

Public Report

June 3, 2018: Use of Force Complaint



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INCIDENT

The alleged improper use of force during this incident occurred during a pre-planned event at the Tysons Corner Center shopping mall (hereinafter “Tysons Corner”) in Fairfax County. The event was held on June 3, 2018, and was planned by the Jewish Federation of Greater Washington to celebrate seventy years of independence of the State of Israel (hereinafter “*Israel at 70*”). Prior to the event, the Fairfax County Police Department (hereinafter “FCPD”) learned of the potential for protests by people opposed to the Israeli treatment of Palestinians. Because of the potential for protests, the FCPD coordinated its presence at the event with several entities prior to the event. Also, because of the nature of the event and its location at Tyson’s Corner, much of the use of force incident and the events leading up to and after it, were captured on police body-worn cameras, police and private handheld or cellphone cameras, or on security cameras maintained by Tysons Corner management. In keeping with Supreme Court precedent which states that uses of force must be judged based on what officers knew (or reasonably believed) at the time force was used, and not with the benefit of 20/20 hindsight,¹ I describe the incident based on interviews describing the officers’ state of mind during the incident, and on an interview of the individual who made a complaint to the FCPD about the force used during the incident. I also reviewed the camera footage and will refer to it where appropriate in this Report.

The company that owns and operates Tysons Corner learned, in advance of the June 3, 2018 event, that protests were likely. The company shared this information with the FCPD, and FCPD officers met with members of the potential protest group prior to the event. They were advised that they could gather and peacefully protest on public property adjacent to the mall, but that Tysons Corner management would not allow certain activities on their property, to include assemblies that disturb the public peace, solicitation, or disruption to mall operations. Furthermore, the protestors were informed that Tysons Corner maintains a publicly available Code of Conduct which is typically enforced by private security personnel. Conversely, the

¹ Graham v. Connor, 490 U.S. 386 (1989).

protestors expressed their belief that because the mall was open to the public, they had the right to gather and protest on mall property. During their meeting, the protestors also told the FCPD officers that they would share the information provided to them by the FCPD with other potential protestors, but explained that there were no identified leaders of the protest group.

An FCPD operational plan was prepared in advance of the event, identifying the primary goals of the operation. These included: 1) ensuring that citizens would be afforded the opportunity to exercise their First Amendment rights, including their rights to peaceably assemble and freedom of speech; 2) ensuring that all event attendees and participants, as well as protesters and members of the general public visiting Tysons Corner, would be safe; and, 3) ensuring that protesters would be directed to designated protest areas near the Tysons Corner Metro Station while enforcing the laws of the Commonwealth of Virginia and the County of Fairfax.

On June 3, 2018, officers from the FCPD McLean District Station, the Civil Disturbance Unit (CDU), the Special Weapons and Tactics (SWAT) team, and troopers from the Virginia State Police were present to monitor the *Israel at 70* event. Based on inclement weather, organizers decided to move the outdoor portions of the celebration into a ballroom at the Hyatt Regency Tysons Corner. At approximately 11:30 a.m., approximately 100 potential protestors arrived at the mall. FCPD officers identified them as potential protestors based on the signs and flags they carried. Several of the individuals entered the hotel and appeared to be looking for the event, which was not occurring on the outdoor plaza as had been planned. When additional potential protestors entered the hotel, hotel management instructed private mall security personnel to ask them to leave. All of those asked to leave the hotel complied; however, they began to congregate outside of the hotel entrance on the mall plaza. When the group increased in number, hotel management requested that the group move away from the hotel entrance, which they did.

The group then moved to one side of the plaza, near Earl's Kitchen & Bar, where there is a pedestrian bridge from the Tyson's Corner Metro Station to the plaza. The group on the plaza grew to approximately 150 people. They engaged in loud protest chants, but remained peaceful. Because of the growing number of individuals and the location of the group, mall patrons and pedestrians encountered difficulty passing the protestors to access the bridge leading to the Metro station. The protestors' presence also hindered access to Earl's Kitchen & Bar, prompting

the restaurant's manager to ask for assistance from FCPD officers to reposition the protestors so that patrons could access the restaurant more easily. After the request was made, however, the group continued to block access, prompting Tysons Corner management and its security personnel to request that the group move from the area. Several announcements were made advising the protestors that they needed to re-locate to public property, but instead of leaving they remained and continued to engage in loud chants and block free access for patrons.

One individual, later identified as having the initials YAA (hereinafter "YAA"), stood on a concrete bench and led several of the chants. The FCPD operational commander (hereinafter "LT#1") approached YAA and specifically requested that he vacate the private property, hoping it would encourage others to do the same. YAA refused to get down from the bench, so LT#1 explained that he would be arrested if he continued to remain on this private property. When YAA continued his actions, LT#1 took hold of his arm to arrest him, but YAA pulled his arm away. When other nearby officers saw this, they assisted in the arrest of YAA. Specifically, another lieutenant (hereinafter "LT#2"), and two Police Officers First Class (hereinafter "PFC#1" and "PFC#2") pulled YAA away from the bench, escorted him to a less congested area approximately 15 feet from the bench, lowered him onto a different bench, and were then able to get control of his arms to handcuff him and complete the arrest. The arrest was witnessed by other protestors and recorded by an officer's body-worn camera. Following his arrest, YAA was transported to the Fairfax County Adult Detention Center.

After the event ended, one of the protestors in the area made a complaint to the FCPD that the force used was unnecessary and excessive. Specifically, the complainant alleged that an FCPD officer applied a "chokehold" on YAA during his arrest. While the complainant acknowledged that she did not personally see this happen, she indicated that another protestor told her that it had occurred. That complaint prompted this review of the FCPD investigation into the use of force and the alleged chokehold.

CRIMINAL INVESTIGATION/ PROSECUTIVE DECISION

The FCPD conducted only an administrative investigation into FCPD officers' actions during this incident. No referral was made to the Office of the Commonwealth's Attorney.

YAA was charged with misdemeanor trespassing and with resisting arrest.²

INTERNAL ADMINISTRATIVE INVESTIGATION

The internal administrative investigation of this incident included the gathering and review of a voluminous amount of private security, handheld and cellphone camera, and police body-worn camera footage; the review of several Incident Reports; interviews of officers involved in policing the protest, to include those involved in arresting YAA; interviews of witnesses to the arrest of YAA; a review of the FCPD operational plan prepared in advance of the event; a review of the FCPD Civil Disturbance Unit's training material; and consultation with Fairfax County Criminal Justice Academy training instructors.

Based on my review of this investigation, my opinion is that it was complete, thorough, objective, impartial, and accurate.

The FCPD concluded that no chokehold had, in fact, been used during the arrest of YAA. The officers who were interviewed reported that no chokehold was used. YAA did not complain of a chokehold or of having difficulty breathing. Lastly, based on a frame-by-frame analysis of body-worn camera footage, it is clear that no chokehold was applied to YAA during his arrest. The footage shows PFC#1's forearm close to YAA's neck briefly; however, it is alongside the neck rather than around it, which does not constitute a chokehold.

The FCPD investigation further concluded that the officers' use of force to arrest YAA was in compliance with departmental policy, specifically FCPD General Order (hereinafter "G.O.") 540, *et seq.* The FCPD finding was that the officers complied with G.O. 540 when arresting YAA because they used an objectively reasonable amount of force to effect a lawful arrest.

CONCLUSIONS

FCPD G.O. 540.0 on USE OF FORCE states, in part: "Force is to be used only to the extent it is objectively reasonable to defend oneself or another, to control an individual during an investigative or mental detention, or to lawfully effect an arrest. Force should be based upon the

² Code of Virginia § 18.2-119 and § 18.2-479.1 (repealed, now found at § 18.2-460 E.).

totality of the circumstances known by the officer at the time force is applied, without regard to the officer's underlying intent or motivation, and weighs the actions of the officer against their responsibility to protect public safety as well as the individual's civil liberties. Force shall not be used unless it is reasonably necessary in view of the circumstances confronting the officer.” FCPD G.O. 540.1 defines “Objectively Reasonable” as follows: “The 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 takes into account the fact that officers must make rapid and necessary decisions regarding the amount of force to use in tense, uncertain, and rapidly evolving situations.” Applying these provisions to the incident under review makes it clear that the force used on YAA was permitted by departmental policy. LT#1 asked YAA to leave the private premises after the property owner had requested that the protest group re-locate to public property. When YAA did not respond, LT#1 told YAA that he would be arrested. When LT#1 attempted to arrest him, YAA pulled away. His actions constituted active resistance, defined in FCPD policy as “[w]here an individual’s verbal and/or physical actions are intended to prevent an officer from taking lawful action, but are not intended to harm the officer.”³ LT#2, PFC#1, and PFC#2 then took control of YAA’s arms and upper body, walked him to a less congested area, put him down onto a bench, and placed handcuffs on him. None of the officers struck or used any type of weapon on YAA.

FCPD policy authorizes the use of “less-lethal”⁴ force “to gain compliance by individuals offering resistance,”⁵ and it specifically allows for the use of “empty-hand tactics, such as strikes, kicks, or takedowns”⁶ to effect an arrest.⁷ The force used to get YAA to a location and into a position where he could be handcuffed was minimal and objectively reasonable; therefore, it complied with departmental policy.

The FCPD policies on the use of force by its officers closely track the language provided by the United States Supreme Court to analyze a law enforcement officer’s use of force. In its

³ FCPD G.O. 540.4 I. A. 2.

⁴ Defined as “[a]ny level of force not designed to cause death or serious injuries.” G.O. 540.1 I. I. Also, G.O. 540.1 I. G. defines “Force” as {a}ny physical strike or instrumental contact with an individual, or any significant physical contact that restricts an individual’s movement.”

⁵ FCPD G.O. 540.4 II. A. 2.

⁶ FCPD G.O. 540.6 I.D.1.

⁷ FCPD G.O. 540.6 I. A. 1.

Graham v. Connor decision,⁸ the United States Supreme Court recognized “that the right to make an arrest or investigatory stop necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it.”⁹ In that case, the Court also pronounced that such uses of force by law enforcement officers in this country are to be analyzed under the Fourth Amendment to the United States Constitution.¹⁰ To be lawful under that Fourth Amendment standard, an officer’s use of force must be objectively reasonable. Therefore, the officers’ use of force in this incident met not only departmental standards, but the legal standard governing the use of force as well.

The complaint triggering this review of the FCPD’s investigation into the incident was that a “chokehold” had been used on YAA. While the allegation was disproven during the investigation, it should be noted that a chokehold is a tactic that is neither sanctioned nor trained by the FCPD. Specifically, FCPD G.O. 540.13 I. C. states that “[c]arotid artery restraints and chokeholds are not sanctioned force options by the Fairfax County Police Department.”

RECOMMENDATIONS

FCPD policy thoroughly addresses the use of force, aligns with constitutional standards on the use of force, and provides its officers extensive guidance on the types of force that are typically considered objectively reasonable in different situations. The FCPD analyzed the actions of LT#1, LT#2, PFC#1, and PFC#2 during this incident by examining those actions against the policies in place, and I agree with the conclusions reached. Furthermore, FCPD policy already prohibits the use of chokeholds and carotid artery restraints. Therefore, I have no recommendations to make in relation to the officers’ use of force based on this incident review.

⁸ *Supra*, note 1.

⁹ *Id.* at 396.

¹⁰ 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.

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

Force – defined in Fairfax County Police Department General Order 540.1 I. G. as any physical strike or instrumental contact with an individual, or any significant physical contact that restricts an individual's movement. Force does 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 a reportable action.

Less-Lethal Force – defined in Fairfax County Police Department General Order 540.1 I. I. as any level of force not designed to cause death or serious injuries.

Deadly Force – defined in Fairfax County Police Department General Order 540.1 I. B. as any level of force that is likely to cause death or serious injury.

Serious Injury – defined in Fairfax County Police Department General Order 540.1 I. Q. as an injury which creates a substantial risk of death, disfigurement, 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; considered less-lethal force. Defined in defined in Fairfax County Police Department General Order 540.1 I. C. 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. Often referred to as a Taser.

Empty-Hand Tactics – considered less-lethal force. Described in Fairfax County Police Department General Order 540.4 II. A. 2. as including strikes, kicks, and takedowns.

OC – Oleoresin Capsicum; considered less-lethal force; often referred to as “pepper spray.”

Passive Resistance – defined in Fairfax County Police Department General Order 540.4 I. A. 1. as where an individual poses no immediate threat to an officer 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 540.4 I. A. 2. as where an individual’s verbal and/or physical actions are intended to prevent an officer from taking lawful action, but are not intended to harm the officer.

Aggressive Resistance – defined in Fairfax County Police Department General Order 540.4 I. A. 3. as where an individual displays the intent to cause injury, serious injury, or death to others, an officer, or themselves and prevents the officer from taking lawful action.

