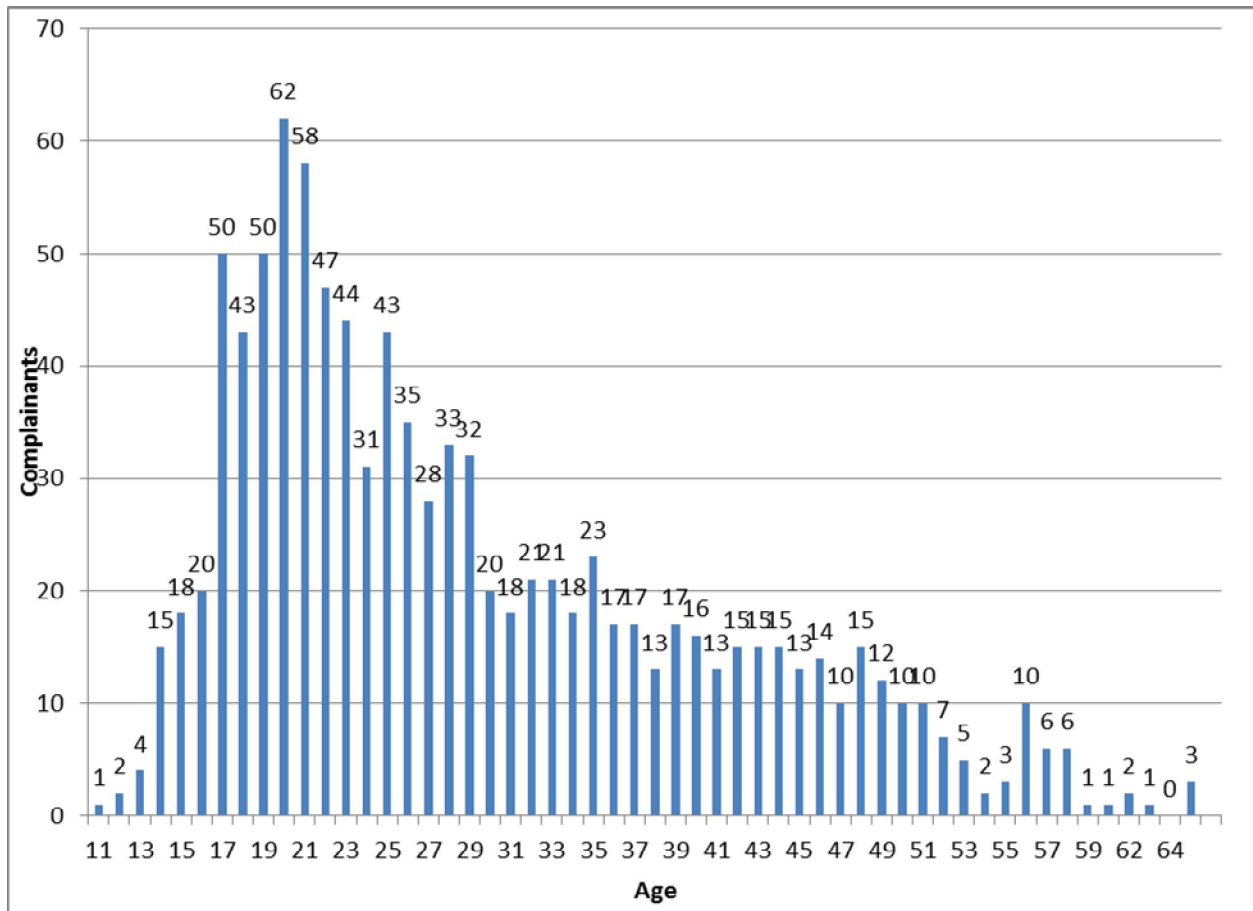
Chart 6.19 describes the relationship between chokehold incidents and the age of the complainants. The information was not available in 175 instances.

Of the 1,006 cases in which the age was available, there were 22 complainants that were 14 years old or younger, 181 complainants between the ages of 15 and 19 years old, 242 complainants between the ages of 20 and 24 years old, 269 between the ages of 25 and 34 years old, 161 between the ages of 35 and 44 years old, 98 complainants between the ages of 45 and 54, 30 between the ages of 55 and 64 and 3 complainants who were 65 and older. More than two thirds of complainants were between the ages of 15 and 34 years old, with approximately one quarter of all complainants between the

ages of 20 and 24 years old. The percentage of complainants between the ages of 15 and 24 years old was 42% of all complainants. The peak years were between 19 and 21 years old with more than 50 complainants in these categories.

Chart 6.19: Age of complainants, January 2009 - June 2014





A table cross-referencing race and age, which is known statistically as a cross-tabulation, shows that there was no difference in the racial distribution of complaints filed by people between the ages of 15 and 24 years old. Whites and blacks between the ages of 15 and 24 years old were 42% of all white and black complainants, respectively. There was a slight difference with Hispanics between the ages of 15 and 24 who were 41% of all Hispanic complainants.

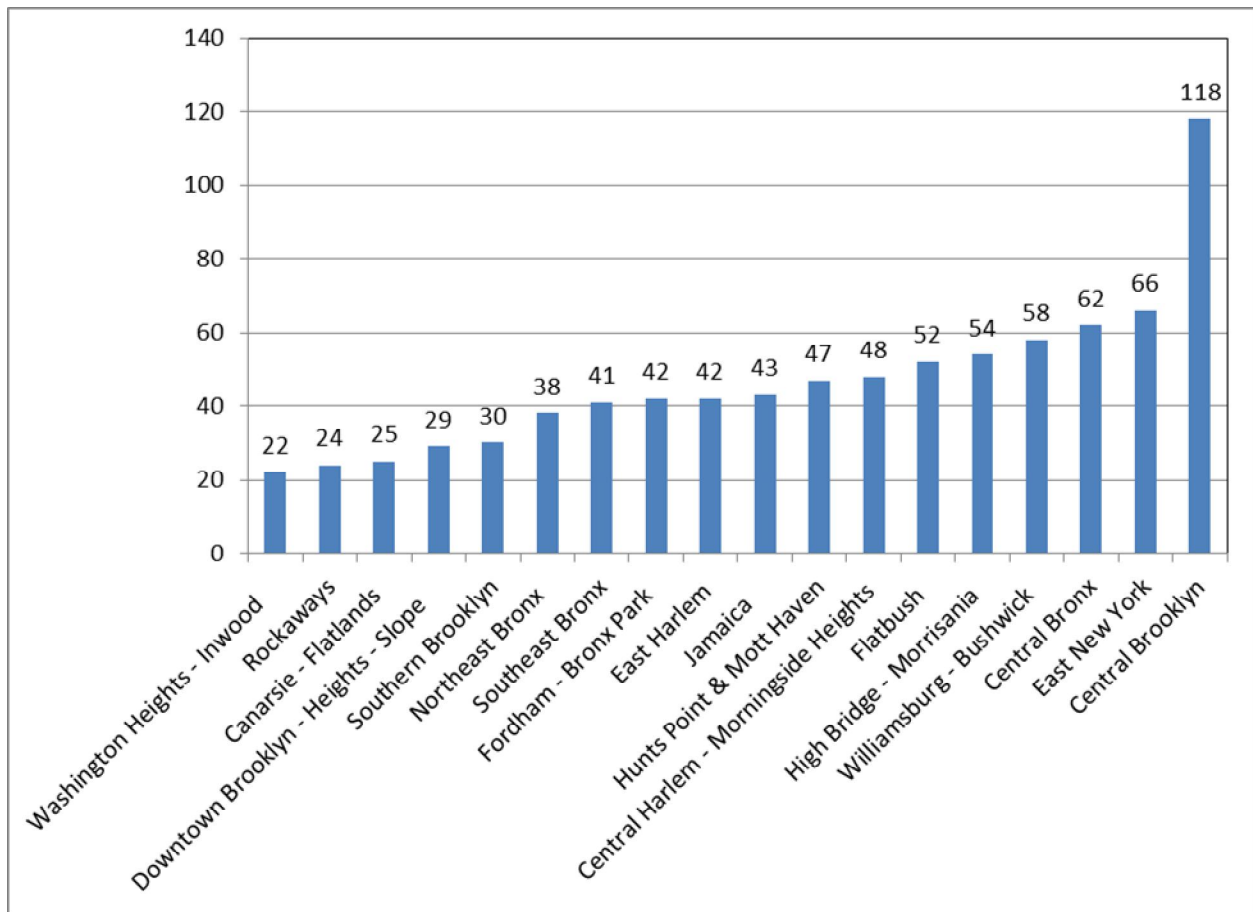
The percentage of complainants between the ages of 25 and 34 years was 27% of all chokehold complainants. There was a slight upward difference for whites in this age group, 29.5%, and a slight downward difference for Hispanics in this age group, 24.5%. 27% of blacks were in this age category.

The only noticeable deviation from the pattern that there was no age difference by race groups was in the 45 to 54 years old category that was 9.7% for all races. The data

shows that 9.6% of all blacks were in this age group, 10.2% of all Hispanics and 14.1% of all whites.

Charts 6.20 and 6.21 show the residence of the complainants, based on the zip code information provided to the CCRB.

Chart 6.20 Residence of complainants, by zip code, January 2009 – June 2014 (21 or more)

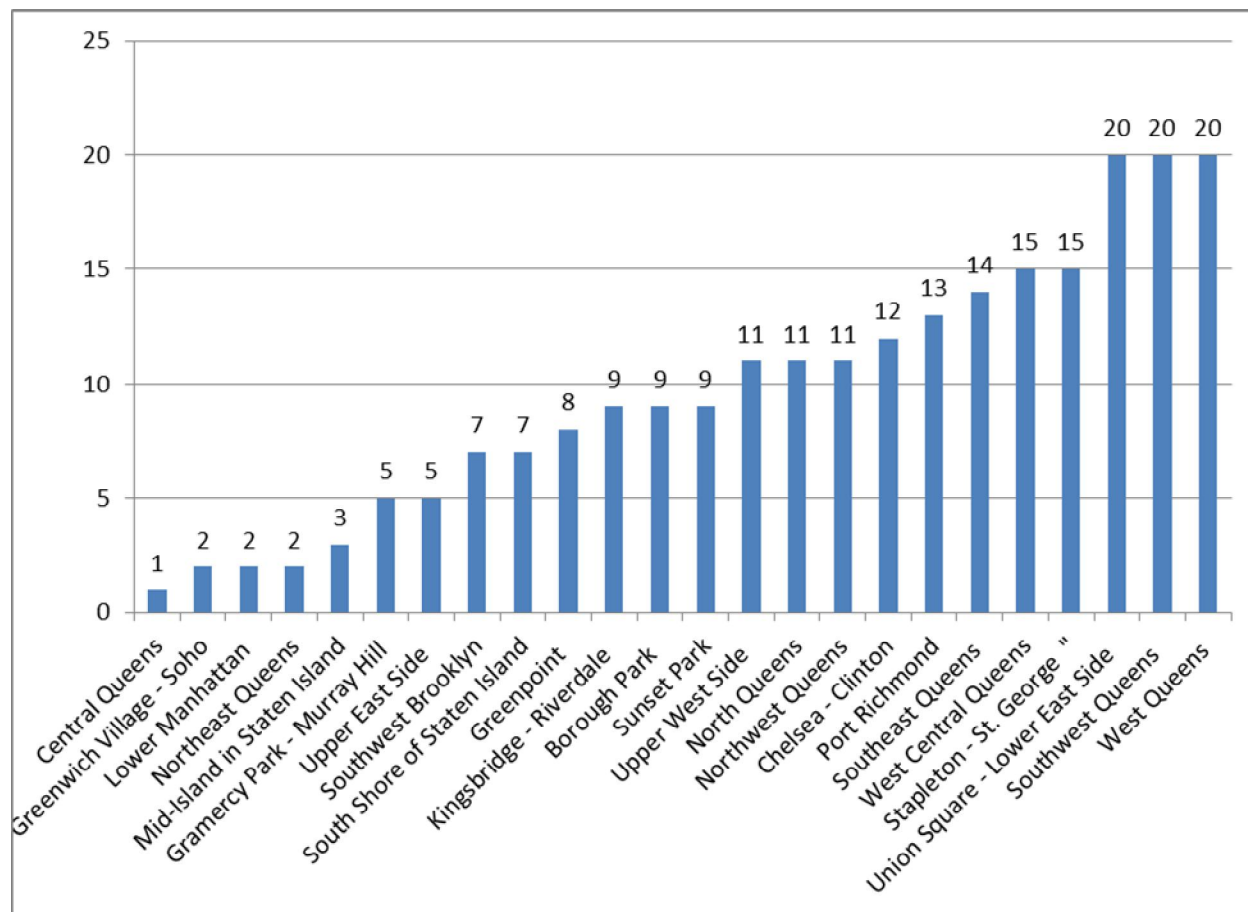


There were 118 complainants that listed their residences in Central Brooklyn, Bedford-Stuyvesant and Crown Heights; 66 complainants listed East New York of Brooklyn; 62 complainants listed Central Bronx.



Seven neighborhoods provided 5 or fewer complainants: Central Queens with 1; Greenwich Village-Soho, Lower Manhattan and Northeast Queens with 2; Mid-Island of Staten Island with 3; and Gramercy Park and Upper East Side of Manhattan with 5.

Chart 6.21 Residence of complainants, by zip code, January 2009 – June 2014 (20 or fewer)



By the borough of residence, the results are as follows: 411 complainants listed their residence in Brooklyn, 293 in the Bronx, 169 in Manhattan, 161 in Queens, and 38 in Staten Island.

Based on the information provided to the CCRB, in most instances complainants of chokehold did not retain an attorney. However, there were 101 complainants that retained an attorney, or 8.8% of all complainants.

The information in the CCRB's database pertaining to civil lawsuits against the City of New York stemming from these chokehold incidents is incomplete. The review of the sample of 53 cases shows that in approximately one-fourth of these cases there was a notice of claim related to the incident, although the notice of claim did not necessarily mention the chokehold incident.

### Subject Officer Information

Of the 1,128 chokehold allegations, there were 552 allegations where the officer was not identified (49%). In most instances, the officer was not identified because the entire case was not fully investigated and, hence, the specific subject officer of the allegation remained unidentified. Of the 552 allegations against unidentified officers, there were 439 allegations in cases that were not fully investigated and, as a result, the investigation was closed without identifying the officer who allegedly committed the act of chokehold.

There were 113 allegations against unidentified officers in cases that were fully investigated. Not all of these allegations were closed with the disposition "officer unidentified." There were 70 allegations closed as "officer unidentified" after a full investigation was completed. In addition, there were many other instances where the officer remained unidentified and the allegation was closed with another disposition. There were 41 allegations against an unidentified officer in which the CCRB found the allegation to be unfounded. In one case the allegation was closed as unsubstantiated and in another case the allegation was closed as "miscellaneous." Miscellaneous means that the officer is no longer a member of the service.

During this time period, 50,747 officers, both identified and unidentified officers, were the subjects of 35,063 complaints. Of these 50,747 officers the CCRB positively identified 58% of officers involved in the complaint (N=29,514) and did not identify 42% of subject officers (N=21,233). Officers are identified by tax id number. Of the 14,157 uniquely identified officers, 7,526 had one CCRB complaint (53%) and 6,631 had two or more complaints (47%). The total is 14,157 officers.

Of these 14,147 identified officer, there were 554 unique officers identified as the subject officers of 576 chokehold allegations: 536 officers had one chokehold allegation and 18 officers had two or more allegations of chokehold. Of these 554 officers, 496 were members of the service as of June 30, 2014. The demographic information is discussed in detail in here.

It is important to note that, in many instances, some of the characteristics of the officer were identified even as the officer remained unidentified. Thus, for instance, the complainant may have identified the subject officer as a male but his precise identity remained unknown after the investigation was completed. Thus, for instance, the rank of the officer in a chokehold incident was identified in 579 allegations, the race was identified in 638 allegations, and the command of the officer was identified in 717 instances.

Charts 6.22 through 6.25 show demographic and roster information about the officers involved in the chokehold complaints.

Chart 6.22: Rank of subject officers, January 2009 – June 2014

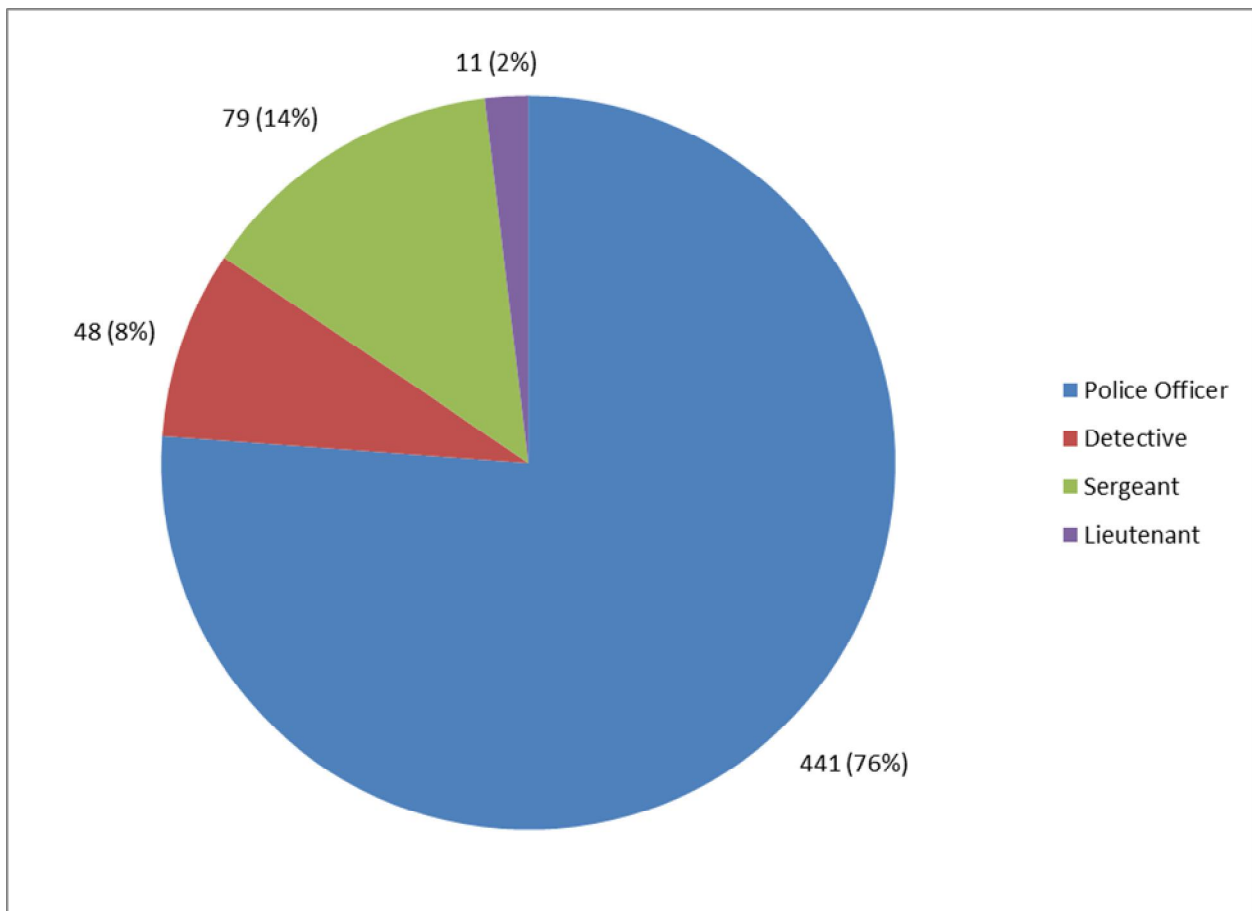


Chart 6.22 shows that 76% of allegations involved members of service with the rank of police officer. When compared to all officers identified in all CCRB investigations completed from January 2009 through June 2014, 73% of all officers identified had the rank of police officer.

Sergeants were slightly overrepresented as they were involved in 14% of alleged chokeholds but they were the subjects of 12% of all other CCRB complaints. Both detectives and lieutenants were underrepresented in the chokehold cases as compared to their proportion of CCRB complaints. There were no subject officers with ranks above lieutenant involved in chokehold incidents.

Chart 6.23 shows that both black and Hispanic officers were overrepresented in chokehold complaints when compared to the distribution of all complaints. Hispanic officers were the subject of 31% of chokehold allegations and the subject officers of 28% of all CCRB complaints. Black officers were the subjects of 20% of allegations of chokehold and 16.5% of all CCRB complaints. Asian officers had the same levels, 5%. White officers were underrepresented in chokehold complaints being the subject of 44% of chokehold complaints but the subject of 50.5% of all CCRB complaints.

There is a strong relation between the race of officers in all CCRB complaints and the roster of the Police Department.<sup>94</sup>

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<sup>94</sup> Police Roster June 30 2014: 51.6% of officers were white, 15.5% were black, 26.6 were Hispanics, 6.2% were Asians, and 0.1 were Native Americans.

Chart 6.23: Race of subject officers, January 2009 – June 2014

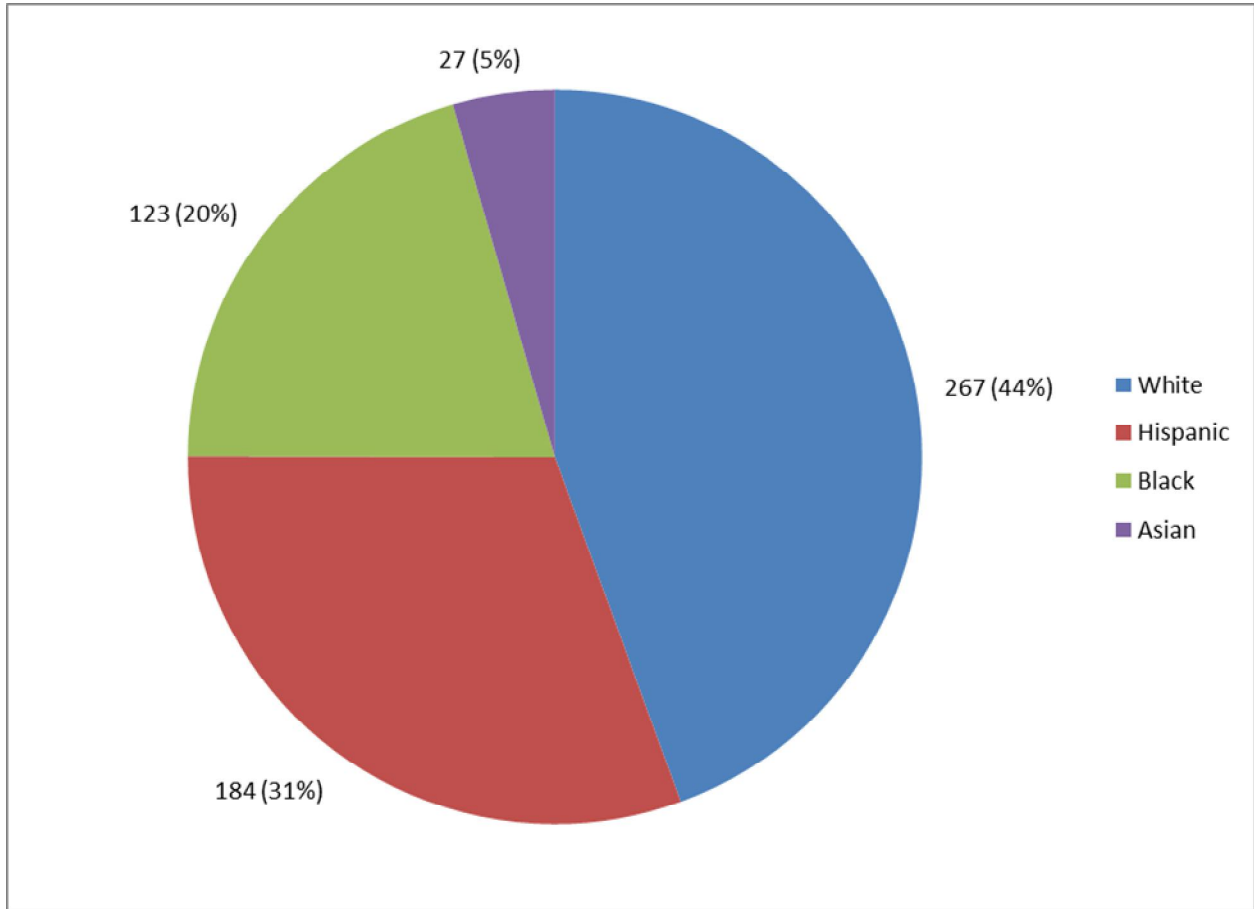
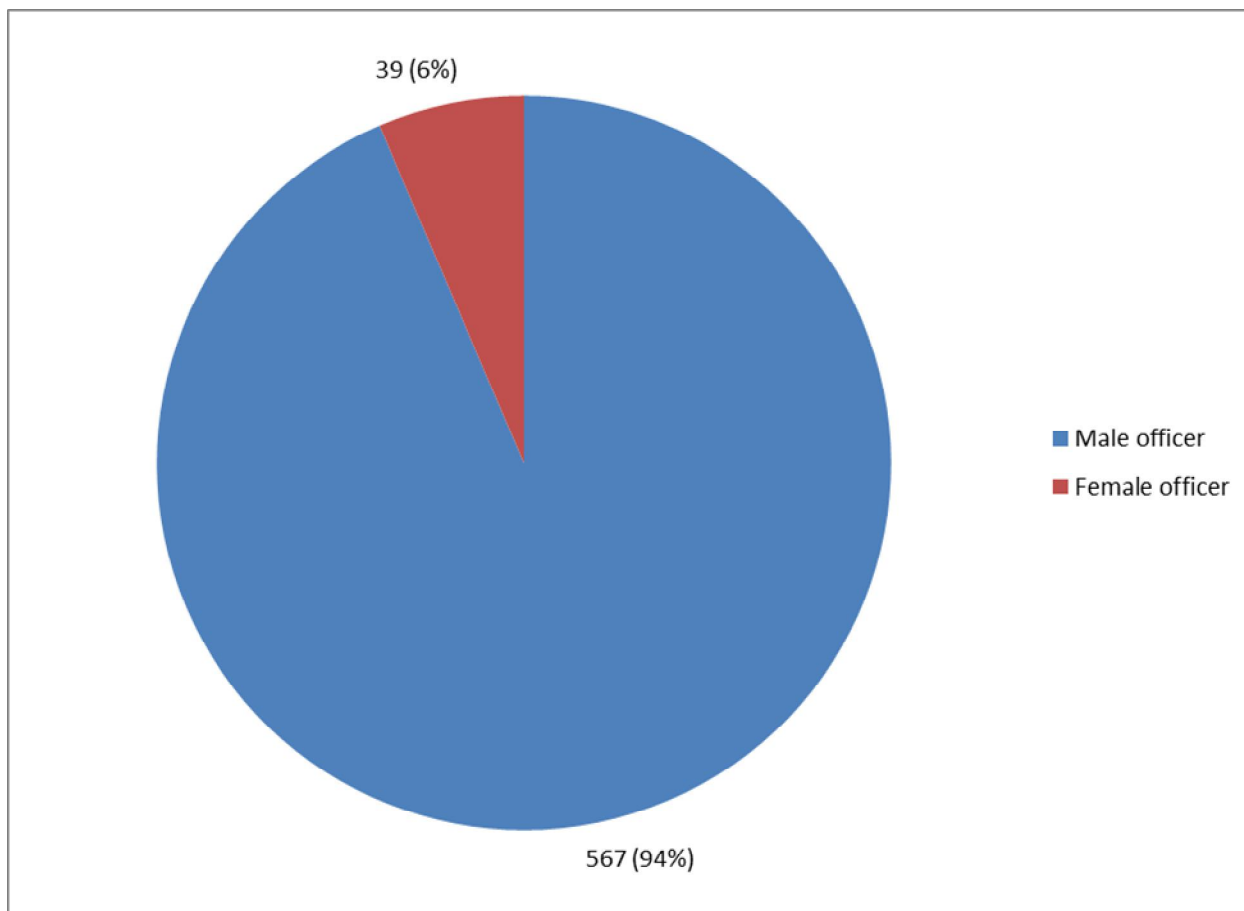


Chart 6.24 shows that 94% of officers involved in chokeholds were male. By comparison, 88% of all identified subject officers in all CCRB complaints were male.

Chart 6.24: Gender of subject officers, January 2009 – June 2014

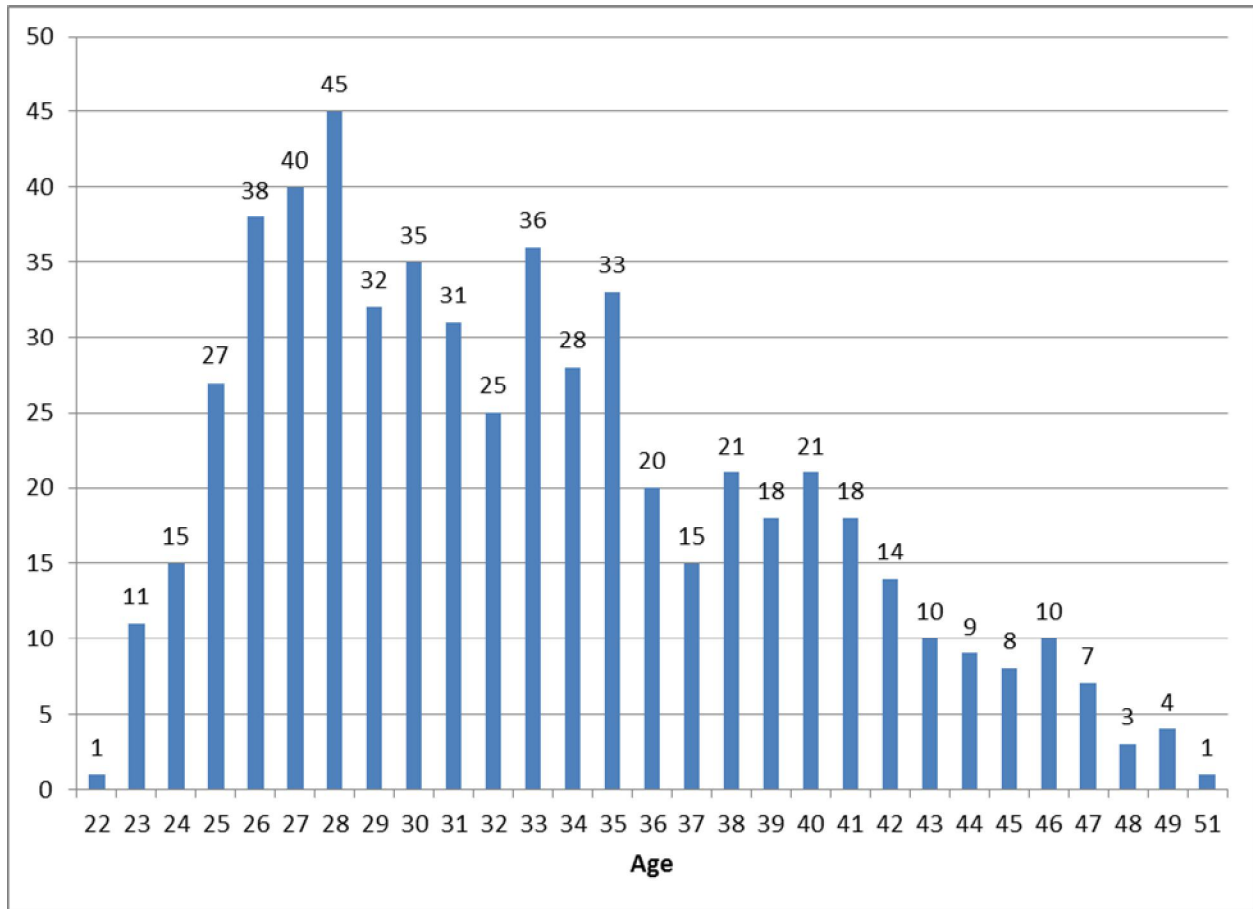


When comparing the age of subject officers in chokehold cases to the age of subject officers in all complaints, although not statistically significant, age is a minor factor. (See 6.25) In the 22 to 30 years old category, 42.4% of all subject officers in chokehold cases were in this age group as compared to 39.4% in all complaints.

During this period, 43.1% of chokehold allegations involved officers in the age group between 31 and 40 years old as compared to 43.2% in all complaints.

There were, however, more officers in the 41 and older category who were part of a non-chokehold complaint, 17.4%, than those officers who were involved in a chokehold complaint, 14.6%. No officer over the age of 51 was involved in a chokehold allegation.

Chart 6.25: Age of subject officers, January 2009 – June 2014



Finally, recidivism, as defined in the strictest terms possible, having received two or more chokehold complaints, is infrequent. In the database, regardless of the time period, there were 1,126 identified officers who received one or more chokehold complaints. Of these 1,126 officers, 1,075 had one chokehold complaint (95%) and 51 had two or more chokehold complaints (5%). Of the officers who received a chokehold complaint from January 2009 through June 2014, 536 officers had one chokehold allegation (97%) and 18 officers had two or more allegations of chokehold (3%).