



County of Fairfax, Virginia

MEMORANDUM

DATE: 10/22/2020

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-19-29

Executive Summary

This report concerns a citizen complaint related to an interaction between the citizen (Complainant) and a Fairfax County police officer in a parking lot. The incident began when the officer, while driving his patrol car, observed the Complainant as the officer drove past him. The officer followed the Complainant into the parking lot of the Complainant's apartment building and questioned the Complainant. The officer's questions focused on whether the Complainant lived in the apartment complex. The complaint alleges that racial profiling was the impetus for this conversation, and that the Complainant had done nothing wrong. The Complainant maintained that he should have never been approached by the officer.

The Fairfax County Police Department (FCPD) investigated the incident and ultimately agreed with the Complainant that the officer had no reasonable suspicion to suspect that the Complainant had violated a law or was in the process of committing a crime. The FCPD concluded that the Complainant had every right to not answer the officer's questions. Further, the FCPD found that the officer acted improperly and was in violation of FCPD regulations. However, with regard to the Complainant's allegation of racial profiling, the FCPD concluded that the investigation did not find any evidence that racial bias played a role in the incident. The Complainant asked the Police Civilian Review Panel (Panel) to review the police investigation. While the Panel agreed with the FCPD in its assessment that the officer's behavior had been improper, the Panel was not satisfied that the investigation had adequately examined the question of whether racial profiling played a role in the incident. The Panel sent the complaint back to the FCPD for additional investigation. In response, the FCPD took some, but not all, of the Panel's investigatory recommendations. After a review of the FCPD's secondary investigation, the Panel determined again that the FCPD's investigation did not adequately investigate the allegation of racial profiling involved in the incident.

I. Introduction

On May 23, 2019, the Panel received a citizen complaint alleging racial profiling by a FCPD officer during an incident that occurred on May 17, 2019, where the officer followed the Complainant into the parking lot of the Complainant's apartment complex and repeatedly questioned whether the Complainant lived there. The FCPD investigated the complaint and sent a disposition letter to the Complainant notifying him of its findings on December 19, 2019. The FCPD investigation concluded that the evidence did not support the Complainant's allegation of bias-based policing, but it also found that some of the officer's actions were improper and in violation of FCPD regulations. The Complainant requested a review of the investigation by the Panel on December 20, 2019.

The Panel held a Review Meeting on March 9, 2020. By a vote of 6-3, it determined that with regard to the racial profiling allegation, the FCPD investigation was not complete, thorough, accurate, objective and impartial. The Panel requested further investigation by the FCPD and specifically requested four additional investigative actions relating to the racial profiling allegation.

The Panel received a letter from FCPD Chief Edwin Roessler on June 10, 2020, that responded to some, but not all, of the Panel's requests and further explained that the FCPD would not complete the investigation as requested. An additional response was provided to the Panel in a letter dated August 17, 2020. At a public meeting on September 10, 2020, the Panel considered the additional FCPD investigation findings and voted by 7-2 to advise the Board of Supervisors that, in the Panel's judgement, the investigation is incomplete and additional investigation is recommended.

II. Background Facts

On May 17, 2019, the Complainant, a young adult Black man, stopped his vehicle at a red traffic light in the Herndon area of Fairfax County. While he was stopped, a FCPD officer drove past him in the opposite direction. According to both the officer and the Complainant, the two made eye contact. At the time, the officer had been with the FCPD for approximately six years and was assigned as a detective in the Reston Criminal Investigations section of the FCPD. On the date of the incident, he was working overtime on patrol for the Reston District on the evening shift.

According to the investigation file, the officer was observing other motorists for their reaction to his cruiser when he noticed the Complainant's vehicle. Internal Affairs Bureau (IAB) Investigators stated that the Complainant turned around in his seat, leaned towards the window, and stared at the officer. The officer became suspicious, made a U-turn, and pulled behind the Complainant's vehicle. No other action taken by the Complainant precipitated the incident in question, nor did the Complainant commit any illegal violation. The officer began to run the Complainant's license plate registration, but he did not have time to fully review the returns because the traffic light

turned green. However, the officer did have time to note that the license plate was registered under two names. One of the names was that of a woman who lived in Virginia Beach. IAB investigators noted that the officer was aware that Virginia Beach was a “source city” for illicit substances in Fairfax County, and that he became more suspicious of the Complainant.

The Complainant stated that when the officer began to follow him, he became fearful, “because I knew I did not do anything wrong, but yet was followed.” After the light turned green, the Complainant turned, drove a short distance to his apartment complex, turned right into his parking lot, and parked his car.

The officer followed the Complainant into the apartment complex parking lot. According to investigators, the officer became increasingly concerned when the Complainant turned into the first available parking lot, because his experience and training as an officer suggested that individuals who behave suspiciously often park their vehicles quickly after being spotted by police, and they often abandon them to run away from police.

The officer parked his cruiser in the parking lot and approached the Complainant, who was still sitting in his parked vehicle. As the officer walked to the vehicle, he noticed that the Complainant was moving toward the floorboard of the vehicle and seemed to be reaching for something. After approaching the Complainant, the officer observed that the Complainant was holding a backpack to his chest, and this caused the officer to suspect that drugs, contraband or weapons could be in the backpack. The officer also observed that the Complainant was nervous and that there was a strong odor of air freshener coming from the vehicle, indicating to the officer that the Complainant might be trying to conceal incriminating odors. (Notably, there was an air freshener hung on the rearview mirror). The Complainant remained in his vehicle as the officer approached, so the officer determined that the Complainant was willing to engage him in conversation.

The Complainant stated that as he saw the officer approach his vehicle, he leaned down to get his cell phone, and he quickly set it to record, as shown in the video provided by the Complainant. He positioned the phone so that the video could capture half of the driver’s door opening, which would reveal part of the officer’s body but not his face. The Complainant admitted that he was extremely frightened and nervous.

A conversation between the Complainant and the Officer was recorded as follows and posted later on YouTube:

Complainant: Hey
Officer: Hey sir, how you doing?
Complainant: Doing well, how are you?
Officer: Hey good. Hey, do you live here?
Complainant: I do, yes.
Officer: Okay, where do you live at?

Complainant: In this apartment, right here.
Officer: Oh, okay. You got ID on you?
Complainant: No, I don't.
Officer: You don't have an ID?
Complainant: Well, I do have an ID, but do I have to show it to you?
Officer: You don't have an ID on you?
Complainant: I do have an ID.
Officer: Okay.
Complainant: Do I have to show it to you?
Officer: You don't have to. Is this your car?
Complainant: Yes, it is.
Officer: Okay.
Complainant: Is there a problem?
Officer: What building do you live in?
Complainant: This building right here.
Officer: What's the address?
Complainant: I don't have to tell. I don't have to tell, I don't have to tell you the address.
Officer: What's that?
Complainant: Do I need to tell you the address?
Officer: Yeah, what's the address?
Complainant: Why do I need to tell you my address?
Officer: I'm asking you what the address is.
Complainant: But why do I need to tell you that?
Officer: 'Cause I'm asking you.
Complainant: But is there a reason why you're asking me?
Officer: Because I want to know if you live here. Because if you don't live here...
Complainant: But I just told you, I do live here.
Officer: Right, but if you don't know the address, it doesn't look like, to me, like you live here, okay?
Complainant: But I do, and why is that?
Officer: To be honest with you...
Complainant: Why is that?
Officer: Whose vehicle is this?
Complainant: This is my vehicle.
Officer: Is it in your name?
Complainant: It's in my Mom's name, and it's in my name also.
Officer: Okay. How long have you lived in this area?
Complainant: Do I have to tell you that?
Officer: I'm just asking you the question.
Complainant: Okay, but why are you asking me these questions?
Officer: Do you live here or not, sir?
Complainant: I already told you. I live here.
Officer: Okay, 'cause if you don't live here, you're trespassing.
Complainant: I know that, and I told you. I live here.

Officer: Okay, what's the address that you live at?
Complainant: Why do I have to tell you that?
Officer: 'Cause I don't believe you live here, sir.
Complainant: And why don't you believe me? Why don't you believe I live here?
Officer: 'Cause you don't know the address.
Complainant: I already told you, I do know the address.
Officer: Okay, what's the address that you live?
Complainant: I don't have to tell you that. I live here. Why are you harassing me?
Officer: Okay, I'm not harassing you.
Complainant: You're in my neighborhood, coming up to me asking me what my address is, 'cause you say I don't live here. Why don't you believe I live here?
Officer: Sir, I'm not harassing you.
Complainant: Can I have your name and badge number?
Officer: You can. Ah [redacted] and my badge number is [redacted]
Complainant: Okay, thank you.
Officer: So do you have an ID on you or not?
Complainant: I do. I already told you. I do have an ID.
Officer: Okay, what's your name?
Complainant: I don't have to tell you that. Am I being detained or am I free to go?
Officer: You're free to go, sir.
Complainant: Thank you, you have a good day.
Officer: You, too.
Complainant: Thank you.

The conversation between the Complainant and the officer lasted two minutes and 21 seconds. As is clear from the transcript, the officer waited until the end of the conversation to tell the Complainant that he was free to leave, and he did so in response to the Complainant's specific question. After the officer stepped away, the Complainant exited his vehicle and continued to record the officer and his cruiser. The Complainant stopped recording after a few minutes and went back to his car. He stated that he did not go to his apartment because he knew the officer was watching him, and he did not want the officer to follow him. He also said he wanted to remain in a public space where other individuals could see him. The Complainant considered driving away, but he did not because he thought the officer would follow him and pull him over for a minor traffic violation. The Complainant said he was shaken by the encounter.

The officer remained in the parking lot for several more minutes. During that time, he observed the Complainant and finished reviewing the entire Department of Motor Vehicles return on the license plate check. The officer verified the Complainant's identity using a photograph provided by the DMV and also determined that the Complainant lived at the apartment complex. He then left the area.

III. Procedural Background, Allegations, and Investigation Findings

As noted above, the Panel received the complaint on May 23, 2019, six days after the incident. The Complainant alleged, “The detective could not tell me why he followed me and why he believed I did not live there, so one can only assume that this is a result of racial profiling.” Further, the Complainant stated that, “If the detective would have done his due diligence, he would have saw [sic] that I had the same parking permit in my window as every other car there.” The complaint included this link to his video: <https://www.youtube.com/watch?v=GI9S6H-ilww&feature=youtu.be>

A. The Internal Affairs Bureau Investigation and Findings

The Panel referred the complaint to the FCPD for investigation. Investigators at the IAB reviewed the video sent to them by the Complainant. The officer had not activated his in-car video during the encounter. No explanation was provided in the investigation file for why the car video was not activated during the encounter. However, it was activated after the encounter, and it recorded approximately sixteen minutes of video following their interaction. The Complainant could be seen walking around the area where his vehicle was parked while talking on his cell phone. At one point, the officer zoomed the camera on the Complainant. The video ended as the officer drove away.

IAB Investigators used email to contact the Complainant, who preferred to remain anonymous.¹ They were able to determine his name but did not reveal to the Complainant that they had that knowledge. The Complainant answered several questions by email but refused to meet with investigators. The Complainant told investigators that he felt he had been targeted and suspected of trespassing “for no reason at all.” He said that the fact that the officer did not believe he lived in the apartment complex indicated that the encounter was racially motivated. The Complainant also stated that the officer stood in a manner that inhibited his ability to get out of the car. He confirmed, however, that the officer did not use force to detain him. Further, the officer did not make any racial slurs or use inflammatory language. The Complainant never had any prior or subsequent interactions with the officer.

Investigators found that the video was grainy and difficult to see, but it appeared that the officer stood to the rear of the driver’s door, which was slightly open. They observed that the officer did not appear to be hindering the Complainant’s ability to get out of the vehicle.

Investigators also interviewed the officer. Investigators revealed that the reason the officer wanted to talk to the Complainant was to determine if there was trespassing, so that he could elevate what was a consensual encounter to an investigative detention.

¹ Although the Complainant initially filed an anonymous complaint, he revealed his name to the Panel after he filed his Request for Review of the investigation.

Additionally, they determined that when the officer approached the Complainant, he did not have reasonable suspicion of a specific crime but did believe the Complainant's behavior was odd. The officer denied race was a factor in his decision to make contact with the Complainant.

The investigation revealed that the officer believed that the apartment complex was posted with signs prohibiting trespassing. However, the apartment complex had no posted signs prohibiting trespassing. The entrance to the complex had a gate, but it was standing open. Investigators spoke to employees in the management office, and they said that the gate had been broken for some time and had been left open to allow residents to leave and enter. The investigation also revealed that the officer did not know whether the complex had a letter on file at the Reston District Station authorizing the FCPD to enforce trespassing laws on the premises. The officer was not familiar with the apartment complex. Moreover, the officer did not notice that the Complainant's vehicle had a parking sticker for the complex on the windshield on the driver's side.

Investigators went back to the complex and knocked on the doors of 48 apartments and made contact with 17 residents. None of those contacted witnessed the interaction between the officer and the Complainant.

Investigators also reviewed the officer's arrests in the Reston District from January 1, 2018, to June 30, 2019. The officer made a total of 36 arrests, of which 23 were white (64%), 12 were Black (33%) and one was Asian. The investigation compared the officer's arrests to that of the Reston District as a whole and found that the arrest statistics were comparable. For the Reston District, white arrests accounted for 67% of the total arrests for the same period, and Black arrests accounted for 30% of the total arrests. The investigation also reviewed the officer's training records and found that he had completed eight courses on criminal patrol, interrogation and interdiction since 2014. The officer had six training hours relating to culture and diversity. Investigators noted that the officer relied on his training in assessing whether the Complainant's behavior could be connected to criminal activity.

The IAB reviewed the evidence and considered: (1) whether the encounter was a voluntary citizen contact under General Order 603.4; (2) whether the Complainant was seized or detained at any point; (3) whether the officer engaged in bias-based or unlawful discrimination under Regulations 201.14 and 201.22; (4) whether the officer violated Regulation 603.4 by not advising the Complainant as to why he was stopped; and (5) whether the officer violated Regulation 201.13 by acting in an unprofessional manner.

The IAB found that the encounter was a legitimate voluntary field contact and that the officer was in compliance with General Order 603.4, which provides procedures for such contacts. Investigators pointed out that voluntary field contacts may be initiated when an officer wants to approach someone to talk or wants to ask a person for identification. Officers do not violate an individual's Fourth Amendment

rights if they merely approach a person and ask if that person is willing to answer some questions. However, during a voluntary field contact, the individual does not have to answer questions and may leave at any time. A contact becomes an investigative stop, and an officer can detain an individual, when there is reasonable suspicion that criminal activity has occurred, is occurring, or is about to occur. The IAB found that the officer was not prohibited from approaching the Complainant for the purpose of conversation,² and that the Complainant was not detained, even though he did not feel comfortable exiting his vehicle. In viewing the video and taking into account all of the circumstances surrounding the incident, a reasonable person would have believed that the Complainant was free to leave.³ Furthermore, even though the officer may have thought the Complainant's behavior was suspicious, at no time did those suspicions become reasonably articulable suspicions of criminal activity as defined by law.

The IAB also found that the officer did not engage in bias-based policing or unlawful discrimination. The investigation found that the officer was able to articulate numerous factors and behaviors that drew his attention, none of which pertained to race. The IAB admitted that, in isolation, the officer's remark, "[It] doesn't look like, to me, that you live here" appears "problematic." However, given the greater context of what the officer had observed, "it's meaning is more apparent." The investigation also reasoned that both the Complainant and the officer viewed the encounter through the lens of their own experiences. The Complainant was offended that the officer did not believe he lived at the complex and felt that he was motivated by racial bias. On the other hand, through his training and experience, the officer had learned to perceive certain behaviors, such as the long look at the officer, entering the first available parking lot, clutching the backpack to his chest during the encounter, using car air freshener, and acting nervously, as potential indicators of criminal activity. Noticing those behaviors of the Complainant had influenced the officer's decisions and actions. Although the IAB found that the officer's questions and statements to the Complainant were not motivated by bias, the IAB acknowledged that they had a negative effect on the Complainant.

The IAB concluded that the officer should have provided an explanation to the Complainant as to why he was making the contact. When appropriate, officers should advise community members why they have been stopped.⁴ "Though [the officer] lacked any intent to offend [the Complainant], the statement he made, absent any explanation of its true meaning, could easily be taken as offensive by an objective and reasonable person." Therefore, the investigators concluded, it was appropriate for the officer to provide the Complainant an explanation of what he had observed that led him to make the contact. The IAB sustained a violation of Regulation 201.3, Obedience to Laws and Regulations, as it pertains to General Order 603.4, Police Citizen Contacts, Section IV, Voluntary Field Contacts, Subsection B, Conducting Voluntary Field Contacts.

² United States v. Mendenhall, 446 US 544 (1980)

³ McGee v. Commonwealth, 219 Va. 560, 248 S.E.2d 808 (1978)

⁴ General Order 603.4(IV)(B)(3)

Finally, the IAB found that even though the officer intended no offense by the words he used in speaking to the Complainant, from an objective viewpoint, the words were offensive. Additionally, the officer's attempt "to provide reasonable suspicion of the crime of trespassing was based on an incorrect assessment of the circumstances surrounding the incident," the IAB found. There were no signs banning trespassing, and the complex had not submitted a letter to the FCPD authorizing police to enforce trespassing on behalf of the management of the complex. The officer did not ask the Complainant if he was visiting anyone living at the complex or had any other lawful purpose being there. Therefore, the IAB concluded that the conduct of the officer was unprofessional and violated Regulation 201.13.⁵

B. The Reston District Commander's Findings

In accordance with FCPD procedures for internal administrative investigations, the IAB findings were reviewed by the Reston District Commander. He disagreed with the IAB and found that the officer was in compliance with all General Orders and Regulations. He stated that the officer could have provided the Complainant with a better explanation of what he had observed and why he was making the contact, but by failing to do that, the officer did not violate FCPD regulations. He also stated that it was reasonable to believe that the Complainant did not live at the apartment complex, because the Complainant did not tell the officer his address. The officer's words must be evaluated objectively, he concluded, and from that standpoint, what he said was clearly not offensive.

C. The Findings of Chief Edwin Roessler

The investigation findings were sent to Chief Roessler for final approval. He determined that the investigation was not thorough, and he conducted an additional review.

In particular, the Chief disagreed with the Commander's finding that the officer was in compliance with Regulation 201.13 Human Relations (professional conduct). He found that the Commander's review was too narrow and focused only on words spoken to the Complainant. The officer's actions must be evaluated from the time of his first glance at the Complainant to the parting of their ways, he stated.

The Chief pointed out that several facts needed to be taken into account: (1) The officer had worked in the Reston District for six years and was a detective; (2) The officer had no knowledge of the apartment complex, did not know whether a trespassing sign was posted at the apartment complex, and was not aware of whether a

⁵ Regulation 201.13 Human Relations, Community Contacts, states in part: "Employees shall conduct themselves professionally at all times when representing the Department. They shall use respectful, courteous forms of address to all persons. Displays of bias towards any person on account of race, sex, ethnicity, religious preferences or sexual orientation shall be considered unbecoming conduct...."

trespassing letter was on file with the Reston District Station; (3) The officer did not know that the apartment complex used an authorized vehicle sticker system; and (4) The officer never fully read the DMV return.

As a detective, the Chief wrote, the officer “is held to a higher standard to know the entire Reston community so that he can police effectively.” He should have been more focused on knowledge of the area and taken into account readily available information. The officer missed critical details that could have enabled him to end the contact earlier or not have had one at all, the Chief said. Moreover, the officer’s justification for getting out of his cruiser “was not based on factual circumstances which required taking the time to fully equip himself with the knowledge to then apply his policing skills properly.” The Chief said that what is most troubling for him is that the officer justified his actions by his training and experience. “Frankly stated, he deals with all community members from a hyper-vigilance standpoint.”

The Chief pointed out that the officer asked the Complainant 11 times about his residency. The Complainant answered the officer at least nine times that he lived in the complex. The officer became discourteous based upon his “substandard knowledge and his demeanor of repeated questioning” about the Complainant’s address. The officer kept pressing the Complainant for answers, “when he was free from any reasonable suspicion of being involved in any sort of crime.”

The Chief noted that when the Complainant asked specifically, “Do I need to tell you the address,” the officer replied, “Yeah, what’s the address?” With that answer, the officer was compelling the Complainant to tell him his address. “This is wrong, as it’s a voluntary field contact,” the Chief stated. “This was not a professional statement,” the Chief wrote, “nor was it accurate, and its utterance poorly reflects upon being respectful and courteous when addressing [the Complainant].” Because the contact was consensual, the Complainant had a right to refuse to answer questions.

In addressing the issue of bias, the Chief asserted that both the Complainant and the officer had implicit biases, because both were lacking in trust for each other based upon their life experiences. However, the Chief found that the officer was held to a higher standard by training, regulations, policies and laws that define how officers are to engage with members of the community. “They are to use professionalism that embodies tact, savvy, and diplomacy,” he said, “and not just proactive training classes as the driver of actions.”

The Chief concluded that the officer did not have ill intent towards the Complainant when he told him, “it does not look like you live here.” However, the Complainant had the right to find the statement offensive, and it would be offensive by any objective and reasonable person. Therefore, the Chief concluded that the officer was in violation of Regulation 201.13, which states that officers must conduct themselves professionally at all times, and that “[d]isplays of bias towards any person on account of race...shall be considered unbecoming conduct.” The Chief further

concluded that the officer was in compliance with all other General Orders and Regulations.

On December 19, 2019, Chief Roessler sent a letter to the Complainant, stating, “As Chief of Police, I am tasked with ensuring that all investigations are thorough and unfortunately, when the investigation arrived for my review, I found that it was not completed to my satisfaction; therefore, additional administrative steps were taken which prolonged the completion of the investigation.”⁶

The Chief further stated, “Based upon my review of the facts discovered during this investigation, I have concluded that evidence does not support your allegation of bias-based policing. However, some of [the officer’s] actions were improper and in violation of departmental regulations, as these were not professional and not within my expectations of all Fairfax County Police officers. Appropriate measures have been imposed to prevent a recurrence of this type of incident.”

On December 20, 2019, the Complainant requested that the Panel review the FCPD investigation. The Complainant stated in his request that the FCPD did not explain why he was followed and why the officer watched him in the parking lot after the encounter. He stated that his allegation was not bias-based policing, but rather racial profiling, which he alleged the police did not investigate.

IV. Panel Meeting

A subcommittee of the Panel was convened on January 9, 2020, to consider whether the Panel had authority to review the investigation. The subcommittee concluded that the complaint had been timely submitted and contained allegations that met the Panel’s standard of “abuse of authority and serious misconduct.” The subcommittee recommended that the Panel review the complaint, and on February 10, 2020, the Panel voted to review the investigation.

On March 9, 2020, the Panel met to review the investigation. All Panel members were present and had reviewed the FCPD investigation file prior to the meeting. The Complainant was present, and Chief Roessler and Major Matt Owens represented the FCPD. The Complainant reiterated that he wanted to know why he was followed by the officer in the first place. He said the investigation only addressed bias-based policing, which he understood typically involves a detention. He said that he would like the Panel to request that the FCPD directly address racial profiling. He also maintained that the investigation was not impartial or objective because it was conducted by the FCPD and not an independent investigator.

⁶ The FCPD requested four extensions to complete its investigation. (July 24, 2019, September 23, 2019, November 13, 2019, and November 27, 2019.) The Board of Supervisors was informed of these extension requests.

A. Presentation and Questioning of the Complainant

Responding to questions from Panel members, the Complainant explained why he was fearful and nervous when he was followed and questioned. He said that he didn't want to tell the officer where he lived, because he was aware of an incident in Texas where an officer went into an apartment and fatally shot an individual. He said he also did not go to his apartment after the encounter because he didn't want the officer to follow him. He further explained that he had two other encounters with Fairfax County police that were not positive. He recalled one incident where he was pulled for a broken taillight. He said that the officer introduced himself and told him why he was being stopped. The Complainant was given a warning. The second incident occurred at a bar in Reston, where he was approached by a FCPD officer because the officer said he smelled marijuana in the area. The officer asked him for his ID, and he felt harassed. The Complainant said his friends have also had negative encounters with the FCPD.

One Panel member asked the Complainant if he had previous training on his rights. The Complainant responded that in his first encounter with the FCPD he had not known his rights, so he educated himself and learned the importance of recording encounters with police.

When asked whether this incident would have been different if the officer had explained why he had wanted to talk to him, the Complainant answered that it would have been different, because he would have known why the officer followed him. However, he still might not have answered any questions, because he had not done anything wrong. He emphasized that he had not committed a crime and did not think he would have been followed if he were not Black.

When asked what remedy he was seeking from the Panel, the Complainant responded that he would like the Panel to recommend that FCPD officers receive additional education and training on implicit bias. He said that he knew that officer discipline could not be disclosed publicly, but he would also like to know which FCPD regulations were violated.

B. Presentation and Questioning of Chief Roessler

In his presentation to the Panel, the Chief stated that the officer had made a series of poor, cascading assumptions and judgments that were wrongly based on his training. However, in his view, there was no evidence that race was a factor in the incident. He recognized that issues concerning racial bias are a concern in the community. He said that he has formed a human relations committee to address the racial and procedural justice policing issues in the county, and he is also reviewing officer training. Admitting that the FCPD has work to do, he said, "This is something we have to train-away. We can't just keep going to proactive patrol training." He concluded his presentation by telling the Complainant, "I pray that you understand that as your Chief I don't want this to happen to anyone else."

During questioning of the Chief, one Panel member asked why there was minimal information and analysis in the investigative file on the allegation of racial bias. The Chief replied that he thoroughly reviewed the investigation, reviewed the officer's training history, and spoke at length with the officer. He said that the officer had not indicated to him that any of his actions were based on race. Rather, he reiterated that the officer's actions were based on several assumptions and poor decisions that started with a glance and ended with "badgering" the Complainant with questions. The Chief added that there was no reason to believe that the officer was not telling the truth when he denied that race was a factor in his decisions.

The Chief was asked whether he had explored how implicit bias may have played a role in the officer's decision to follow the Complainant. He was asked whether the incident would have happened had the Complainant been a white older man. The Chief said that "everyone has implicit bias," but added that he did not want to engage in hypotheticals. "This case is a problem without regard to race," he said. He concluded by saying, "This young man was treated wrong." He said that the complaint was "going to create a lot of change, I assure you."

C. Panel Discussion and Vote

Several members of the Panel were concerned that IAB does not have a standard for investigating allegations of racial bias and racial profiling in complaints, which can differ in unique ways from other types of investigations. Panel members appreciated the work the Chief had done on the complaint, and they agreed with the finding that the officer had not performed in a professional manner and violated Regulation 201.13. However, they were concerned that the issue of racial profiling was not adequately analyzed using objective criteria. One Panel member acknowledged that racial profiling is difficult to prove, but investigators should do more than just ask the officer whether he was racially motivated. It was pointed out that the only evidence in the investigative record that related to the racial profiling allegation was the officer's denial and his arrest statistics.

Further, the Panel had recommended in its 2019 Annual Report that "where the evidence gathered during an investigation into a complaint of racial bias does not offer a race-neutral explanation for the conduct of the accused officer, the FCPD should continue to investigate seeking some explanation for the officer's conduct by obtaining reasonably available evidence that will corroborate either a race-neutral or race-biased explanation such as examining the officer's social media accounts and/or interviewing witnesses." While the FCPD did sustain a violation for unprofessional conduct which was race-neutral, this violation focused primarily on the officer's conduct after his first glance at the Complainant. The investigative record was virtually silent as to why the officer decided to follow the Complainant in the first place, and Panel members questioned whether a similarly situated white driver would ever have been followed in such a manner. One Panel member asserted that the officer's decision to follow the

Complainant based on a mere “glance” hardly constituted a justification so clearly race-neutral as to vitiate the need for additional investigation. Moreover, investigation into whether the officer had demonstrated any bias in conversations with co-workers or on social media would have helped to corroborate the race-neutral explanation in the FCPD’s findings.

Moreover, the Complainant had expressly asked the Panel to review whether the investigation was thorough, complete, accurate, and objective specifically with regard to his racial profiling allegation. Panel members concluded that based on their reviews of the file, the investigation as it related to the racial profiling allegation was not complete. In accordance with Article VI(E)(1)(h) of the Panel’s Bylaws, the Panel voted by 6-3 to request further investigation by the FCPD and provide a supplemental report that details the findings of the additional investigation. Specifically, the Panel requested further investigation into the allegation of racial profiling by:

1. conducting a search of the officer’s publicly available social media profiles to ensure an absence of racial bias;
2. interviewing the officer’s coworkers for evidence of racial bias;
3. reviewing data related to the officer’s community contacts and stops in the same manner the FCPD viewed arrest statistics, and
4. comparing the circumstances and claims of the current complaint to any prior complaints against this officer.

V. Additional Investigation by FCPD

The Panel sent a letter to the Chief requesting further investigation on March 11, 2020. The letter stated that the suggested investigative steps should in no way limit the FCPD from conducting further investigation into the racial profiling allegation.

On June 10, 2020, the Chief responded to the Panel with a letter updating the Panel on the additional investigation. The letter stated that the IAB investigated the officer’s social media profiles by completing an open source review of publicly available information. It also stated that IAB had not completed its additional investigation relating to the community contacts of the officer.

The Chief informed the Panel that the FCPD would not interview the coworkers of the officer for evidence of racial bias. “The mere curiosity seeking, through interviews of random employees, absent any reasonable suspicion and/or probable cause, would violate the procedural rights of employees as established by prevailing laws and personnel regulations,” he said. Furthermore, conducting such interviews would “significantly hinder the operations” of the FCPD. The Chief added, “Any officer who is aware of racial bias exhibited by a coworker not only has a duty to report such bias, but is required by policy to report it.”⁷

⁷ See General Order, Regulation 201.5 (regarding reporting obligations for conduct unbecoming); Regulation 201.13 (explaining that “while in the performance of their duties, or while otherwise representing the Department,

With regard to the Panel's request to compare the circumstances and claims of the current complaint to any prior complaints against the officer, the Chief wrote that the reviewing commander considers prior complaints and allegations when determining appropriate discipline. Disciplinary matters are a part of an employee's personnel record and cannot be publicly shared, he said. The reviewing commanders found no nexus to apply any progressive discipline. In summary, the Chief reported that the investigation did not reveal any evidence to support the allegation of bias-based policing.

On August 17, 2020, the Chief reported to the Panel that the additional investigation was complete. Investigators had reviewed data relating to the officer's community contacts and stops between January 1, 2018, and May 17, 2019, in the Reston District. The report indicated that, with the exception of the encounter with the Complainant, the officer had no consensual encounters that "were not based on reasonable suspicion or probable cause, where no reasonable suspicion or probable cause was ever developed, and where the involved community member was never detained."

All Panel members reviewed the investigation file. The additional investigation found that the officer had no social media presence.

A manual search and analysis of the officer's field contacts and stops was conducted, but it was unsuccessful. Investigators conducted a narrow search of consensual encounters that matched the exact circumstances of the complaint – i.e., a consensual encounter not based on reasonable suspicion or probable cause, where no reasonable suspicion or probable cause was ever developed and where the community member was never detained. Based on that criteria, the officer had no other similar contacts.

The investigation noted that there were three instances with four individuals (including the Complainant) where it was unclear if the officer made a consensual contact without reasonable suspicion or probable cause and where none was ever generated. "Due to lack of clear information," the investigation concluded, "these stops were not included in this analysis."

The investigation did not analyze the officer's traffic stops by breaking them down by race and ethnicity. Investigators also did not analyze by race and ethnicity the officer's non-consensual contacts, that began as voluntary contacts, but eventually led to a detention based upon reasonable suspicion or probable cause. Investigators attempted to compare the officer's consensual contacts with those of all officers in the Reston District. However, the data for consensual contacts in the Reston District was incomplete and inconsistent. The investigation revealed that documentation of

officers shall refrain from using offensive words and language. At times it may be appropriate to use raised voices to issue commands and to gain compliance, however, the use of cursing, obscenities and/or racial, ethnic, sexual, religious or sexual orientation slurs will not be tolerated)."

community contacts is insufficient to identify the true nature of the contact. The FCPD is taking steps to address this.

VI. Panel Meeting and Findings

The Panel met virtually on September 10, 2020, to review the additional investigation. The Complainant was present, and the Chief and Major Tonny Kim represented the FCPD. Several Panel members disagreed with the FCPD's decision to not interview the officer's coworkers. One Panel member said he disagreed with the conclusion that there was no probable cause related to the allegation of racial bias. He was also dissatisfied with the FCPD's explanation that there was no need to interview coworkers because officers had an affirmative duty to report bias of coworkers if they observe it. He noted, for instance, that coworkers have an affirmative duty to report biases based on sex, but that any investigation into alleged sexual harassment in the workplace would certainly involve interviewing other coworkers.

Another Panel member asked the Chief whether criminal investigative detectives are organized into squads. The Chief responded that the criminal investigative units report to a Police Second Lieutenant. When asked how many officers comprise the criminal investigative section of the Reston Police District station, the Chief replied that he did not know exactly but there would be at least five officers.

The Chief defended the decision not to interview the officer's coworkers. He explained that the investigation looked at all the evidence, and there was "not a nexus" between the officer's actions and racial bias. Absent any evidence, the FCPD would not interview coworkers.

The Panel also was concerned about the lack of statistical analysis in the additional investigation. Major Kim explained that the FCPD's records management system is not designed to produce reports with the requested information. He said that an intensive manual search of the officer's contacts was conducted, but investigators could not reliably recreate past events, since some information was not captured into the system.⁸

One member asked why the additional investigation did not break down community contact and stop statistics by race and ethnicity. The Chief said the file should have included traffic stop data for the officer. He was also asked why the statistical analysis for arrests, stops and community contacts covered only one year. The Chief offered to expand the data analysis to more than one year. He also invited the Panel to review the different systems and modules used by the FCPD to better understand what information is collected and captured.

⁸ Notably, while a large spreadsheet was provided with incident summaries related to community contacts, the printing of the Microsoft Excel file did not create a paper record containing full incident summaries for the Panel members to review.

One Panel member asked whether the FCPD had established a threshold that would prompt additional review if the data indicated an officer's arrests, stops or community contacts were excessive for a particular racial or ethnic group. For example, if an officer's arrest record for a certain group was overrepresented by 20%, would that trigger additional review? The Chief answered that investigators review each officer's record as it is related to complaints. He said the current study commissioned by the county to evaluate use of force incidents will help in the development of an early identification system.

The Chief was also asked why the officer had not been found in violation of General Order 603.4. It was pointed out that the Chief had admitted that when the officer asked the Complainant to provide his address, the encounter stopped being a consensual encounter. At the March meeting, the Chief stated that once the officer said, 'Yeah,' in response to the Complainant's question as to whether he must tell the officer his address, the officer "violated our policy." However, the Chief found that the officer was in compliance with General Order 603.4.⁹ Major Kim confirmed that the only violation that was sustained against the officer was for a violation of Regulation 201.13.

During its deliberation, a majority of the Panel was not satisfied with the FCPD's response to the request for additional investigation. They did not think that the Panel's request for investigators to interview the officer's squad was unreasonable, since a squad is comprised of at most five officers. Passive reliance on officers to come forward with evidence of an officer's racial bias in response to a complaint does not meet best practice standards for investigations. Interviewing possible witnesses is standard procedure for any investigation, regardless of the reporting obligations of potential witnesses. Additionally, the statement that there was no "probable cause" to engage in such further investigation was met with skepticism by some members of the Panel, who pointed out that the "probable cause" included a witness alleging racial bias – the Complainant himself – and there was evidence that encounter was based on a "glance" that had not been adequately demonstrated by investigators to be wholly unbiased.

A majority of the Panel also concluded that the data analysis provided was incomplete. While the Panel understood that the current records management system needs updating, the data analysis that was carried out was incomplete. All traffic stop data should have been analyzed, as well as consensual contacts and stops (where there was reasonable suspicion and probable cause before, during or after the encounter). Even if, for instance, the statistics had shown that a high percentage of the officer's consensual contacts had turned into non-consensual stops due to reasonable suspicion or probable cause, a high disparity in the race of the subjects could have been indicative of treating potential suspects of one race differently from potential suspects of another. Although the Panel did not ask for it, the FCPD should have broadened the data analysis to include the officer's contacts and stops for the past five years. The data

⁹ General Order 603.4 is titled Police Citizen Contacts, Section IV, Voluntary Field Contacts, Subsection B, Conducting Voluntary Field Contacts.

analysis also should have been broken down by race and ethnicity. The FCPD should not wait for the results of the commissioned study to analyze use-of-force incidents, which may not be available until mid-2021. The FCPD must expedite its update of the data management system and change how it analyzes data so that it can improve early warning systems and investigations of complaints.

During the Panel's deliberation, several Panel members pointed out that the FCPD is in the best position to evaluate and improve its investigative processes. Panel members are not experts on police practices and procedures. However, the Panel has now reviewed several complaints alleging racial bias and racial profiling. In those reviews, the Panel has noted repeatedly that the investigation files did not have a process for adequately investigating racial bias and profiling. In this case, the Panel made four specific requests for additional investigation. The FCPD complied fully with only one, which related to a search of the officer's social media profiles.

Several members also stated that they did not want the Panel to focus merely on the specifics of how the investigation was conducted. They thought it was important not to lose sight of the broader issue of implicit bias and how it impacts policing. The Report on 21st Century Policing states that the unconscious nature of implicit bias demands that police departments look for new evidence-based strategies to mitigate the impact of implicit bias in policing. The FCPD should consider implementing new, objective, evidence-based procedural justice practices that could prevent an officer from making decisions based upon his implicit bias. For example, what if, before making community contacts, officers were required to ask themselves whether they had prior information that tied a particular person to a specific crime? Would that have prevented the questioning of the Complainant in this case? After the first glance, would the officer have checked himself before making assumptions based on how the Complainant looked? Would he have completed the license plate check, noted that there was no posted trespassing sign, and checked to see if the Complainant had a parking sticker on his car? Other police departments have required officers to go through a short checklist before making community contacts, and this practice has been demonstrated to significantly reduce unnecessary questioning of community members by police. The FCPD should consider doing the same.¹⁰

In conclusion, a majority of the Panel agreed with the Chief that the incident in this complaint reflected a "cascade" of mistakes and wrong assumptions made by the officer and supported his finding that the officer violated Regulation 201.13. However, with respect to the Complainant's allegation of racial profiling, the Panel voted by 7-2 that the investigation was not thorough and complete. As such, according to Article VI(F)(2)(iii), the Panel advises the Board of Supervisors that, in the Panel's judgment, the investigation is incomplete and recommends additional investigation into the allegation of racial profiling by interviewing the officer's coworkers at the Reston criminal investigation section for evidence of racial bias and reviewing data related to

¹⁰ The Oakland, California Police Department implemented a checkbox requirement for stops in 2018. In 2017, Oakland officers made approximately 32,000 stops. After implementing the checkbox, officers made about 19,000 stops in 2018.

the officer's community contacts and stops in the same manner the FCPD reviewed arrest statistics.

An audio recording of the March 9, 2020 Panel meeting may be reviewed here:

<https://soundcloud.com/fairfaxcounty/police-civilian-review-panel-march-9-2020>

An audio recording of the September 10, 2020 Panel meeting may be reviewed here:

<https://soundcloud.com/fairfaxcounty/police-civilian-review-panel-meeting-sept-10-2020>

An audio recording of the October 22, 2020 Panel meeting may be reviewed here:

<https://soundcloud.com/fairfaxcounty/police-civilian-review-panel-meeting-october-22-2020>

VII. Recommendations

1. The FCPD should develop objective criteria and processes to evaluate allegations of bias or profiling (as pertains to race, ethnicity, sexuality, religion or sexual orientation) in internal investigations of complaints against officers. These criteria may include (1) searching the officer's public social media profiles; (2) interviewing coworkers in the officer's unit and other potential witnesses; (3) quantitatively and/or qualitatively analyzing data (by trained analysts) from community contacts, stops, searches and arrests; and (4) comparing the circumstances and claims of the current complaint to any prior complaints. Quantitative analysis of data should not be limited to descriptive analyses, but when appropriate, should include bivariate and multivariate analyses to ensure that appropriate variables are considered. The investigation file should contain a clear evaluation and summary of the officer's actions under each of the criteria listed above.
2. All community contacts, stops, searches and arrests by the FCPD should be entered into the data management system. Data analysis of an officer's community contacts, stops, searches and arrests should be broken down by the race and ethnicity of community members. Data on community contacts should be broken down as follows: (1) community contacts that remain consensual for the duration of the encounter; (2) community contacts that evolve into detentions by virtue of reasonable suspicion; and (3) community contacts that evolve into detentions by virtue of probable cause. Officers should also enter into the data base the reasons for the community contact, stop, search or arrest. Such rationale should be coded (i.e., by a particular violation of law, type of behavior, appearance, time, place, etc.). If a community contact evolves into a detention, the officer should enter into the data base the reasons for such detention.
3. Data analysis of an officer's community contacts, stops, searches and arrests should be compared and contrasted with comparable data from the district station where

the incident occurred and the county as a whole. The data analysis should also take into account the racial and ethnic composition of each district as compared to the county overall.

4. For the purposes of investigations into allegations of bias or profiling, data analysis of the officer's community contacts, stops, searches and arrests should cover a period of 3-5 years, or if the officer has less tenure, for the duration of his service in the FCPD. If during the prescribed time period the officer has worked in different districts within the county, the review and analysis of the officer's community contacts, stops, searches and arrests should not be limited to the district where the officer is assigned at the moment, but rather should include all such encounters in every county district where the officer served during the time period.
5. Like the efforts the FCPD has undertaken to analyze and identify use of force incidents, the FCPD should consider creating an early warning system to alert commanders as to whether an officer's community contacts, stops, searches or arrests are excessive and disproportionate for a particular race or ethnic group.
6. The FCPD should retain an independent expert on implicit bias to examine all law enforcement policies, practices and training for the purpose of recommending evidence-based strategies to mitigate the impact of implicit bias on policing.
7. Officers should receive implicit bias training on an annual basis.

CC: Complainant