



County of Fairfax, Virginia

MEMORANDUM

DATE: 1/9/2020

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 in case of Complaint No. CRP-19-11

I. Introductionⁱ

The Panel held a Panel Review Meeting on December 17, 2019, to review the Investigation resulting from the complaint first submitted to the Panel on May 21, 2019. The requested review was of an investigation originally completed on April 4, 2019, following a citizen complaint submitted directly to the FCPD at the Franconia District Station on December 27, 2018. In June 2019, the FCPD reopened its investigation and issued a second disposition letter dated August 30, 2019.

After reviewing the Investigation file, the Panel Members present¹ voted 6-1 that the Investigation was complete, thorough, accurate, objective, and impartial, and concurred with the ultimate findings of the FCPD documented in the Investigation Report. The Panel Members present determined to present several comments and recommendations for future Investigation Reports and police procedures based on unique aspects of the file.

II. Background Facts and Review Request

On December 27, 2017, at approximately 6:00pm, the individual who filed the complaint at issue (hereinafter referred to as the "Complainant") was stopped by a uniformed FCPD Officer (herein after referred to as the "Subject Officer") in a marked cruiser for parking in a handicapped parking spot without a handicapped sticker in the parking lot of an extended stay hotel where the Complainant and his family were staying. The Complainant, who is a Black male, was driving the car with a Black male passenger in the front seat and a White female passenger, his wife, in the back seat. The Complainant had exited the car and was walking into the hotel when the Subject Officer stopped him. The Complainant would later admit at the Review Meeting that he parked in the handicap spot because he was nervous that the Subject Officer was following him and the Complainant did not have a driver's license.

¹ Panel members Rhonda VanLowe and Sris Sriskandarajah were not present.

Upon being stopped, the Complainant acknowledged to the Subject Officer that his car did not have a handicapped sticker but told the Subject Officer that he believed that the renter of the car had one. The Complainant offered to go upstairs to retrieve the sticker from the renter, but the Subject Officer instructed the Complainant to return to the vehicle and the Subject Officer also explained that he would be calling for backup. The Complainant called his family friend, the renter of the car, who came down to explain the situation, but the family friend, a Hispanic female, admitted that she did not have a handicap sticker.

While waiting for other officers to arrive, the Subject Officer requested that all four individuals remain in the vehicle. According to the Subject Officer, he also informed the individuals that he smelled marijuana in the vehicle. According to the Subject Officer, the Complainant admitted to having smoked marijuana in the vehicle earlier that day.

The Complainant repeatedly asked the Subject Officer if he was under arrest, was told that he was not, and then informed the Subject Officer that his children were left unattended up in the hotel room. In addition, the Complainant's family friend who had been watching the children and had come down from the hotel room explained that the stove was still on. The Complainant's children were three years old and seven months old. The Complainant insisted that he be allowed to attend to his children, but the Subject Officer thwarted his efforts to leave the car, which prevented the Complainant from opening the door, leading to the Complainant's leg to be pinched in between the door and the car. The Complainant put his hands outside the window of the car, informed the officer that he would be remaining in the car, and moved his leg back into the car. The Complainant was not injured.

When backup arrived, consisting of several marked cruisers, additional police officers, and a police ride-a-long civilian, the Complainant and the other passengers were removed from the car. Male officers patted down all occupants of the vehicle. The Subject Officer handcuffed the Complainant and placed him in a police cruiser. Officers retrieved the children from the hotel room and brought them to the lobby.

Upon searching the vehicle, the Subject Officer informed the Complainant that he had recovered a small bag with apparent marijuana residue on the driver's side of the vehicle and a loaded handgun in the glove compartment with a filed off serial number. The Subject Officer issued a summons to the Complainant for possession of marijuana. The Complainant did not receive a summons in connection with the handgun and ultimately was never charged as all investigatory efforts (including using fingerprint and DNA evidence) failed to tie the gun to a particular person.

According to the Complaint, the whole incident took roughly forty-five minutes, during which the Complainant's young children were left unattended. The Complainant calculated his estimate by noting that roughly ten minutes passed before his family friend came down from the hotel room, during which the Subject Officer attempted to run the Complainant's social security number and date of birth, that further fifteen or so minutes passed before backup arrived, and that another fifteen or so minutes further passed before the children were retrieved.

The Complainant also asserts that the gun recovered on the scene was not his and did not, in fact, come from the car, and that there was no marijuana in the car either. The Complainant further asserts that the pat downs of his female companions were improper. In addition, the Complainant asserts that he was assaulted when the Subject Officer closed the door on his leg. Finally, Complainant asserts that he was the victim of racial profiling.

Specifically, the Complaint read:

- Complaint (1): [Subject Officer] claiming he found Marijuana in the vehicle.
- Complaint (2): Being charged with Possession of Marijuana.
- Complaint (3): Racial Profiling.
- Complaint (4): Assault by a police officer.
- Complaint (5): Records stating I had a weapon (GUN) but never was charged with having a weapon in my possession.
- Complaint (6): Children unattended to for 45 minutes.

The Commonwealth's Attorney dismissed the possession of marijuana charge against the Complainant. The Complaint alleged his attorney advised him to wait a full year until the statute of limitations had run out on the possession charge before filing a citizen complaint against the Subject Officer on December 27, 2018.

III. Procedural Background

As explained above, the Complainant filed a citizen complaint on December 27, 2018, directly with the Franconia District Station. The Complainant's family friend and his wife also filed complaints at that time.

A supervisor at the Franconia District Station investigated the incident, interviewing the Complainant, his wife and his family friend, the Subject Officer, and two police officers who had provided backup. This investigation addressed all allegations of misconduct in the complaint, including the Complainant's assertions of racial bias. Although the investigator located no videos documenting the incident due to the passage of time (over one year), the investigator was also able to review the Computer Aided Dispatch ("CAD") history of the patrol cars involved, which documents when officers leave and reenter their cars. The investigator further reviewed the evidence logs from the time of the incident in question and the history of the prosecution of the case—or in this instance the lack thereof.

On April 4, 2019, the FCPD informed the Complainant that it had concluded "a comprehensive examination of the facts and circumstances surrounding the allegations" and found that the Subject Officer's initial stop "was not based upon bias, but instead, on a clear violation of law for parking in a handicapped parking spot without the proper placard displayed." Further, addressing the other allegations, the letter to the Complainant explained:

A review of all relevant information, in addition to witness interviews, indicated that [Subject Officer] acted in accordance with policy and procedures. [Subject Officer] detained you for the plain smell of marijuana in the vehicle and gave

you lawful commands to remain in the vehicle. When you attempted to exit the vehicle, he sought to contain you by closing the door. When he subsequently searched the vehicle, evidence of marijuana was located as well as an illegal gun. All evidence recovered was entered into the Police Department Property Room. As soon as it was practical to do so, [Subject Officer] ensured your children were attended to. Finally, it is permissible by Department Policy, for an officer to conduct a cross gender search or pat down.

The letter further informed the Complainant that he could request that this Panel review the investigation of his complaint.

On May 21, 2019, the Complainant requested review by the Panel and provided his complaint to the police as well as those of his wife and his family friend. He requested the Panel review all three police complaints. The Panel assigned them all the same intake number and the investigation addressed all three complaints.

Because the complaint contained an allegation of bias-based policing, and specifically racial profiling, the Internal Affairs Bureau (“IAB”) chose to reopen the investigation and notified the Panel of its intent to do so on June 4, 2019. A Second Lieutenant conducted a second investigation along the same lines as the first, also entailing witness interviews, including with the Complainant, and a comprehensive record review. This second investigation occurred because the initial complaint had been reviewed by the Franconia District Station and not the IAB. On August 30, 2019, the FCPD informed the Complainant that:

During this review, [IAB] completed additional investigative steps into the allegation of bias based policing. [IAB] observed that this specific allegation was investigated [by the Franconia District Station], however, not to the standards of the Internal Affairs Bureau. Additional investigative steps that were taken regarding your bias based policing allegation included seeking clarification from you regarding what occurred during the event, further interviews with the involved officers, and discussing your experiences, and related options, regarding your concerns with other agencies that were involved. The additional factfinding measures were completed and documented. At the conclusion of this supplemental investigation and review, the outcome and analysis came to the same conclusion: [Subject Officer’s] actions were within Department policy.

The letter was sent to the Panel in addition to the Complainant.

On Monday, October 7, 2019, a subcommittee of the Panel met to discuss the Investigation. Having reviewed the Investigation and the complaint, the Panel determined that the Investigation concerned matters within the purview of the Panel because complaint was timely submitted and concerned allegations that rose “to the Panel’s standard of abuse of authority and serious misconduct.”

At the Panel meeting on November 19, 2019, the subcommittee recommended the Panel review the Investigation. In light of the claim of assault, the subcommittee asked the Independent Police Auditor whether the allegations rose to the definition of use of force set forth by FCPD General Order 540 and thus was within his purview. The Independent Police Auditor and the Panel agreed that the allegations were not sufficient to require that the Auditor, not the Panel, review the allegations. By a vote of 8-0, the Panel Members present² accepted the recommendation of the subcommittee, determined that the Panel had the authority to review the Investigation, and issued an initial disposition notice.

IV. Panel Meeting

All Panel Members present for the Panel Review Meeting reviewed the Investigation Report prior to the Meeting on December 17, 2019. The Complainant and his family friend were present at the Panel Review Meeting. The Complainant made a statement and answered questions of the Panel. Major Matt Owens appeared on behalf of the FCPD and answered questions from the Panel.

Based on the Complainant's statement and responses to questions, Major Owens's statement and responses to questions, and the Panel's review of the Investigation file, the Panel made the following findings:

The Investigation interviewed the Complainant and his wife and family friend, also complaining witnesses; the Subject Officer; and two other officers. The Investigation also examined the available records of the patrol cars in question. The Investigation further reviewed contemporaneous files concerning the incident, including police reports and evidence logs concerning the handgun and the alleged marijuana found in the car.

The lengthy passage of time between the incident and the Complaint created challenges for investigators and, unfortunately, meant that certain potentially important evidence simply was not available. For instance, under state law, police departments are required to retain video evidence for one year, but there was no in car video or similar evidence that had not been purged after a year had passed.

That said, FCPD vehicles are equipped with CAD systems. Based on the CAD information, the Subject Officer exited his vehicle and the event started at 6:34pm.³ According to CAD information from the other patrol cars involved, officer backup arrived on the scene within seven and a half minutes of the Subject Officer's request. While there were discrepancies between the perspectives of the complaining witnesses, who claimed the incident had lasted forty-five minutes, and the police officers, who asserted a much shorter timeline

² Panel Member Hansel Aguilar was not present.

³ Officers are trained to press a button in their vehicle connected to the CAD system to signify when they leave and enter their vehicles. This system helps track the location of police officers.

(and who claimed that the children were attended to after backup arrived on the scene), the Investigation found that the evidence did not as a whole suggest the lengthy detention asserted, nor that the safety of the Complainant's children was compromised. While the Panel expressed concern that there was not a clear policy in place to deal with a situation where children were left unattended by a then-detained individual, the Panel concurred with the Investigation's finding that it was reasonable for a solo officer dealing with an illegally parked car smelling of marijuana who received backup within seven and one half minutes to continue to detain the individuals in question and deal with the children upon the arrival of backup.

Further, the Complainant's claim that neither a firearm nor marijuana were found in the car was simply unsupported by the evidence uncovered in the Investigation. The officers involved contended that they found marijuana and the handgun in the vehicle. The Subject Officer submitted the contraband to the evidence custodian contemporaneously with the incident. The Complainant argues, more or less, that the fact that the police never obtained a gun charge or pursued the simple marijuana possession charge suggest that said contraband was not really seized. But this position is mere unfounded speculation; charging discretion simply does not prove that evidence obtained and logged never existed. Moreover, the Investigation revealed, for example, that the FCPD tested the firearm for fingerprint and DNA evidence in the hopes of connecting it to the Complainant or another person. Said testing was unsuccessful.

The Panel also considered the claims that the Complainant had been assaulted. The Complainant admitted that he was unhurt when the Subject Officer closed the door that struck his leg. The parties were all in agreement that the Subject Officer was preventing the Complainant from leaving the vehicle during the stop. Nothing in the Investigation suggested anything more than an inadvertent striking of the Complainant, rather than a use of force (as explained by the Independent Police Auditor). The Panel's lone dissenter disagreed with this finding and suggested that a use of force investigation should have been conducted. However, the Panel found that the incident had been properly investigated.

With respect to the two females who complained of invasive pat downs conducted by a male officer, the Panel found that the Investigation took these allegations seriously but was reasonable in clearing the Subject Officer. While the department has expressed a preference for same-gender pat downs, opposite gender pat downs are permissible, and the evidence did not support the assertion that the pat downs had been excessively invasive. Nevertheless, the Panel discussed making a comment or recommendation regarding future cross-gender pat downs. *See Part V supra.*

Lastly, the Panel considered the allegations of racial profiling. The Complainant offered that he was a target and asserted that Subject Officer had no basis to stop him expressing his belief that he was stopped because he is Black, and his wife is White. Complainant claimed that Subject Officer initiated racially motivated contact with him before he parked illegally in a handicap spot.

The Investigation did not support the Complainant's claims. The Subject Officer claimed that he stopped the Complainant only after the car was illegally parked, at which point the Complainant had exited the vehicle. The Complainant admitted that he had parked illegally and was trying to get away from the Subject Officer because he was driving without a license and did not want to get a ticket. The written complaint provided by the Complainant's wife, contradicted the Complainant's position, as did the interview with Complainant's wife: she asserted that the police car had been driving behind the car and Subject Officer made contact with Complainant only *after* Complainant had parked in a handicap space. The interview with Complainant's wife further contradicted claims of the husband that he did not use marijuana and asserted her belief that Complainant had pulled into the handicapped space because he did not have a license. Complainant also could not explain his belief that he alone was targeted because of his race, whereas his front seat passenger of the same race was not charged with any crime.

Moreover, the IAB made the deliberate choice to reopen and review the case in light of the complaint of racial bias. The IAB conducted additional interviews and pulled arrest statistics for the Subject Officer and similarly situated officers, namely those in the Franconia District Station. The statistics revealed that the Subject Officer arrested fewer Black suspects than the average police officer of the Franconia District Station.

While one Panel Member expressed concern that the initial district station Investigation had not been as comprehensive with respect to the racial bias complaint in particular, the IAB reopened the Investigation on its own volition to ensure that the matter was handled in accordance with IAB practices. In light of the actions taken by the IAB and the investigative choices made in considering the complaint, the Panel found by a vote of 6 to 1 that the Investigation is complete, thorough, and accurate, and concurred with the conclusions of the Investigation.

At the same time, the Panel felt that room for improvement in the Investigation exist, and decided to make certain Comments and Recommendations seen below.

First, while the Investigation included interviews with the Complainant, his wife, and his family friend, the Police failed to interview with the passenger in the front seat of the car. Major Owens did not know why the front seat passenger had not been interviewed. While a number of innocent hypothetical reasons may exist for why the front seat passenger was not interviewed, including, given the passage of time, a difficulty finding said witness, the Panel criticized the Investigation for failing to provide any explanation for why a known and obvious witness had not been interviewed.

Second, while the Investigation interviewed several responding officers, the ride-a-long civilian who arrived at the scene and apparently played a role in securing the children was also never interviewed. The Investigation determined that the officer described in complaining witness statements as a "female officer," a "rookie cop in training," and an "officer in training" was, in fact, a police ride-a-long civilian, an employee of the Department of Public Safety Communications, but the Investigation Report admitted that investigators could not determine

who that individual was. The Panel did not have reason to believe that the investigator had never tried to identify the ride-a-long individual, but it did fault the Investigation, and the record keeping related to ride-a-longs, for being unable to obtain a statement from a potentially unbiased observer to the incident, given that she was neither a member of the Police Department nor an individual detained by the Subject Officer. Indeed, such a witness could have been just as helpful in clearing the actions of the Subject Officer as she could have been supporting the allegations of the complaint.

Third, while the Panel concurred with the Investigation Report finding that the Subject Officer had not acted improperly when waiting for backup before addressing the issue of unsupervised children, the Panel expressed concern that there was not clarity with respect to how an officer should make such decisions.

An audio recording of the December 17, 2019, Panel Review Meeting may be reviewed here: <https://soundcloud.com/fairfaxcounty/police-civilian-review-panel-dec-18-2019>.

On January 9, 2020, the Panel discussed the Finding Summary; an audio recording of that meeting may be reviewed here: <https://soundcloud.com/fairfaxcounty/police-civilian-review-panel-jan-9-2020>

V. Recommendations

- a. With respect to obvious, known witnesses who are not interviewed, Investigation Reports should include an explanation for why such an interview failed to occur.
- b. FCPD civilian ride-a-long individuals should be tracked and recorded in all instances. A police ride-a-long individual should never be unknown such that when an incident containing alleged misconduct is investigated, the civilian witness cannot be determined.
- c. The FCPD should implement a clear policy for what officers should do in situations where children are left unattended by detained individuals to make sure that such children are safe during such incidents.

CC: Complainant

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

MEMORANDUM

To: The Fairfax County Police Civilian Review Panel

From: Hansel Aguilar, Panelist

Date: January 9, 2020

Re: CRP-19-11 Complaint Dissent

I. Introduction

After a careful consideration of the case file, the review meeting deliberation, and the Majority report of the CRP-19-11 matter, I find that I am not able to support the conclusion stated in the report that the "...Investigation is complete, thorough, and accurate..." At best, the investigation is inconclusive on various areas of concern brought forth by the complainant.

II. The Investigation concerning the allegation of assault by a police officer was not completely, thoroughly and accurately investigated and is inconclusive

Determining whether the officer exhibited an excessive use of force on the complainant 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.

The complainant reported that he was struck by the door of the vehicle when the subject officer pushed the door shut to contain him in the backseat of the vehicle. During the investigation of the allegations lodged by the complainant, the subject officer did not deny that he closed the door of the vehicle and informed the Department that it appeared the complainant was attempting to exit the vehicle at the time when he instructed him to remain in the vehicle. In his complaint to the Department, the complainant classified this event as an "assault by a police officer."

While the FCPD investigators did question the subject officer regarding this allegation of force, the Department did not classify the event as a "use of force" incident even though FCPD General Order 540 describes this event as force:

"G. Force: Any physical strike or instrumental contact with an individual, or any significant physical contact that restricts an individual's movement."

Based on the review of the file, there is sufficient reason to believe that there was instrumental contact (i.e. the door) with the complainant caused by an action taken by the officer. The inquiry should then have moved to attempt to identify why the event was not classified as a use-of-force incident and whether the force was justified. The majority asserts in its report that in the November 19, 2019¹ Panel meeting the IPA explained that the event appeared to be an "inadvertent striking." While this is accurate, the IPA also

¹ Panelist Aguilar was not present for this Panel review meeting; however, he was able to review the recording of the meeting.

indicated in that same meeting, “that could certainly be reviewed by the Panel as well.”² [07:30-07:39] As such, I maintain that the FCPD failed to properly document and investigate that allegation as a use of force incident.

A thorough and complete investigation of the incident would have required a questioning of the witnesses regarding this allegation and attempting to review available footage (i.e. surveillance footage of the hotel cameras; other public cameras, and or in-car-video). As noted in the Majority’s report, due to the passage of time from when the police encounter occurred and when it was investigated, some evidence appeared to be unavailable. The case file, however, did not indicate whether the investigators attempted to review the footage or just assumed it was no longer available due to the lapse of time. Specifically, in the December 18, 2019 Panel meeting, I asked Major Owens whether he had knowledge of whether the subject officer had an in-car-video activated on the day in question, to which he replied, “it would be impossible to tell if he had an in-car-video, if it was working that night, or anything because of the time frame of the initial incident to the time of the complaint prohibits us from finding that.” [41:25-41:40]³ Furthermore, Major Owens explained to the Panel that even if there was an in-car-video system installed in the subject officer’s patrol cruiser on the day of the incident in question, there would be no way for the FCPD to determine whether it was activated on the day of the incident and whether it collected any footage because of the lapse of time from when the incident occurred and when it was investigated.

III. Witnesses were not completely, thoroughly and or accurately identified or interviewed

As noted in the Majority’s report and recommendations, the Investigation Report indicated that the investigators did not identify and or interview all known witnesses.

IV. Cross-gender pat down/searches

While the FCPD (via the Investigation Report and Major Owens affirmation at the Panel meeting) indicated that the Department permits cross-gender pat downs and searches, in my opinion, it failed to completely and thoroughly investigate whether (in this particular instance) it would have been “practical” to avoid it as instructed in FCPD General Order 203, “*Whenever practical, cross sexual search should be avoided.*”

V. Conclusion

While I understand and share the Chair’s sentiments about the “futility of additional investigation” [56:45]⁴ by returning this case to the FCPD for information that individuals would be unlikely to remember, based on the unknown (and unknowable) aspects of this case I must dissent from the conclusion that this investigation is complete, thorough, and accurate.

² A transcript of the meeting is not available, however as it is practice of the Panel, a link to the SoundCloud audio recording of the public meeting can be accessed via <https://soundcloud.com/fairfaxcounty/police-civilian-review-panel-nov-19-2019> . Time stamps of selected statements from the session are provided in brackets.

³ A link to the SoundCloud audio recording of the public meeting can be accessed via: <https://soundcloud.com/fairfaxcounty/police-civilian-review-panel-dec-18-2019> . Time stamps of selected statements from the session are provided in brackets.

⁴ A link to the SoundCloud audio recording of the public meeting can be accessed via: <https://soundcloud.com/fairfaxcounty/police-civilian-review-panel-dec-18-2019> . Time stamps of selected statements from the session are provided in brackets.