

Public Report

April 28, 2019: Use of Force Complaint-Assault



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INCIDENT

On April 28, 2019, an individual later identified as having a name with the initials M.M. (hereinafter “MM”) was arrested by Fairfax County Police Department (hereinafter “FCPD”) Police Officer First Class #1 (hereinafter “PFC#1”). The arrest occurred near the intersection of Thomas Drive and Bowie Drive within the FCPD’s Franconia District police station area of responsibility. The intersection is at the back of a residential neighborhood. PFC#1 wrote in his Incident Report that he approached MM’s vehicle to engage in a consensual encounter¹ to ask why MM was sitting in a parked car at the back end of a residential neighborhood. When MM rolled down the vehicle’s window, PFC#1 smelled the odor of marijuana. Now having probable cause to arrest MM, PFC#1 told MM to get out of the car, which he did. After arresting him, PFC#1 conducted a search of the car and discovered various drug-related items, to include a plastic container with a white residue which PFC#1 suspected was cocaine residue. Police Officer First Class #2 (hereinafter “PFC#2”) arrived to back up PFC#1 shortly after MM’s arrest and before the vehicle search. PFC#1 then transported MM from the arrest location to the Franconia District police station.

After arriving at the station, PFC#1 escorted MM to an interrogation room and provided him a bottle of water. After a brief attempt to interrogate him, MM requested to have an attorney present. PFC#1 then forcefully took the water bottle from MM² and escorted him back to his patrol cruiser for transport to the Fairfax County Adult Detention Center (hereinafter “ADC”).

On June 26, 2019, MM lodged a complaint with a supervisor at the FCPD’s Franconia District station based on PFC#1’s treatment of him during the incident occurring on April 28, 2019. His complaint consisted of numerous allegations against PFC#1, including a use of force (hereinafter “UOF”) that occurred after arriving at the ADC which MM believed rose to the level of a criminal assault. Consequently, the FCPD initiated both a criminal and an administrative investigation into the incident. This review of the FCPD’s investigations will focus primarily on

¹ PFC#1 said he intentionally did not activate the in-car video (hereinafter “ICV”) capability in his police cruiser because he feared that activating the camera would affect his ability to testify that the encounter was consensual at the outset.

² Although the interrogation room was equipped with audio and video recording equipment, the equipment was not activated by PFC#1; therefore, the forceful retrieval of the water bottle was not recorded. Additionally, MM stated that PFC#1 slammed him onto a table in the interview room, which was disputed by PFC#1.

MM's UOF allegation; however, the Fairfax County Police Civilian Review Panel will conduct a separate review of the FCPD's investigation into MM's other allegations.³

The following is what MM described as having occurred after arriving at the ADC:

After arriving at the ADC, MM remained in the backseat of the patrol car while PFC was retrieving items out of the trunk. When MM heard PFC#1 cut open a bag using a knife, he asked PFC#1 if he was planting evidence. PFC#1 then angrily pulled MM out of the car—with the open knife still in his hand—while telling him to “get out of the fucking car.” After removing MM from the backseat, PFC#1 slammed him into the rear quarter panel of the car before escorting him into the ADC and presenting him to a magistrate.

**CRIMINAL INVESTIGATION/
PROSECUTIVE DECISION**

The FCPD conducted both a criminal and an administrative investigation into PFC#1's actions. Based on MM's allegations, the criminal investigation into PFC#1 explored whether he had engaged in criminal Assault and Battery.⁴ At the conclusion of the criminal investigation, the Commonwealth's Attorney (hereinafter “CWA”) for Fairfax County concluded that no criminal violation of assault and battery had occurred.⁵

The results of the administrative investigation into PFC#1's UOF will be detailed in the following section of this report.

³ After establishing both the Independent Police Auditor and the Fairfax County Police Civilian Review Panel (hereinafter “Panel”), the Fairfax County Board of Supervisors approved the Panel's by-laws on July 11, 2017. In Article VI. at A. 3., those by-laws provide that “[w]here a Complaint alleges misconduct within both the Panel's scope of authority and the Auditor's scope of authority, the Panel and the Auditor shall each conduct a review of the Investigation within their requisite scope of authority. The Auditor and Chair shall coordinate the work of the Panel and Auditor to ensure efficient use of resources and avoid duplication of effort.” For a full discussion of the respective scopes of authority of the Auditor and the Panel, visit <https://www.fairfaxcounty.gov/policeauditor/> and <https://www.fairfaxcounty.gov/policecivilianreviewpanel/>. On October 22, 2020, the Panel voted to undertake a review of the FCPD investigation into MM's other, non-UOF, allegations.

⁴ Va. Code § 18.2-57.

⁵ Based on what was discovered during the FCPD's Internal Affairs Bureau (hereinafter “IAB”) investigation into MM's numerous non-UOF allegations, the possibility that PFC#1 had committed criminal perjury during a court proceeding related to MM's arrest was also explored. Upon being apprised of the investigation's findings, the CWA found no probable cause to believe that PFC#1 committed perjury.

All criminal charges against MM based on this incident were dropped pursuant to a motion by the CWA for *Nolle Prosequi*⁶ on September 20, 2019.

INTERNAL ADMINISTRATIVE INVESTIGATION

MM's initial complaint to the FCPD included numerous allegations of misconduct committed by PFC#1. The ensuing IAB investigation concluded that numerous violations of departmental policy provisions had, in fact, occurred. Specific to the UOF allegations made by MM, the FCPD investigation concluded that PFC#1 violated FCPD policies when he forcibly knocked the water bottle out of MM's hand while in the Franconia District station's interrogation room; and, when he forcibly pulled MM out of the patrol cruiser at the ADC with a knife in his hand and while using profanity.

The internal investigation into the UOF allegations during this incident was, in my opinion, complete, thorough, objective, impartial, and accurate. All appropriate interviews were conducted, and all potential evidence was pursued.

CONCLUSIONS

The FCPD internal investigation determined that the policy PFC#1 violated when he forcefully took the bottled water away from MM, and when he used profane language directed at MM at the ADC was FCPD General Order (hereinafter "G.O.") 201.7 rather than the departmental G.O. addressing the use of force. Force is defined in FCPD G.O. 540.1 I. G. as "[a]ny physical strike or instrumental contact with an individual, or any significant physical contact that restricts an individual's movement." There was no video footage captured of the PFC#1's forceful retrieval of the water bottle because PFC#1 did not activate the recording equipment inside the Franconia District station interrogation room. Even as described by MM, it is tenuous to characterize PFC#1's actions as a UOF. Consequently, I agree that this was not a violation of FCPD G.O. 540, *et seq.* The FCPD did conclude, however, that PFC#1's actions violated FCPD G.O. 201.7—STANDARDS OF CONDUCT, A. Unbecoming Conduct—which,

⁶ Va. Code § 19.2-265.3 states that "[n]olle prosequi shall be entered only in the discretion of the court, upon motion of the Commonwealth with good cause therefor shown." *Nolle prosequi* is a Latin phrase meaning "will no longer prosecute" or a variation on the same. It amounts to a dismissal of charges by the prosecution.

in pertinent part, mandates that “[e]mployees shall conduct themselves at all times, both on and off duty, in such a manner as to reflect most favorably on the Department. Conduct unbecoming an employee shall include that which brings the Department into disrepute, reflects discredit upon the employee as a member of the Department, or that which impairs the operation or efficiency of the Department or employee.” I agree with this conclusion.

MM’s allegation that PFC#1 slammed him on the table in the interrogation room could also not be substantiated due to PFC#1’s failure to activate the recording equipment and his denial that it happened. This unfortunate result of not activating the interrogation room recording equipment will be addressed in the RECOMMENDATIONS section of this report.

PFC#1 did not, however, dispute his use of profanity while removing MM from the police cruiser after arriving at the ADC. Clearly, simply using profane language does not constitute a UOF. However, these actions were also determined to violate FCPD G.O. 201.7—STANDARDS OF CONDUCT, A. Unbecoming Conduct. I agree with that determination as well.

Meanwhile, FCPD G.O. 540.0—USE OF FORCE—states, in pertinent part that “[f]orce is to be used only to the extent it is objectively reasonable to defend oneself or another, to control an individual during an investigative or mental detention, or to lawfully effect an arrest,” and that “[f]orce shall not be used unless it is reasonably necessary in view of the circumstances confronting the officer.” When PFC#1 forcibly pulled MM from the police cruiser while in the ADC sallyport, his actions were unreasonable. He was not yet ready to escort MM into the ADC to go before a magistrate, nor did he give MM the opportunity to voluntarily exit the car. PFC#1 admitted to having the knife in his hand when he extracted MM from the vehicle, adding to the unreasonableness of his actions. He denied intentionally pushing or slamming MM into the car, and this allegation could not be verified.⁷ Regardless, the FCPD found that when PFC#1 pulled MM out of the vehicle—while holding a knife in his hand—he violated G.O. 540.0. I believe this was an accurate finding.

⁷ While the ADC sallyport, where this incident occurred, does have cameras which are monitored by Fairfax County Sheriff’s Office (hereinafter “FCSO”) personnel, they do not record. Furthermore, the investigator who conducted the investigation into MM’s allegations was unable to locate any FCSO personnel with knowledge of his allegations.

RECOMMENDATIONS

While I have no recommendations for the FCPD UOF policy based on this incident, I do have recommendations related to other policies which impacted the conduct of the FCPD's investigation of MM's allegations and this review of that investigation.⁸

First, PFC#1 indicated that he deliberately did not activate the ICV capability in his police cruiser when he first approached MM because he feared that activating the camera would affect his ability to testify that the encounter was consensual at the outset. While G.O. 430.8—IN CAR VIDEO PROGRAM—addresses the mandatory activation of ICV equipment, it does not mandate its use during a consensual encounter such as the one that initiated this incident. FCPD G.O. 430.8 IV. A. mandates the use of ICV in the following situations:

- 1) traffic stops, and the equipment can only be turned off after the traffic stop has ended and the violator and/or officer have left the scene;⁹
- 2) pursuits, and the equipment can only be stopped when a suspect is taken into custody, a supervisor directs the deactivation, or the pursuit is terminated;¹⁰
- 3) emergency response driving situations;¹¹
- 4) transports of people.¹²

I recommend that the FCPD add all consensual encounters, investigative detentions, and arrests to this list whenever it is foreseeable that the consensual encounter, investigative detention, or arrest, will be initiated or occur within the range of the ICV equipment, as was the case in the incident under review. This recording will not transform a consensual encounter into an investigative detention, and footage of a consensual encounter may even help establish the voluntary nature of such an encounter.

Furthermore, if implemented by the FCPD, this policy change will make the ICV policy consistent with the requirements of the body-worn camera (hereinafter "BWC") policy currently in place during the ongoing implementation of the FCPD's BWC program. Specifically, FCPD Standard Operating Procedure (hereinafter "SOP") 18-056 requires the activation of an officer's

⁸ The Police Civilian Review Panel's review of the investigation into MM's non-UOF allegations may address these same concerns.

⁹ FCPD G.O. 430.8 IV. A. 1.

¹⁰ FCPD G.O. 430.8 IV. A. 2.

¹¹ FCPD G.O. 430.8 IV. A. 3.

¹² FCPD G.O. 430.8 IV. A. 4.

BWC, unless there is an immediate threat to the officer or others that would prevent activation, prior to the following situations:

- 1) the arrival at any call for service;¹³
- 2) traffic *or subject* stops;¹⁴
- 3) *self-initiated* events involving the rendering of public services or *law-enforcement related activity*;¹⁵
- 4) The transportation of any person in-custody.¹⁶

A second and similar recommendation addresses the recording of custodial interrogations. PFC#1 stated that he did not know *how* to turn the recording equipment on in the interrogation room located at the Franconia District police station. His failure to record at that location prevented the FCPD internal investigator and me from viewing footage of the forceful retrieval of the bottled water from MM, and from substantiating the allegation that PFC#1 slammed MM onto a table in the interrogation room. Regardless of PFC#1's stated reason for the failure to record, the FCPD should mandate the recording of custodial interrogations, with certain exceptions to this requirement delineated in policy. Recognizing that custodial interrogations may take place in a variety of settings (e.g., the backseat of a patrol cruiser, a holding cell at the ADC), which may or may not allow for recording,¹⁷ the FCPD should mandate that custodial interrogations conducted in an FCPD-controlled interrogation room be recorded. This mandate should apply to uniformed patrol officers—like PFC#1 in this incident—as well as to non-uniformed detectives and other investigators. Potential exceptions to mandatory recording of custodial interrogations should be identified – such as when the individual who is in custody and being interrogated is likely to cooperate in future investigations and does not want to be recorded. Of course, all interrogations should be documented by the notetaking of someone involved in conducting the interrogation, whether or not it is electronically recorded. Finally, the policy should allow for, but not mandate, the recording of non-custodial interrogations or other interviews. Adoption of this policy recommendation will not only prevent a situation such as the

¹³ FCPD SOP 18-056 III. C. 3. a.

¹⁴ FCPD SOP 18-056 III. C. 3. b. (emphasis added).

¹⁵ FCPD SOP 18-056 III. C. 3. c. (emphasis added).

¹⁶ FCPD SOP 18-056 III. C. 3. g.

¹⁷ Even many of these interrogations may be recorded because of the increasing use of BWCs, ICVs, and facilities not controlled by the FCPD that have recording capability available.

one occurring in the incident under review, but will also provide factfinders (e.g., judges, juries, internal investigators) with reliable evidence of what transpired during an interrogation.

APPENDIX: GLOSSARY OF TERMS

FCPD – Fairfax County Police Department

FCSO – Fairfax County Sheriff's Office

G.O. – General Order

SOP – Standard Operating Procedure

UOF – Use of Force

BWC – Body-worn Camera

ICV – In-Car Video

ADC – Adult Detention Center

CWA – Commonwealth's Attorney

Fourth Amendment to the United States Constitution - The right of the people to be free in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Force – defined in Fairfax County Police Department General Order 540.1 I. G. as any physical strike or instrumental contact with an individual, or any significant physical contact that restricts an individual's movement. Force does not include escorting or handcuffing an individual who is exhibiting minimal or no resistance. Merely placing an individual in handcuffs as a restraint in arrest or transport activities, simple presence of officers or patrol dogs, or police issuance of tactical commands does not constitute a reportable action.

Less-Lethal Force – defined in Fairfax County Police Department General Order 540.1 I. I. as any level of force not designed to cause death or serious injuries.

Deadly Force – defined in Fairfax County Police Department General Order 540.1 I. B. as any level of force that is likely to cause death or serious injury.

Serious Injury – defined in Fairfax County Police Department General Order 540.1 I. Q. as an injury which creates a substantial risk of death, disfigurement, prolonged hospitalization, impairment of the functions of any bodily organ or limb, or any injury that medical personnel deem to be potentially life-threatening.

ECW – Electronic Control Weapon; considered less-lethal force. Defined in defined in Fairfax County Police Department General Order 540.1 I. C. as a device which disrupts the sensory and motor nervous system of an individual by deploying battery-powered electrical energy sufficient to cause sensory and neuromuscular incapacitation. Often referred to as a Taser.

Empty-Hand Tactics – considered less-lethal force. Described in Fairfax County Police Department General Order 540.4 II. A. 2. as including strikes, kicks, and takedowns.

OC Spray – Oleoresin Capsicum; considered less-lethal force; often referred to as “pepper spray.”

PepperBall System – defined in Fairfax County Police Department General Order 540.1 I. N. as a high-pressure air launcher that delivers projectiles from a distance. Typically, the projectile contains PAVA powder which has similar characteristics to Oleoresin Capsicum. Considered less-lethal force.

Passive Resistance – defined in Fairfax County Police Department General Order 540.4 I. A. 1. as where an individual poses no immediate threat to an officer but is not complying with lawful orders and is taking minimal physical action to prevent an officer from taking lawful action.

Active Resistance – defined in Fairfax County Police Department General Order 540.4 I. A. 2. as where an individual’s verbal and/or physical actions are intended to prevent an officer from taking lawful action, but are not intended to harm the officer.

Aggressive Resistance – defined in Fairfax County Police Department General Order 540.4 I. A. 3. as where an individual displays the intent to cause injury, serious injury, or death to others, an officer, or themselves and prevents the officer from taking lawful action.

