

Public Report

Sept. 5, 2023: Deployment of
Electronic Control Weapon
IPA-23-20



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A Public Report by the Fairfax County
Independent Police Auditor

Publication Date: Sept. 16, 2025



A Fairfax County, Va., Publication

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NOTE TO THE READER: The Fairfax County Police Department revised its policy addressing the use of force on April 29, 2024. The actions of the officer involved in this incident will be analyzed using the policy provisions that were in effect on September 5, 2023 (i.e., General Order 540, effective August 12, 2022).

INCIDENT

On September 5, 2023, at approximately 6:40 p.m., Fairfax County Police Department (hereinafter “FCPD”) Police Officer First Class #1 (hereinafter “PFC#1”) was assisting members of the department’s Gang Intelligence Unit (hereinafter “GIU”) in the 9300 block of Lee Highway. While in the courtyard of an apartment building, PFC#1 recognized an individual (hereinafter identified by his initials “J.N.”) for whom he knew there was an outstanding arrest warrant for failure to appear on a previous drug charge. PFC#1 decided to arrest J.N. and instructed him to stop. Instead, J.N. ran away and toward a stairwell leading to a parking garage. PFC#1 chased after him and advised J.N. to “Stop, or you’re going to get tased!” PFC#1 drew his electronic control weapon (hereinafter “ECW,” but commonly referred to as a “taser”) and aimed it at J.N.’s back. Three seconds after the first warning, PFC#1 stated, “I will tase you!” as J.N. continued running. PFC#1 deployed the ECW as J.N. was descending the first short flight of stairs leading to a landing before a second short flight of stairs. Two seconds after the deployment, J.N. fell over the right-side stair rail and struck his head on the concrete floor below. PFC#1 got to him and, despite J.N. tensing his arms, PFC#1 handcuffed him without using any additional force. When J.N. complained that his head hurt, PFC#1 summoned the Fairfax County Fire and Rescue Department (hereinafter “FCFRD”) to his location, and the FCFRD transported J.N. to INOVA Fairfax Hospital. J.N. remained in the hospital until he was discharged on September 8, 2023.

INTERNAL ADMINISTRATIVE INVESTIGATION

The FCPD’s Internal Affairs Bureau (hereinafter “IAB”) conducted an administrative investigation into PFC#1’s actions. The investigation included a review of the Incident Report prepared by PFC#1 following the incident; interviews of J.N., PFC#1, and a GIU detective; review of body-worn camera footage; a review of PFC#1’s training records; and consultation with FCPD’s subject matter expert on ECW usage. At the conclusion of the investigation, the

department determined that PFC#1 violated its policy on the use of force when he deployed his ECW against J.N.

I agree with the FCPD's conclusion and, in my opinion, the investigation leading to it was complete, thorough, objective, impartial, and accurate.

CONCLUSIONS

Just like the legal standard set forth in the Supreme Court's Graham v. Connor¹ opinion, the FCPD policy requires that force used by its officers be "objectively reasonable."² FCPD General Order (hereinafter "G.O.") 540 III. 18. defines "objectively reasonable" force 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." The same G.O. goes on to explain that "[o]bjective 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."³

Specific to the use of ECWs, FCPD G.O. 540 VI. D. provides that "[o]fficers may use ECWs in an objectively reasonable manner when confronted with an exigency that creates an immediate safety risk likely to be cured by using the ECW." G.O. 540 VI. D. 2. contains the caveat that "[p]rior to utilizing an ECW, officers should consider the totality of the circumstances, to include environmental conditions (e.g., persons standing in or near water) and the likelihood of enhanced injury when incapacitated by the ECW (e.g., persons on elevated ledges, near open windows, buildings, and bridges, etc.)." Furthermore, the "**Prohibited Uses**" section covering ECWs includes the provision that "[t]he use of an ECW should be avoided on (1) fleeing individuals where flight constitutes the sole component of resistance and the individual is believed to have committed a non-violent offense."⁴

J.N. was fleeing from PFC#1 and had an outstanding warrant for failure to appear on a non-violent drug charge. Additionally, when PFC#1 was interviewed as part of the administrative investigation, he admitted that he failed to consider the likelihood of enhanced

¹ 490 U.S. 386 (1989).

² FCPD General Order 540 II., effective August 12, 2022.

³ FCPD G.O. 540 III. 18.

⁴ FCPD G.O. 540 VI. D. 6. This policy provision is based on the Fourth Circuit Court of Appeals' decision in Armstrong v. Village of Pinehurst, 810 F.3d 892 (4th Cir. 2016).

injury to J.N. when he deployed his ECW as J.N. was descending a flight of stairs. Clearly, the FCPD's determination that PFC#1 violated its policy covering the use of ECWs by officers was appropriate in this case.

RECOMMENDATIONS

FCPD policy thoroughly covers the use of both deadly and "less-lethal" force, and it provides specific guidance on using (or prohibiting) certain devices such as the ECW. Departmental training provides hands-on and classroom instruction before officers are certified to carry ECWs. In spite of the sound policy and PFC#1's training on ECWs,⁵ he violated the policy and deviated from his training when he deployed his ECW during the incident under review. Because this was an obvious and isolated violation of sound policy and training, I have no recommendations to make based on this incident review.

⁵ PFC#1 completed ECW certification training in November 2020 and again in April 2022.

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.