

Public Report

Sept. 25, 2023: Use of
Force Complaint

IPA-23-19



Richard G. Schott
Fairfax County
Independent Police Auditor

Sept. 25, 2023:
Use of Force Complaint
IPA-23-19

A Public Report by the Fairfax County
Independent Police Auditor

Publication Date: October 9, 2024



A Fairfax County, Va., Publication

Office of the Independent Police Auditor
12000 Government Center Parkway, Suite 233A
Fairfax, VA 22035

www.fairfaxcounty.gov/policeauditor

Contact Us: IPAPoliceAuditor@fairfaxcounty.gov

To request this information in an alternate format, call 703-324-3459, TTY 711.

NOTE TO THE READER: The Fairfax County Police Department revised its comprehensive policy addressing the use of force on April 29, 2024. The actions of the officers involved in this incident will be analyzed using the policy provisions that were in effect on September 25, 2023 (i.e., General Order 540, effective August 12, 2022).

INCIDENT

On September 25, 2023, Police Officer First Class #1 (hereinafter “PFC#1”) and Police Officer First Class #2 (hereinafter “PFC#2”) from the Fairfax County Police Department (hereinafter “FCPD”) responded to a call for service at a residence on Horseshoe Cottage Circle in Lorton, Virginia. The call stemmed from a dispute between the homeowners (the husband hereinafter identified by his initials, “K.M.” and the wife hereinafter identified by her initials, “H.K.”) and one of the two employees of a cleaning service (hereinafter identified by her initials, “L.R.”) who had been at the home to provide cleaning services.

When PFC#1 and PFC#2 arrived, they were advised by L.R. that following a dispute over fees, K.M. and H.K. pushed her down some stairs and kicked her in the back to get her out of their house. Neighbors witnessed part of the initial incident and also provided information to PFC#1 and PFC#2. The Fairfax County Fire and Rescue Department (hereinafter “FCFRD”) also sent personnel to the house because L.R. reported being injured by the assault.

While PFC#1 was interviewing individuals outside of the home, H.K. approached him. He briefly put his hand on her arm and requested that she go back inside. After completing the interviews outside, PFC#1 and PFC#2 went inside and obtained K.M.’s and H.K.’s versions of events. These conversations took place in the foyer near the front door. When PFC#1 determined there was probable cause to believe that K.M. had assaulted L.R., PFC#1 instructed K.M. to put his hands behind his back.¹ PFC#1 grabbed K.M.’s hands, but K.M. immediately began to pull them to his front.

PFC#1 told K.M. not to resist, and PFC#2 tried to help get control of K.M. At this point, H.K. moved between the officers, which interfered with the arrest of her husband. PFC#2 then tried to control H.K., leaving PFC#1 struggling to get K.M. handcuffed. K.M. placed one of his

¹ PFC#1 failed to tell K.M. that he was under arrest, nor did he explain the reason for the arrest. This failure to verbally communicate will be addressed in the RECOMMENDATIONS section of this report.

hands on PFC#1's neck and squeezed. K.M. opened the front door and he and PFC#1 continued to struggle outside. FCFRD personnel jumped in to assist PFC#1 in getting control of and handcuffing K.M. PFC#1 only utilized control tactics and forceful handcuffing during the incident.²

Meanwhile, PFC#2 continued to struggle with H.K. and they also ended up outside, where H.K. grabbed PFC#2's protective vest and pulled her hair. PFC#2 did not use any strikes or less-lethal devices, but she did pull H.K.'s hair and executed a takedown to get her to the ground, where she was able to get control of H.K. However, H.K. maneuvered her body and intentionally bit PFC#2's leg. PFC#2 immediately advised H.K. that she would be charged with assault for biting her.³

An FCPD supervisor (hereinafter "SGT#1") was called to the scene because of the force used to arrest K.M. and H.K. K.M. was taken directly to the Fairfax County Adult Detention Center (hereinafter "ADC") where multiple warrants were issued by a magistrate.

H.K. requested to be examined by FCFRD and to be taken to a hospital. She was taken to Mount Vernon Hospital, where she was treated for bruises and scrapes. She declined an X-ray of her back despite complaining of back pain. She was then transported to the ADC and a magistrate issued multiple warrants for her.

On September 30, 2023, H.K. submitted a complaint to the Fairfax County Police Civilian Review Panel (hereinafter "Panel") listing several allegations, to include excessive force being used on her and her husband during this incident. The Panel forwarded H.K.'s complaint to the OIPA because the complaint stated that H.K. and K.M. were "subjected to violent and unjustified assault..." and that both had sustained injuries from the encounter. This report will address only the alleged uses of force, while the Panel will review the investigation into any allegations of abuse of authority or serious misconduct.⁴

² PFC#1 stated, in a subsequent interview, that he would have deployed his electronic control weapon (hereinafter "ECW," and commonly referred to as a taser), but he was using both hands trying to get control of K.M.'s hands.

³ PFC#1 had already decided to arrest both K.M. and H.K. for the initial assault of L.R. However, before she was arrested (or even advised that she was under arrest), H.K. interfered with her husband's arrest and bit PFC#2. When she was arrested after that, she was told it was for assaulting a law enforcement officer.

⁴ The Panel's by-laws, in Article VI. at A. 3., 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

CRIMINAL INVESTIGATION/ PROSECUTIVE DECISION

The FCPD conducted only an administrative investigation into the actions of PFC#1 and PFC#2 during this incident.

The warrants issued by the magistrate on September 23, 2023, charged both K.M. and H.K. with one count of assault and battery on L.R., the cleaning service employee;⁵ two counts of assault of a law enforcement officer;⁶ and two counts of obstruction of justice.⁷

INTERNAL ADMINISTRATIVE INVESTIGATION

The administrative investigation into this incident was conducted by the FCPD’s Internal Affairs Bureau (hereinafter “IAB”). That investigation included a review of the complaint and accompanying videos and photographs submitted to the Panel, the Incident Reports prepared following the incident, all body-worn camera (hereinafter “BWC”) and in-car video (hereinafter “ICV”) footage, photographs and medical records pertaining to alleged injuries sustained by H.K., and all Department of Public Safety Communications material relevant to the incident. The investigation also included interviews of H.K., K.M., witness neighbors, L.R. and the second cleaning service employee who was present during the incident, all FCPD employees who responded to the incident, and all FCFRD employees who were on the scene of the incident.⁸

The FCPD concluded that the force used by PFC#1 and PFC#2 to accomplish the arrests of K.M. and H.K. was objectively reasonable. I agree with the FCPD’s conclusion, and that it was based on an investigation that was complete, thorough, objective, impartial, and accurate. Separate from the use of force determination, the department did determine that PFC#1 violated FCPD policy when he decided to arrest K.M.⁹ without a warrant for a misdemeanor assault—that

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/>.

⁵ Va. Code § 18.2-57.

⁶ Va. Code § 18.2-57 (C).

⁷ Va. Code § 18.2-460.

⁸ Because the complaint lodged by H.K. and K.M. included allegations of misconduct by members of the FCFRD, the FCPD’s IAB forwarded the complaint to the FCFRD’s Office of Professional Standards.

⁹ Note 1, *supra*. In fact, PFC#1 had decided to arrest both K.M. and H.K. solely for the misdemeanor assault of L.R.

was not committed in his presence—instead of simply charging him by virtue of a summons for the offense.¹⁰

CONCLUSIONS

Based on FCPD policy, neither K.M. nor H.K. should have been arrested based on the misdemeanor charge of assault on L.R.¹¹ That policy violation, however, does not affect the analysis into whether the force used to accomplish the arrests of K.M. and H.K. was lawful and within departmental policy. Not even a prior Constitutional violation taints an otherwise reasonable use of force. In its County of Los Angeles v. Mendez decision,¹² the United States Supreme Court pronounced that there is no basis for a so-called “provocation rule,” which would turn an otherwise permissible use of force into an impermissible one if it were preceded by a separate Fourth Amendment violation committed by officers. Justice Samuel Alito, writing for the Court in Mendez, recognized that “[a]n excessive force claim is a claim that a law enforcement officer carried out an unreasonable seizure through a use of force that was not justified under the relevant circumstances. It is not a claim that an officer used reasonable force after committing a distinct Fourth Amendment violation such as an unreasonable entry;”¹³ or, as in this case, an earlier policy violation.

In analyzing PFC#1’s and PFC#2’s uses of force, the legal standard to consider is the Fourth Amendment to the United States Constitution.¹⁴ In its landmark Graham v. Connor opinion,¹⁵ the United States Supreme Court pronounced that the Fourth Amendment to the United States Constitution is the standard by which an officer’s use of force during an arrest or detention—both of which are Fourth Amendment seizures—must be analyzed. That Fourth

¹⁰ Although a warrantless arrest for a misdemeanor—not committed in an officer’s presence—is generally prohibited by FCPD policy (see, FCPD General Order 601 V. A. and B.), both state and federal law allow them (see, Va. Code § 19.2-81 and Street v. Surdyka, 492 F.2d 368 (4th Cir. 1974)).

¹¹ *Id.*

¹² 137 S.Ct. 1539 (2017).

¹³ *Id.* at 1547.

¹⁴ Amendment IV to the U.S. 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.

¹⁵ 490 U.S. 386 (1989).

Amendment standard dictates that an officer's use of force must be "objectively reasonable" for it to be lawful.

Also in Graham v. Connor, the Supreme Court recognized that "police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation."¹⁶ The Court went on to point out that that determining the reasonableness of those officers' actions "requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight."¹⁷ Finally, the Court cautioned that "'[n]ot every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers,' violates the Fourth Amendment"¹⁸ because an officer's use of force must "be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight."¹⁹ Based on this guidance, the FCPD found PFC#1's and PFC#2's uses of force to arrest K.M. and H.K. to be objectively reasonable.

When PFC#1 first tried to handcuff K.M., K.M. pulled his arms to his front and began to struggle to avoid being arrested. At this point, he displayed "active resistance," defined by the FCPD as "[v]erbal and/or physical actions by an individual intended to prevent an officer from taking lawful action but not intended to harm the officer."²⁰ He became an "aggressive resistor" when he put his hand on PFC#1's throat and began to squeeze. The FCPD defines "aggressive resistance" as "[a]ctions displayed by an individual intended to cause injury, serious injury, or death to an officer, themselves, or another person, and to prevent the officer from taking lawful action." Despite the heightened level of resistance, PFC#1 only used "empty-hand tactics"²¹ to gain control of K.M. This level of force was objectively reasonable.

Likewise, PFC#2 used force on H.K. when she became an active resistor by interfering with her husband's arrest. She became an aggressive resistor when she grabbed PFC#2's protective vest and pulled her hair. PFC#2's response—tactically taking her to the ground—was a proportionate response and objectively reasonable.

¹⁶ *Id.* at 397.

¹⁷ *Id.* at 396.

¹⁸ *Id.*, quoting Johnson v. Glick, 481 F.2d 1028 (2nd Cir. 1973).

¹⁹ 490 U.S. 386, 396.

²⁰ General Order 540 III.25; See Glossary.

²¹ FCPD. G.O. VI. A.

The officers' uses of force were within FCPD policy for the same reasons their actions conformed with the Fourth Amendment. Closely following the pronouncements from Graham v. Connor,²² FCPD General Order 540 II. states, in part: "The use of all force options by officers shall never be performed in a reckless manner and shall only be used to the extent it is objectively reasonable to defend oneself or another, maintain control over an individual during an investigative or mental health detention, or overcome resistance to a lawful detention or arrest." Furthermore, General Order 540 III. 18. Defines "objectively reasonable" as "[a] level of force that is appropriate when analyzed from the perspective of a reasonable officer possessing the same information and faced with the same set of circumstances. Objective reasonableness is not analyzed with the benefit of hindsight, but, rather, accounts for the fact that officers must make rapid and necessary decisions regarding the amount of force to use in tense, uncertain, and rapidly evolving situations." Finally, General Order 540 IV. A. cautions that "[i]f force is required, officers should use only the amount of force reasonably necessary to overcome an individual's level(s) of resistance and to gain control," and that "[f]orce options allow for reasonable escalation and/or de-escalation of force in proportion to an individual's level of resistance." The force used during this incident satisfied these departmental guidelines.

RECOMMENDATIONS

Even though PFC#1 violated FCPD policy by arresting M.K. and H.K. for the initial assault of L.R., the officers did have probable cause to arrest them, making the arrests lawful.²³ Compounding the decision to arrest in lieu of issuing a summons, PFC#1 failed to tell K.M. that he was under arrest, nor did he explain the reason for the arrest. Effective verbal communication may have made force unnecessary to accomplish the arrests if that communication had resulted in compliance from H.K. In fact, FCPD G.O. 540 E. requires that "[w]henver possible, officers shall attempt to utilize de-escalation strategies and *verbal communication skills* to gain compliance and, *ideally, prevent situations from potentially deteriorating to the point where force may be necessary.*"

²² Note 15, *supra*.

²³ Note 10, *supra*.

Additionally, FCPD G.O. 002, addressing HUMAN RELATIONS, includes a definition of “procedural justice,” which defines the term as “[t]he concept of fairness in a process that fundamentally strives to achieve effective dispute resolution, equitable resource allocation, the promotion of positive organizational change, and the fostering of cohesive relationships. Police officers engage in procedural justice by treating all people with respect, *explaining their actions*, and dutifully listening to individuals and answering their questions. Procedural justice strives to (1) be fair in process, (2) be transparent in actions, (3) provide opportunity for voice, and (4) be impartial in decision making.”²⁴

In this incident, a seemingly innocuous (and unnecessary) arrest led to force being used on two individuals who resisted being arrested. When M.K. and H.K. resisted, however, the officers responded by using force that was both lawful and authorized by departmental policy.

The department’s policies adequately address the use of less-lethal force and align with Constitutional standards. They also stress that the sanctity of human life is always paramount,²⁵ that de-escalation strategies should always be attempted, and that procedural justice requires good communication.

The FCPD also had a sound arrest policy in place prior to this incident; and the policy violation identified in this incident (i.e., making an arrest for a misdemeanor not committed in the arresting officer’s presence) was addressed following the internal investigation.

With the sound policies already in place, I have no recommendations to make based on this incident review.²⁶

²⁴ FCPD G.O. 002 III. I.

²⁵ FCPD G.O. 540 II. states that “[i]t is the policy of the Department that all members hold the *highest regard for the sanctity of human life* and respect the dignity and liberties of all individuals.” (*emphasis added*).

²⁶ As evidenced on BWC footage, other officers who responded to the incident, after the arrest had been accomplished, recognized the misdemeanor arrest policy violation. Therefore, I do not believe this is a widespread issue requiring additional department-wide training.

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.III.10. as any physical strike or instrumental contact with an individual, or any significant physical contact that restricts a person's movement. Reportable uses of force do 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 reportable uses of force.

Less-Lethal Force – Defined in Fairfax County Police Department General Order 540.III.13. as any level of force not designed to cause death or serious injury.

Deadly Force – Defined in Fairfax County Police Department General Order 540.III.2. as any level of force that is likely or intended to cause death or serious injury.

Serious Injury – Defined in Fairfax County Police Department General Order 540.III.26. as any injury which creates a substantial risk of death, 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; Defined in Fairfax County Police Department General Order 540.III.5. 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. Considered less-lethal force. Often referred to as a Taser.

Empty-Hand Tactics – Described in Fairfax County Police Department General Order 540.VI.A. as including strikes, kicks, pressure points, and takedowns in an objectively reasonable manner to overcome resistance. Considered less-lethal force.

OC Spray – Oleoresin Capsicum; Defined in Fairfax County Police Department General Order 540.III.19. as a less-lethal force instrument that contains a projectile lachrymatory agent spray designed to irritate an individual’s eyes and temporarily take away their vision in order to effectuate lawful control. Often referred to as “pepper spray.”

PepperBall System – Defined in Fairfax County Police Department General Order 540.III.21. 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.III.25. as where an individual poses no immediate threat to an officer and exhibits no resistive movements 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.III.25. as where an individual’s verbal and/or physical actions are intended to prevent an officer from taking lawful action but not intended to harm the officer.

Aggressive Resistance – Defined in Fairfax County Police Department General Order 540.III.25. as where an individual displays the intent to cause injury, serious injury, or death to an officer, themselves, or another person and to prevent the officer from taking lawful action.