



# County of Fairfax, Virginia

## MEMORANDUM

**DATE:** October 8, 2020

**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-20-15

### I. Introduction

The Fairfax County Police Civilian Review Panel (Panel) held a public meeting on August 27, 2020, to review the investigation resulting from a citizen complaint submitted to the Fairfax County Police Department (FCPD) at the Fair Oaks District Station on March 27, 2020. After the investigation was completed, the FCPD sent a disposition letter to the Complainant on April 4, 2020. The letter concluded that no police misconduct had occurred. On June 12, 2020, the Complainant requested a review of the investigation by the Panel.

After reviewing the investigation file, the Panel members voted by 8-1 that the investigation was complete, thorough, accurate, objective, and impartial, and they concurred with the findings of the FCPD documented in the Investigation Report.

### II. Background Facts

On March 23, 2020, the Complainant drove a truck loaded with trash to Fairfax County's I-66 Transfer Station. At the entrance, he told employees that he wanted to be allowed to dump the trash without paying the standard fee of \$13.00. He requested a waiver of the fee because of the state of emergency declared by Fairfax County and the Commonwealth of Virginia in response to the Covid-19 epidemic.

The Complainant was informed by site employees that free dumping had not been authorized. When he continued to refuse to pay the fee, an assistant manager offered him the options of receiving a bill, using a payment plan, or paying a reduced

fee. The Complainant declined these offers. During the conversation, he was told several times by the assistant manager that if he did not want to pay, he would have to leave the property.

A call was made to the FCPD after the Complainant refused to comply with the requests to leave. Two uniformed officers arrived at the scene. They talked initially with the facility employees, who described the failed negotiations with the Complainant. The officers initiated a discussion with the Complainant, who remained in his truck during the conversation that followed. Both officers told him several times that he would have to pay or leave. He asked the officers for their names, which they provided. According to the officers, on multiple occasions he rolled up his truck window when one of the officers attempted to talk with him.

While the officers continued their effort to persuade him to comply with their request, the Complainant talked by cell phone to an official at the Department of Public Works and Environmental Services. He described the situation to the official and repeated his demand for a waiver of the dumping fee. The official advised him to leave the property and offered to meet with him at a nearby gasoline station. The discussions with the police officers ended when the Complainant drove his truck to the meeting place. He met with the official and agreed to pay a reduced fee.

### III. Procedural Background, Allegations and Findings

As noted above, the complaint was communicated directly to the FCPD on March 27, 2020, when the Complainant contacted a supervisor at the Fair Oaks District Station. The Complainant alleged the following: (1) The officers issued an unlawful order by demanding that the Complainant immediately leave the Transfer Station because of a civil dispute; (2) The Complainant's First Amendment right to peacefully assemble and petition the government for a redress of grievances was violated; (3) The number of officers on the scene was excessive because it was not proportionate to the nature of the incident; (4) The names of the officers printed on their badges were not visible to the Complainant and had been covered up; (5) The officers yelled at the Complainant and were "talking over him;" and (6) The police record of the incident was not sufficient, because inaccurate and incomplete comments were recorded on the CAD system by one of the officers, and a written report of the incident should have been submitted.

A supervisor at the Fair Oaks District Station investigated the incident. He interviewed the Complainant and also questioned the officers who were involved in the

incident. The assistant manager of the transfer station, who had attempted to resolve the dispute with the Complainant, was also interviewed. In addition, the investigator reviewed the comments that had been recorded into the CAD system by one of the officers at the scene.

Responding to each of these allegations, the investigator found: (1) The officers' actions were not unlawful; (2) It was appropriate for the FCPD to send two officers to the scene and not just one. The normal practice under the dispatching procedures is to send two officers in response to civil disputes that are "in progress." (3) At the scene, the Complainant was given the names of the two officers. (4) According to the officers and the witnesses who were interviewed, the officers did not yell, were not threatening, and were not rude to the Complainant. (4) One of the officers at the scene provided an adequate and detailed description of the incident that was recorded on the CAD system. Also, as explained to the Complainant, the officer correctly determined that the incident was a civil matter. Since written reports on civil matters are not routinely submitted when the CAD system is used, the officer properly concluded that a written report was not necessary.

Based on these findings, the investigator concluded that the two officers met the standards of conduct that applied to the situation, and they complied with all Department rules and regulations. On April 4, 2020, the FCPD sent a letter to the Complainant informing him that it had completed a comprehensive examination of the facts and circumstances surrounding the Complainant's allegations and that the officer's actions "were lawful and in compliance with Department Regulations regarding community member contacts."

On June 12, 2020, the Complainant requested a review by the Panel. A subcommittee of the Panel was convened on July 20, 2020, to review the complaint and the investigation file and then determine whether the Panel had authority to review the investigation. The subcommittee concluded that the investigation concerned matters within the purview of the Panel. It found that the complaint had been timely submitted and contained allegations that met the Panel's standard of "abuse of authority and serious misconduct."

#### IV. Panel Meeting

The Panel Review Meeting was held virtually on August 27, 2020. All Panel members had reviewed the Investigation Report prior to the meeting. The Complainant was present at the meeting. In his statement to the Panel, the Complainant said that his

civil rights were violated and that the officers violated FCPD General Order 301, which governs internal investigations. Also, the Complainant stated that he never refused to pay the fee. Rather, he wanted a waiver and was questioning the policy when the police arrived. He also expressed his view that the FCPD cannot demand that he leave public property when he is not breaking the law. He reiterated that he felt intimidated and threatened during the interaction with the FCPD, and that he believed the investigation was inaccurate and incomplete.

Chief Edwin Roessler and Major Tonny Kim represented the FCPD at the Review Meeting. Several Panel members were concerned that one witness at the transfer site was not interviewed during the investigation. They noted that the witness could have provided information on the demeanor of the officers during the encounter with the Complainant. It was also noted that the Panel had made a recommendation to the FCPD, published on January 9, 2019, stating, “The Panel recommends that the FCPD ensure that all concerns outlined in future Complaints be fully investigated and separately addressed in the Investigation Report.” Similarly, in a recommendation to the FCPD published on January, 15, 2020, the Panel stated, “With respect to obvious, known witnesses who are not interviewed, Investigation Reports should include an explanation for why such an interview failed to occur.”

Two Panel members noted that the disposition letter, which was sent to the Complainant by the FCPD after the investigation was completed, did not provide the reasons for the findings. The two Panel members further noted that the Panel had recommended on March 21, 2019, that FCPD disposition letters to a Complainant upon conclusion of a FCPD investigation, “must contain sufficient, specific detail to provide Complainant with a clear understanding of the scope of the FCPD investigation and the rationale for the FCPD findings.”

Some Panel members were also concerned that the investigator did not follow a standardized investigative plan that is based on best practices, policy or practice.<sup>1</sup> One Panel member observed that he has seen a disparity in the quality of investigations, particularly between those conducted at the district level and those at the Internal Affairs Bureau (IAB). Chief Roessler and Major Kim responded that investigators are trained throughout their careers, beginning at the Academy and continuing with advanced training and supervision by field training officers. Investigators are tenured and seasoned professionals, they said. Although each investigation is unique, they

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<sup>1</sup> Following the Review Meeting, the FCPD informed the Panel that senior staff are planning to add a bureau commander review requirement for certain district and division cases to be implemented before the conclusion of the investigation. This will add an additional layer of scrutiny to cases that are not investigated by the IAB.

stated, investigators both at the district level and at IAB adhere to the guidelines in an internal administrative manual, and all investigations follow a general structure.

A few Panel members asked the FCPD about how police are trained in potential trespass situations, where a community member is asked to leave or “move along” from a public place. Police receive extensive training on how to handle trespass cases, Major Kim responded. He said police also attempt to de-escalate conflict situations and work to resolve matters without making an arrest. He said that in this incident, the officers asked the Complainant a number of times to move along before demanding that he leave the site. He said the officers used due diligence to resolve the matter and ultimately there was a positive outcome. The parties agreed to settle the matter themselves.

During their deliberation, most Panel members agreed that while the FCPD should have interviewed the witness who observed the encounter, the additional evidence would not likely change the outcome of the investigation.<sup>2</sup> The weight of the evidence and the substantial completeness of the investigation were important considerations for the Panel in making its finding. Further, the Complainant was asked by Transfer Station managers and FCPD officers to either leave or pay the fee several times before a demand was made for him to leave. To prevent traffic congestion at the site, it was reasonable and lawful for the FCPD to demand the Complainant leave. The Panel voted by 8-1 to concur with the findings in the FCPD investigation.

An audio recording of the August 27, 2020, Panel Review Meeting may be reviewed here: <https://soundcloud.com/fairfaxcounty/police-civilian-review-panel-meeting-august-27-2020>.

On October 8, 2020, the Panel discussed the Review Report and Recommendations. An audio recording of that meeting may be reviewed here: <https://soundcloud.com/fairfaxcounty/police-civilian-review-panel-meeting-october-8-2020>

**CC: Complainant**

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<sup>2</sup> Following the Review Meeting, Major Kim informed the Panel that Chief Roessler directed his staff to interview the witness who might have observed the incident. On October 3, 2020, the FCPD informed the Panel that investigators had identified the witness and interviewed him. The witness statement was included in the investigative case file, and it supported the FCPD investigation finding.

## MEMORANDUM

To: The Fairfax County Police Civilian Review Panel

From: Hansel Aguilar, Panelist

Date: October 8, 2020

Re: CRP-20-15 Complaint Dissent

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### I. Introduction

After a careful and holistic consideration of the case file, the review meeting deliberation, and the Majority report of CRP-20-15, I find that I am not able to support the conclusion stated in the report that the "...Investigation is complete, thorough, and accurate..." Specifically, I dissent from the Majority report because: (1) at the time of the review and Panel deliberation, the FCPD had not interviewed nor attempted to interview a key witness<sup>i</sup>; nor had (2) the FCPD accurately investigated the appropriateness of issuing a "move along order" to the Complainant in the interaction in question.

II. The Investigation concerning the allegation of the officers' demeanors was not completely, thoroughly, and accurately investigated and is inconclusive

Without the use of an objective investigative tool like body-worn camera (BWC) or a comparable video recording of the incident, determining whether the officers exhibited demeanor consistent with FCPD General Order 201.13, which states that,

*"Employees shall conduct themselves professionally at all times when representing the Department. They shall use respectful, courteous forms of address to all persons"*

was a difficult task for the assigned investigators in this case. Fortuitously, there were several witnesses to the event in question. Perplexingly and without reason or justification, the FCPD failed to interview all the available and present

witnesses that could have corroborated or refuted the claims made in this complaint.

This omission of a key witness is not an event in isolation. In fact, this Panel has already made public comments and recommendations to the FCPD regarding the thoroughness and completeness of their investigatory process. As reiteration of a previously provided Panel recommendation<sup>ii</sup>, I would like to emphasize that the FCPD needs to ensure that “With respect to obvious, known witnesses who are not interviewed, Investigation Reports should include an explanation for why such an interview failed to occur.”

Additionally, as previously recommended by this author, the FCPD should strongly consider implementing and standardizing the use of investigation plans for all misconduct investigations to ensure a systematic approach to reviewing and investigating each allegation in the complaint.

### III. Appropriateness of a *move along order* in a public space while engaging in constitutionally protected activity

One of the expressed concerns in the complaint was the appropriateness of the FCPD officers’ instructions to the complainant to leave the premises while he was attempting to resolve a dispute with the solid waste facility operators. Specifically, the complainant alleged that the instruction by the officers to leave the waste facility was “unlawful” and violated his “1<sup>st</sup> amendment right to peaceably assemble and petition the government for a redress of grievances.”

Based on the statements from the complainant, the FCPD, and the witnesses, I disagree with the assertion that the complainant’s first amendment rights to assemble and petition the government were violated. The complainant’s actions in this matter were guided by his interpretation of local and state emergency declarations. It was his understanding that he should have been offered or allowed a waiver considering the global public health emergency. According to the case file, the complainant acknowledged that there were no specific statements or provisions in the emergency declarations regarding the waiver he was seeking.

Objectively speaking, his hardship waiver request was reasonable. Notwithstanding, I do not believe it was reasonable nor consistent for the complainant to physically present himself at the waste station and demand that

the waiver be provided to him. Yes, the waste station is a County facility thus it is a public space which provides certain constitutional protections, however, there were other mechanisms the complainant could have and should have exhausted prior to showing up at the facility. Specifically, the complainant could have exercised his first amendment rights by contacting the waste facility, his local representative, his state representative, etc. via phone, email, or regular mail prior to attempting to speak to someone in person at the waste facility. Additionally, the police appeared to have provided the complainant considerable time before asking him to leave.

My concern with this element of the investigation concerns the lack of clear guidance and instructions provided to FCPD officers regarding issues of trespassing in public spaces. Currently, the FCPD does not have a general order addressing these interactions and allows for officers to utilize their discretion to determine the appropriateness of issuing a move along order or trespassing order to a community member. As I noted in the deliberation of this case, the DC Office of Police Complaints (OPC)- our neighboring civilian oversight agency, which oversees the Metropolitan Police Department- has made similar observations with the misapplication of move along orders by their jurisdiction's law enforcement officers. I believe it would be beneficial for the FCPD to consider analyzing this issue in the County further and explore how to enact clear guidance for FCPD officers. In this review, the FCPD should consider some of the recommendations in OPC's Policy Report #17-3: Blocking Passage<sup>iii</sup>:

*"To help improve and facilitate better relations and increase trust between MPD officers and community members, the PCB recommends that:*

- 1. MPD require its officers to document any incident where a move along order and/or a blocking passage citation was issued, and the incident reports must detail how specifically the person was blocking passage.*
- 2. MPD should provide additional training on the correct application of the statute as well as cultural and sensitivity training on the proper way to issue move along orders in a manner that promotes cooperation and decreases animosity."*



#### IV. Conclusion

Based on the unknown aspects of this case (at the time of review) and the accuracy of the *move along order* allegation, I must dissent from the conclusion that this investigation is complete, thorough, and accurate.

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<sup>i</sup> On Monday, October 5<sup>th</sup>, 2020 the Panel received a memorandum from the FCPD (dated October 2<sup>nd</sup>, 2020) certifying that on the FCPD identified the witness in question and conducted an interview. It was reported by the FCPD that the statements from the witness supported the conclusions of the FCPD investigation.

<sup>ii</sup> CRP-19-11: Published January 9, 2020

<sup>iii</sup> The complete report can be accessed via:

[https://policecomplaints.dc.gov/sites/default/files/dc/sites/office%20of%20police%20complaints/publication/attachments/Blocking%20Passage%20Report.FINAL\\_.pdf](https://policecomplaints.dc.gov/sites/default/files/dc/sites/office%20of%20police%20complaints/publication/attachments/Blocking%20Passage%20Report.FINAL_.pdf)