



County of Fairfax, Virginia

MEMORANDUM

DATE: 7/12/2019

TO: Fairfax County Board of Supervisors
Col. Edwin C. Roessler, Jr., Chief of Police
Mr. Richard G. Schott, Independent Police Auditor

FROM: Fairfax County Police Civilian Review Panel

SUBJECT: Report of Panel Findings for Complaint CRP-18-27

I. Introductionⁱ

The Panel held a Panel Review Meeting on February 7, 2019, to review the Fairfax County Police Department (FCPD) Investigation resulting from a complaint submitted to the Panel for review on December 11, 2018. The complaint was filed by a person who was not a witness and was not at the scene of the incident. The Complainant's knowledge of the incident is based on viewing video of part of the incident on social media and watching media coverage. After reviewing the Investigation file and hearing from the Complainant and FCPD, the Panel expressed concern about the thoroughness, completeness, accuracy, objectivity and impartiality of the Investigation. The Panel requested further investigation of the incident focusing on (1) possible racial bias and/or racial profiling, and (2) the legality of the stop leading to the arrest of an individual by a FCPD officer.

The FCPD conducted further investigation and on April 5, 2019, informed the Panel that an independent legal review concluded that the stop leading to the arrest of the individual was legal and free from any racial bias.

After reviewing the supplemental Investigative file, on May 30, 2019, the Complainant addressed the Panel a second time, and the Panel considered the additional findings by the FCPD. The Panel voted to concur with the findings of the FCPD Investigation on a vote of 6 to 1. Panel member Hansel Aguilar voted not to concur, and Panel members Gregory Gadson and Shirley Taylor were absent from the meeting.¹

¹ Audio of the February 7, 2019 Panel meeting is at <https://soundcloud.com/fairfaxcounty/police-civilian-review-panel-feb-7-2019>. Audio of the May 30, 2019 Panel meeting is at <https://soundcloud.com/fairfaxcounty/police-civilian-review-panel-may-30-2019>.

II. Incident and Review Request

According to the officer, on July 6, 2018, he observed an individual walk toward a Mount Vernon apartment complex looking down at his phone as if he was looking for an address and was unfamiliar with the neighborhood. The officer was on patrol in the neighborhood at the request of management at the apartment complex because of trespassing and criminal activity (including illegal drug trafficking) in the area. Managers of the complex had given the officer keys to the entrance. The officer watched as the individual was let into the complex through a controlled access door.

The individual remained out of view for about 10 seconds and then exited the building and walked toward a nearby shopping center. The officer suspected that the individual may have been involved in a drug transaction based on his behavior and past calls in the area. The officer followed the individual and as he approached the individual, he asked to speak to him about a possible trespassing. The individual replied, “No,” and walked away from the officer. At that point, the officer said that he noticed a strong odor of marijuana on the individual and observed that his right hand was clenched. The officer initiated an investigative detention, and a physical struggle ensued, ending with the individual being arrested and handcuffed. The Independent Police Auditor has conducted a review of the officer’s use of force in this incident.²

The Complainant claimed that the individual was not trespassing, was stopped illegally, and was a target of racial profiling. Following the initial FCPD Investigation, the Complainant requested that the Panel review the Investigation. The Panel determined that it had authority to review the allegations in the complaint of abuse of authority and serious misconduct by the FCPD. At the Complainant’s first appearance at the February Panel meeting, the Panel noted that the complaint did not include a specific allegation of racial profiling, and the initial FCPD investigation did not address the issue. When asked if the Complainant would like to amend the complaint to include racial profiling, the Complainant replied affirmatively. Based on the Complainant’s request and the Panel’s questions regarding the legal justification for the stop, the Panel requested further review by the FCPD.

III. FCPD Finding: Legality of the Stop

In its supplemental investigation, the FCPD requested and received a legal analysis of the stop from the Office of the Fairfax County Attorney and the Office of the Fairfax County Commonwealth’s Attorney. These analyses relied heavily upon federal and state court cases that allow an officer to briefly detain a person based upon reasonable suspicion of criminal activity long enough to dispel the suspicion or allow it to rise to the level of probable cause for an

² Link to OIPA Report 7-6-18: [July 6, 2018: Use of Force Complaint](#)

arrest.³ Additionally, federal and Virginia law allows an officer to conduct a search based upon probable cause if the officer detects the smell or odor of drugs on a person.⁴ (“Plain Smell Doctrine”)

Applying the “plain smell doctrine” to the facts of this incident, both the County Attorney and the Office of the Commonwealth’s Attorney stated that the officer smelled fresh marijuana on the individual and he was subsequently found to have marijuana on his person. As such, there was reasonable suspicion and/or probable cause for the stop, and it was justified under both state and federal law. The attorneys also opined that the observations of the officer and his experience with criminal drug activity also gave the officer “reasonable suspicion” to stop the individual.

The majority of the Panel were satisfied with the legal analyses and concurred with the findings and determination detailed in the Investigation Report.

IV. FCPD Finding: Racial Profiling

In its supplemental Investigation, the FCPD found that no credible evidence was found indicating racial bias played a role in this incident. This conclusion was based upon interviews of the individual, the officers and witnesses, including one who posted a video of the incident. The Investigation also relied upon the officer’s arrest statistics.

Several members of the Panel were troubled by the FCPD’s reliance on arrest statistics to substantiate a finding of no racial profiling in this incident. The Panel has recommended to the FCPD that when statistical evidence is used, the Crime Analyst Unit be consulted regarding the gathering, preparation and reporting of statistical data. When asked whether the Crime Analyst Unit was consulted in this Investigations, the FCPD replied that the unit was not consulted.

Nevertheless, the Panel found that the Investigation, taken in its totality, supported the conclusion that there was no racial profiling, and the Panel concurred with the FCPD finding and determination detailed in the Investigation Report.

V. Comment

- A. Some Panel Members expressed concern over the police officer stopping and arresting for trespass when the individual had been granted access by a resident of the apartment complex and was no longer on the property when stopped.

³ Terry v. Ohio, 392 U.S. 1 (1968)

⁴ Bunch v. Commonwealth, 51 Va. App.491 (2008); United States v. Humphries, 372 F.3d 653, 660 (4th Cir. 2004); United States v. Haynie, 637 F.2d 227, 234 (4th Cir. 1980)

VI. Recommendation

- A. The Police Department sent a letter to the Panel informing the Panel of its supplemental findings. Attached to that letter was investigatory information pertaining to the Complainant's social media accounts. Inclusion of the social media information was inappropriate and unnecessary. Such public disclosure by the Police Department may discourage individuals from filing future complaints, and it undermines community trust in the Panel, even though the information may have been publicly available through other means. Therefore, the Panel recommends that in the future the Department refrain from publicly releasing such information about complainants. If the Department believes that certain information about a complainant may be relevant to the investigation, that information should be included only in the Department's investigative file.

CC: Complainant

ⁱ Unless otherwise noted, terms with initial capital letters are defined in the Bylaws.

Panelist Aguilar dissenting

I respectfully dissent from the majority's conclusion in this matter for the below outlined reason:

- In failing to provide a proper statistical analysis concerning the reported racial disparities in the enforcement activities of the subject officer, it is not clear that the Department accurately, completely and thoroughly, reviewed and considered the allegation of racial bias as prohibited by G.O. 201.22, Biased Based Policing.

Specifically, in its investigation, the Department noted that the arrest activity of the subject officer demonstrated there was margin of at least 20 percentage points¹ in the officer's arrest of African Americans compared to his District level peers' arrests of African Americans. In its report, the Department reasoned that the discrepancy was not of concern because the subject officer was patrolling a neighborhood that did not share the same demographic characteristics of the entire District (i.e. the assigned neighborhood of the subject officer consisted of a higher concentration of African Americans residents than what is seen in the entire District). No further analyses or attempts to compare similarly situated or assigned officers were made to explore whether the racial discrepancies reported by the subject officer's arrest activity were consistent or inconsistent with proper comparators. In addition to the officer's record revealing more arrests of African Americans by a considerable margin (through the Department's own data); the statistics provided in the

¹ This specific point was also discussed in the May 30, 2019 meeting where the Panel discussed the case for a second time.[00:15:30] Audio of this discussion could be accessed by visiting: <https://soundcloud.com/fairfaxcounty/police-civilian-review-panel-may-30-2019>

Department's report also indicated the subject officer was less likely to arrest White offenders than his District counterparts by a margin of at least 20 percentage points.

The lack of statistical scrutiny provided to the pattern of arrests revealed by the department's records was also evident in the questioning of the officer. The questioning of the subject officer could have explored the concept of racial bias in his policing activities or implicit bias by prompting him with questions regarding racial bias or exploring his pattern of arresting more African Americans than White individuals.

For this reason, I cannot accept the Department's conclusion that "*no credible evidence was found indicating racial bias played a role in this incident*"² NOR can I accept the Panel's similar conclusion "*that the Investigation, taken in its totality, supported the conclusion that there was no racial profiling.*" Furthermore, I emphasize the recommendation made by the Panel in its March 7, 2019 report³: (D.) *During FCPD administrative investigations, where statistical evidence is used, we recommend the Crime Analyst Unit be consulted in the gathering, preparation and reporting of the statistical data.* Considering the subject matter expertise of members of the CAU, it appears to be the unit, within the FCPD, best suited to conduct proper statistical analyses. Lastly, as outlined in G.O. 530.7 Crime Analysis Unit, there already exists a mechanism by which the Department may enlist and delegate this task to the CAU, "*Analysts shall, upon request, gather data and prepare statistical reports related to a variety of Departmental activities.*"

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² As indicated by FCPD Chief Edwin C. Roessler Jr., Colonel in his April 5, 2019 letter to CRP Chairman Doug Kay.

³ Report of Panel Findings for Complaint CRP-18-26:

<https://www.fairfaxcounty.gov/policecivilianreviewpanel/sites/policecivilianreviewpanel/files/assets/crp-18-26%20review%20report%20official%20memo.pdf>

MEMORANDUM

To: The Fairfax County Police Civilian Review Panel

From: Rhonda VanLowe

Date: July 8, 2019

Re: The [REDACTED] Complaint

I. Introduction

After a careful review of the report in the [REDACTED] matter and the corresponding dissent, I find that I am not able to support the conclusion stated in the report that, with respect to the issue of racial profiling, “the investigation taken in its totality, supported the conclusion that there was no racial profiling.” At best, the investigation is inconclusive on this issue, and, for this reason, I cannot concur in the FCPD conclusions and findings on the issue of racial bias and profiling. On this aspect of the report, I join Mr. Aguilar in dissenting.

II. The Investigation on the issue of Racial Bias/ Profiling is Inconclusive

Determining whether the officer exhibited a racial bias or profiled the individual involved in the arrest based on race is likely a question that cannot be answered at this point. That said, neither can a definitive conclusion be made based on the information reported in the investigation.

What we have on the issue as an initial input is the Officer’s arrest statistics. These statistics indicate that the officer has an unfavorable margin of at least 20% in the number of arrests of African Americans compared to his District level peers’ arrests of African Americans. The FCPD concluded that the officer’s arrest statistics reflect his patrol assignment to an area heavily populated by African Americans. While this conclusion may be plausible, no other evidenced-based information is provided to support the conclusion. For example, the investigation file does not contain any information about the existence of other community complaints or compliments about the officer that might be related to the question of bias. Nor does the investigation reflect any social media scrutiny similar to that provided on the complainant (which, as indicated to the Panel, was offered to show the complainant’s bias). Mr. Aguilar notes the need for a more comprehensive statistical analysis (the Panel has recommended the same in the past). Further, and regrettably, we do not have any body worn camera footage or corroboration from another officer at the scene of the initial encounter to see and understand how the police stop began and developed.

The Panel has reviewed other complaints alleging racial profiling. In one notable incident involving a traffic stop, body worn camera footage was available. The Panel could view the traffic stop from beginning to end. The recording gave the Panel a clear perspective on the

officer's demeanor, motivation and conduct. The policing in that example was commendable; the Panel could and did support the FCPD conclusion that there was no racial profiling present in the stop.

Because of the persuasive legal analysis by the Office of Fairfax County Attorney and the Office of the Fairfax County Commonwealth Attorney on the issue of the legality of stop and subsequent arrest, concluding that there was no exhibited racial bias may seem like a logical consequence. However, the conclusion conflates two distinct issues.

III. Comments

A significant number of complaints (16% in 2018) received by the Panel contain an allegation of racial bias or racial profiling. Whether perceived or real, the broader community is concerned. I believe that having the FCPD speak with the Panel on the issue of racial profiling and bias within the department would be useful to educate the Panel on the initiatives undertaken by FCPD to address the issue.

IV. Conclusion

Based on the legal analysis provided in the supplemental investigation, I concur with the conclusion with the Panel's conclusion on the legality of the stop. I dissent from the conclusion that there was no racial bias or profiling evident in the incident.