
BEFORE THE
NEW YORK CITY POLICE DEPARTMENT
LEGAL BUREAU
NEW YORK, NY

NOTICE OF OPPORTUNITY TO COMMENT ON PROPOSED RULE
REVISION OF CHAPTER 11 OF TITLE 38 OF
THE OFFICIAL COMPILATION OF RULES OF THE CITY OF NEW YORK

Amend Section 11-11 in order to clarify its criteria and procedures to
summarily suspend or revoke press credentials, and Repeal Section 11-12

**COMMENTS OF THE
NATIONAL PRESS PHOTOGRAPHERS ASSOCIATION
JOINED BY**

**COMMITTEE TO PROTECT JOURNALISTS,
NEW YORK NEWS PUBLISHERS ASSOCIATION,
NEW YORK PRESS PHOTOGRAPHERS ASSOCIATION,
PRESS FREEDOM DEFENSE FUND,
RADIO TELEVISION DIGITAL NEWS ASSOCIATION,
SOCIETY OF PROFESSIONAL JOURNALISTS**

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Introduction

The National Press Photographers Association (NPPA),¹ joined by the Committee to Protect Journalists (CPJ),² New York News Publishers Association (NYNPA),³ New York Press Photographers Association (NYPPA),⁴ First Look Media's Press Freedom Defense Fund (PFDF),⁵ the Radio and Television Digital News Association (RTDNA)⁶ and the Society of Professional Journalists (SPJ)⁷ respectfully submit the following comment.

¹ **National Press Photographers Association (NPPA)**, Founded in 1946, is a 501(c)(6) non-profit professional organization dedicated to the advancement of photojournalism, its creation, editing and distribution in all news media. NPPA encourages photojournalists to reflect the highest standards of quality in their professional performance, in their business practices and in their personal code of ethics. NPPA vigorously promotes freedom of the press in all its forms. Its members include still and television photographers, editors, students and representatives of businesses that serve the photojournalism industry.

² The Committee to Protect Journalists is an independent, nonprofit organization that promotes press freedom worldwide. We defend the right of journalists to report the news safely and without fear of reprisal.

³ **New York News Publishers Association (NYNPA)** is the non-profit trade association representing the daily, weekly, and online newspapers of New York State. NYNPA monitors the New York State Legislature on behalf of the newspaper industry, opposing unfavorable legislation and working to craft new laws to open up government activities to public scrutiny.

⁴ **New York Press Photographers Association (NYPPA)** was established in 1913 to serve working photographers as a professional and social organization. The Association members work for news organizations in the print and electronic media based within a seventy-five-mile radius of Manhattan. The organization maintains a liaison with Governmental agencies whose actions directly affect the Media.

⁵ **First Look Media's Press Freedom Defense Fund (PFDF)** provides essential legal support for journalists, news organizations, and whistleblowers who are targeted by governments, corporations or other powerful figures because they have tried to bring to light information that is in the public interest and necessary for a functioning democracy. The Fund also provides legal resources for operational needs of reporters and news organizations through a pro bono law firm and provides training and education programs to an array of media law professionals, nonprofit organizations, and professional gatherings. The PFDF fearlessly and relentlessly dedicates itself to protecting the First Amendment. Free speech should be regarded as a right, investigative reporting as a duty, and whistleblowing as an act of bravery.

⁶ **Radio Television Digital News Association (RTDNA)** is the world's largest professional organization devoted exclusively to broadcast and digital journalism. Founded as a grassroots organization in 1946, RTDNA's mission is to promote and protect responsible journalism. RTDNA defends the First Amendment rights of electronic journalists throughout the country.

⁷ **Society of Professional Journalists (SPJ)** is the nation's most broad-based journalism organization, dedicated to encouraging the free practice of journalism and stimulating high standards of ethical behavior. Founded in 1909 as Sigma Delta Chi, SPJ promotes the free flow of information vital to a well-informed citizenry through the daily work of its roughly 6,000 members; works to inspire and educate current and future journalists through professional development; and protects First Amendment guarantees of freedom of speech and press through its advocacy efforts.

Summary

As both staff photographers and freelance visual journalists, members of the NPPA, and other press associations gather and report the news for publication by means of print, radio, television, Internet, and other forms of media.

While we commend the NYPD for its proposed rulemaking to amend the rules in order to clarify its criteria and procedures to suspend or revoke press credentials, we believe that those revisions must go further in order to actually bring about the intended improvements in the City's credentialing system.

Ten (10) years ago, spurred by a previous lawsuit,⁸ NPPA provided comments to a notice of proposed rulemaking regarding revisions to 38 RCNY §§ 11-01, 11-02, 11-03 and 11-04. relating to the "Issuance of Working Press Cards, Reserve Working Press Cards, Single Event Working Press Cards and Press Identification Cards." NPPA noted then, that the proposed rule change was overly broad, as well as arbitrary and capricious and failed to adequately address the issue of seizure, suspension and revocation of the working press cards (credentials).

another lawsuit and ten-years later, we appreciate the NYPD attempting to amend 38 RCNY § 11-11 in order to clarify its criteria and procedures to suspend or revoke press credentials, but as we did then, NPPA submits this Comment in the hope of further clarifying such criteria and procedures and narrowing the scope of when and how such suspensions and revocations may take place. Additionally, the NPPA offers the service and vast expertise of its members should the NYPD wish any additional input and advice regarding the proposed rule revisions.

⁸ See: *Martinez-Alequin et al v. The City of New York et al*, Case No. 1:08-cv-09701 (SDNY 2007).

§11-11 Hearing Procedures

We submit these Comments on the Proposed Rule, certified July 2, 2020, of the New York Police Department (“NYPD”), titled “Amendment of Rules for Suspension or Revocation of Press Credentials,” Reference Number 2020 RG 059. The changes would amend section 11-11 and repeal section 11-12 of Chapter 11 of Title 38 of the Rules of the City of New York.

While we feel that the proposed rule represents an important next step — because it better defines and strengthens the procedural due process rights of journalists who possess City-issued press credentials in circumstances where NYPD/DCPI seizes, suspends, or proposes the suspension or revocation of those credentials—we feel that the proposed rule should go even further than it does in protecting the rights of journalists. Specifically, we have serious concerns about the stated justifications and conditions under which a “summary” suspension or revocation may be made or determined.

We feel strongly that the proposed rule fails to define those determinations clearly and narrowly and affords the department far too much discretion by which to threaten to seize or seize credentials. We propose several revisions to address these inadequacies and to more fully protect the First Amendment right to gather news.

We first urge that the practice of “summary” suspension of credentials be re-evaluated to stop the chilling effect it has on legitimate newsgathering activities and freedom of speech and of the press. Rather than permitting the seizure and/or “summary” suspension of a press credential followed by a hearing, we propose that a hearing be held first with suspension *following* a due process determination.

To achieve a more streamlined process, we recommend that the timelines in the

proposed rule for notice and adjudication be accelerated, so as to not deprive journalists of their credentials any longer than necessary. We also advocate that section 11-11 (b)(1)(i), be limited to lawful arrests for felonies and misdemeanors related to a journalist's immediate newsgathering activities. We assert the current language, allowing for suspensions based on "lawful arrests for misdemeanors and violations" is far too broad.⁹ This stems from our concern over the "catch and release" charges such as disorderly conduct and obstruction of governmental administration we have seen NYPD employ to inhibit newsgathering activities.¹⁰

Having the Commanding Officer, Public Information Division as the hearing officer, creates a perceived, if not actual conflict of interest. We believe such real and perceived conflicts must be adequately addressed, by either proposing a different, neutral party as the hearing officer or creating a 3-person panel that would hear these matters.

Finally, NPPA repeats its ongoing offer to NYPD to provide training to its members regarding First Amendment protections for newsgathering, as we have done for so many law enforcement agencies, most recently the Denver Police Department (as part of a settlement in a federal civil rights lawsuit¹¹) and the Milwaukee Police Department (in preparation for the Democratic National Convention).

⁹ See: *Nieves v. Bartlett*, 587 U.S. ___ (2019). S. Ct. 1715, 1722 (2019) ("In our own time and place, criminal laws have grown so exuberantly and come to cover so much previously innocent conduct that almost anyone can be arrested for something," J. Gorsuch, *concurring*).

¹⁰ See: Statement of Interest of the United States, *Garcia v. Montgomery Cty., Md.*, No. 8:12-cv-03592-JFM (D. Md. Mar. 4, 2013), Dkt. 15 at 1-2 ("discretionary charges, such as disorderly conduct, loitering, disturbing the peace, and resisting arrest, are all too easily used to curtail expressive conduct or retaliate against individuals for exercising their First Amendment rights.")(addressing discretionary charges filed against a photojournalist).

¹¹ See: Denver police agree to First Amendment training in settlement with Indy editor they wrongfully detained <https://www.coloradoindependent.com/2019/09/10/denver-police-agree-to-first-amendment-training-in-settlement-with-indy-editor-they-wrongfully-detained/>

It is within this framework of meaningfully improving police-press relations that we offer our comments and suggested edits to the proposed new rule.¹²

- In §11-11(a)(1) we propose that the written hearing date notification be reduced from no more than [thirty (30)] to no more than seven (7) days from receipt of the request for a hearing, unless there is a mutual agreement to another date.
- In §11-11(a)(2) we propose that the written notification be sent via email within seven (7) days of such determination and that the written decision be issued within [thirty (30)] seven (7) days of the date when the appeal is received.
- In §11-11(b)(1) we propose that the DCPI may [summarily] suspend a previously issued press credential upon (i) the press credential holder's lawful arrest incident to newsgathering activities by an NYPD officer based on the press credential holder's commission of a [violation or crime] felony or misdemeanor; or (ii) the press credential holder's failure to comply with a lawful order of [a police] an NYPD officer incident to newsgathering activities; or (iii) the press credential holder's intentional and material interference or attempt to materially interfere with the performance of [a police] an NYPD officer's lawful and official function incident to newsgathering activities; or (iv) the press credential holder misusing or misrepresenting the press credential while not acting in a news gathering capacity; or] (v) the press credential holder [conducting an unauthorized transfer or assignment of] gives or loans such credential to an individual who has not been assigned any of the above-described press credentials; or (vi) other conduct incident to newsgathering activities that significantly endangers public safety or materially interferes with legitimate law enforcement needs.
- Additionally, in (vii) nothing contained herein may be modified by any language contained on the Press Card, by any receipt of other document the holder is required to sign in order to receive it and that (viii) The grounds contained herein are the sole and exclusive grounds for summary suspension.
- In §11-11(b)(2) we propose that where a press credential is seized by a member of the police department, the (v) the maximum length for a [summary] suspension shall be no more than [six (6)] two (2) months. In the event an arrest for a misdemeanor or felony, incident to newsgathering activities results in a conviction or guilty plea, then the length of the [summary] suspension may be extended by the Deputy Commissioner, Public Information for a maximum length of [six (6)] two (2) months or the period of the imprisonment that results from the conviction or guilty plea, whichever is greater.
- In §11-11(b)(3) we propose that if a hearing is requested it shall be held within seven (7) [business] days of the request and all notifications between the NYPD and the credential holder be via email.

¹² New material is underlined. Deleted material is in [brackets]

- In §11-11(b)(4)(ii) we propose that the assigned investigator shall introduce into the record any and all documentary, photographic, and video evidence to the press credential holder or his or her attorney at least [two (2)] three (3) business days before the hearing;
- In 11-11(b)(5)(iii) we propose the press credential holder’s attorney may [not] subpoena any documents or records from the police department or subpoena any City of New York or police department employee.
- In §11-11(b)(6)(vi) we propose the hearing officer need not observe the rules of evidence observed by courts during the hearing but must be satisfied any evidence relied on is reliable.
- In §11-11(b)(11) we propose that within [twenty-one (21)] ten (10) days of the conclusion of the hearing, the hearing officer shall issue a factually detailed, non-conclusory written decision and that , should the hearing officer decide to vacate the summary suspension, the press credential holder shall be notified immediately by telephone and/or email and the press credential shall be made available for pick up from the office of the Deputy Commissioner, Public Information within one (1) business day.
- In §11-11(b)(12) we propose that in deciding whether the NYPD press credential holder engaged in conduct that justifies a [summary] suspension of credentials, the Hearing Officer shall consider:
 - (a) that an NYPD press credential allows its bearer to cross police and fire lines whenever formed, subject only to “legitimate concerns about safety and evidence preservation, as well as space limitations” and that such right “will be honored and access will not be denied.”¹³
 - (b) that an NYPD press credential holder must be “given access as close to the activity as possible, with a clear line of sight and within hearing range of the incident.”¹⁴
 - (c) that an NYPD press credential holder may not be excluded from an area where the general public has access, including limited access with an NYPD escort, so long as the credential holder is not in an interior crime scene;
 - (d) that only an NYPD officer with a rank of lieutenant or above, or a member of office of the Deputy Commissioner for Public Information, may seize an NYPD-issued press credential;

¹³ See: NYPD Patrol Guide

¹⁴ *Id.*

- (e) that before an NYPD-issued press credential is seized its bearer is entitled to warning that if the credential holder does not comply with the order being given that his or her credential may be seized;
 - (f) that it is NYPD policy to afford NYPD press credential holders the maximum amount of access as possible to locations of official activity to observe, photograph, record and report, consistent with evidence preservation or other legitimate law enforcement needs;
 - (g) that an NYPD press credential holder may not be arrested for trespass while covering events that spill over or occur on private property, unless the property owner or representative expressly indicates that the press is not permitted to enter or remain on the property;
 - (h) the length of time that the press credential holder has held department-issued credentials without any charges or complaints
- In §11-11(b)(13) we propose:
 - (a) It shall be a total defense to allegations that an NYPD press credential holder failed to comply with a lawful order of an NYPD officer, or that the NYPD press credential holder intentionally and materially interfered or attempted to materially interfere with the performance of an NYPD officer's lawful official function, that the allegedly lawful order or official function was not, in fact, lawful and was contrary to rules in subsection vi (a-g).
 - (b) If, in seizing an NYPD press credential an NYPD officer violated any of rules in subsection vi (a-g). above, the Hearing Officer must immediately return the NYPD press credential to its holder.
 - §11-11(b)(14)(i) we propose that the hearing officer shall consider whether the misconduct actually occurred in the manner and degree originally alleged;
 - In 11-11(c)(1) we propose (i) a “legitimate suspension” shall be defined as one upheld by a hearing or that was otherwise unchallenged through the hearing process; or (ii) if the press credential holder’s continued possession of the press credential creates legitimate, objective and articulable safety or security [concerns] issues that cannot be resolved by a [summary] suspension.
 - In 11-11(c)(2) we propose whenever revocation of a press credential is sought . . . a hearing shall be held following the same suspension guidelines as above before such revocation shall take effect.
 - In 11-11(c)(6) we propose within [twenty-one (21)] seven (7) days of the conclusion of the hearing, the hearing officers shall issue a factually detailed, non-conclusory written decision stating the officer’s determination regarding the press credential.

Conclusion

The National Press Photographers Association, joined by the Committee to Protect Journalists, the New York News Publishers Association, the New York Press Photographers Association, First Look Media's Press Freedom Defense Fund, the Radio and Television Digital News Association and the Society of Professional Journalists appreciate the opportunity to submit these comments regarding the Proposed Rule of the NYPD amending section 11-11 and repeal section 11-12 of Chapter 11 of Title 38 of the Rules of the City of New York.

We hope that for the reasons stated above, our proposals will be given serious consideration. We expect that their adoption will help to improve the Proposed Rule and provide long overdue standards of review and due process for NYPD press credential holders.

Respectfully submitted,

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