

Public Report

Oct. 25, 2019: Use of Force Complaint



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INCIDENT

The alleged use of force during this incident occurred following an arrest when the arrestee was being seat belted in the backseat of a patrol cruiser. The in-car recording equipment captured the audio portion of the event. Because the video system had a forward-facing camera only, it did not capture the backseat but did capture the arrest when the arrestee got out of his car after being told to do so by the arresting officer. While the description of the incident is based on interviews conducted of the officer and arrestee, I have reviewed the audio and video footage and will refer to it when appropriate.

On October 25th, 2019, at approximately 6:15 a.m., Fairfax County Police Department (hereinafter “FCPD”) Police Officer First Class #1 (hereinafter “PFC#1”)¹ conducted a traffic stop of an individual later identified by name bearing the initials Y.W. (hereinafter “YW”). PFC#1 initiated the traffic stop on Lee Jackson Memorial Highway. He approached the car on the passenger side and spoke to the driver from the front passenger window. PFC#1 identified himself and provided the reasons for the stop. YW did not feel that he had committed the infractions. After preparing summonses for the violations in his police cruiser, PFC#1 re-approached the vehicle and informed YW that the summonses indicated a January 2, 2020 court date, and that he needed to sign them. YW stated that he would not answer any questions. The only passenger in the car then asked PFC#1 what would happen if YW refused to sign, to which PFC#1 replied that he would be arrested and brought to a magistrate. PFC#1 advised YW that he needed to sign the summonses to acknowledge receiving them, but that his signature did not infer guilt. When YW refused to sign, PFC#1 explained to him that if he refused to sign, he would be arrested and taken before a magistrate. YW continued to refuse to sign, so PFC#1 went to the driver’s side of the car, knocked on the window, and asked YW to step out of the vehicle. YW complied, put his hands behind his back after exiting the car, and was handcuffed and arrested.

PFC#1 then escorted YW to his patrol car to place him in the rear, passenger-side seat. After YW was seated, PFC#1 asked YW to “look to the left,” then is heard saying, “did you hear what I said? Sir, look to the left.”² YW did so, and PFC#1 secured the seatbelt on YW. No

¹ On October 25, 2019, PFC#1 was assigned to the FCPD Fair Oaks District Station’s Selective Enforcement Team (hereinafter “SET”). The SET’s primary mission is traffic enforcement.

² The direct quotes can be heard on the audio portion of the in-car video camera system.

conversation, complaint, or indication of discomfort is heard during the time the seatbelt was secured. Police Officer First Class #2 (hereinafter “PFC#2”) arrived on the scene after YW had been placed and seat-belted in the police cruiser.

PFC#1 transported YW to the Fairfax County Adult Detention Center (hereinafter “ADC”). No conversation or comments were captured by the in-car recording equipment during the ride.

After being released from the ADC, YW contacted the FCPD Fair Oaks District Station to lodge a complaint about the incident. YW complained to PFC#1’s supervisor that PFC#1 intentionally “choked”³ him while seat-belting him in the back of the patrol cruiser following his arrest. Specifically, YW indicated that PFC#1 put his forearm across his throat and applied pressure while securing the seatbelt. He also indicated that he was unable to breathe for approximately two seconds while this occurred. YW said that he did not understand why PFC#1 did this, but that he appeared angry during the encounter. He acknowledged that nothing was said during the alleged choking, and he did not allege any injury.

CRIMINAL INVESTIGATION/ PROSECUTIVE DECISION

The FCPD conducted an administrative investigation into PFC#1’s actions during this incident. No referral was made to the Office of the Commonwealth’s Attorney.

YW was charged with reckless driving,⁴ aggressive driving,⁵ and failing to dim headlights⁶ when he was brought before the magistrate while at the ADC following his arrest.

INTERNAL ADMINISTRATIVE INVESTIGATION

Initially, the internal investigation conducted by the FCPD examined whether PFC#1 used excessive force on YW. After receiving the results of that investigation, YW made an additional allegation of bias-based policing against PFC#1. A subsequent investigation was undertaken to examine the new allegation. Although this review focuses on the use of force

³ Neither chokeholds nor carotid artery restraints are sanctioned by the FCPD as force options.

⁴ Va. Code § 46.2-852 Reckless driving; general rule.

⁵ Va. Code § 46.2-868.1 Aggressive driving; penalties.

⁶ Va. Code § 46.2-1034 When dimming headlights required.

allegation, I reviewed both investigations to ensure a full review of the FCPD's investigative efforts into the excessive force claim. The Fairfax County Police Civilian Review Panel conducted a separate review of the FCPD investigation into YW's bias-based policing allegation.⁷

The two separate FCPD investigations included multiple interviews of PFC#1, YW, and the lone passenger in the car driven by YW; an interview of PFC#2; a review of all available video camera and audio recording of the incident; a review of Fairfax County Criminal Justice Academy (hereinafter "FCCJA") training curriculum and an interview of training personnel; a review of prior complaints made against PFC#1; and a review of PFC#1's arrests broken down by race and a comparison of those arrests to the arrests conducted by other officers assigned to the Fair Oaks District Station.

Following the investigations, the FCPD concluded that the allegation of excessive (or of any) force being used by PFC#1 was "unfounded." FCPD General Order (hereinafter "G.O.") 301 VI. lists four potential findings with which to classify each allegation at the conclusion of an administrative investigation, and describes what each means:

1. Unfounded - The allegation is false, and did not occur.
2. In Compliance - The employee's actions were in compliance with the rules and regulations of the Department.
3. Not Sustained - Insufficient evidence exists to either prove or disprove the allegation.
4. Sustained - The allegation is supported by a preponderance of the evidence. Only findings in this category will be included in an employee's personnel file.

⁷ After establishing both the Independent Police Auditor and the Fairfax County Police Civilian Review Panel (hereinafter "Panel"), the Fairfax County Board of Supervisors approved the Panel's by-laws on July 11, 2017. In Article VI. at A. 3., those by-laws 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 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/>. On September 24, 2020, the Panel voted to undertake a review of the FCPD investigation into YW's bias-based policing allegation and conducted its review at its May 6, 2021 meeting.

While there is no evidence to corroborate YW’s allegation, it is difficult to state conclusively that it “is false, and did not occur.”⁸ Therefore, I believe a finding of “Not Sustained” is more appropriate in this situation.⁹

Other than the “Unfounded” finding (as opposed to “Not Sustained”), my opinion is that the FCPD investigations into the excessive force allegation were complete, thorough, objective, impartial, and accurate.

CONCLUSIONS

The FCPD investigations into YW’s allegation of force did not substantiate that PFC#1 “choked” YW. YW said that it happened, while PFC#1 said that it did not. PFC#1 did acknowledge placing his left arm and elbow very close to YW’s collarbone and neck area while seat belting him.¹⁰ Training academy staff assigned to the FCCJA advised that, due to the vulnerability of an officer while securing an arrestee in a vehicle, officers are taught to place their left arm on the arrestee while securing the seatbelt. Unfortunately, the in-car video camera system in PFC#1’s patrol cruiser did not include a rear-facing camera. The audio portion of the footage of the incident provides no indication that PFC#1 applied pressure on YW while securing the seatbelt. YW made no comment nor was there any audible indication of choking or discomfort during the incident. Based on this lack of conclusive evidence, I believe a finding of “Not Sustained”—meaning that “[i]nsufficient evidence exists to either prove or disprove the allegation”¹¹—is warranted.

RECOMMENDATIONS

The FCPD policy governing “INTERNAL INVESTIGATIONS”¹² provides four potential findings at the conclusion of an internal investigation. The first—“Unfounded—is used when an “allegation is false, and did not occur,”¹³ and is how the FCPD classified YW’s allegation of being choked during this incident. The fourth—“Sustained”—is used when the

⁸ FCPD G.O. 301 VI. 1.

⁹ In the Recommendations section of this report, I will suggest a subtle change to the language describing these findings which would make an “Unfounded” finding appropriate in a future case such as this one.

¹⁰ FCPD G.O. 203.3 TRANSPORTATION OF PRISONERS provides that “[s]eatbelts shall be used on all prisoners being transported.”

¹¹ FCPD G.O. 301 VI. 3.

¹² FCPD G.O. 301.

¹³ Note 8, *supra*.

“allegation is supported *by a preponderance of the evidence.*”¹⁴ The “Sustained” classification is the only one of the four that includes the “preponderance of the evidence” burden of proof standard. If the burden of proof to conclude that an “allegation is false, and did not occur” was by the preponderance of the evidence, I would agree that YW’s allegation in this case was “Unfounded.” I also believe that “preponderance of the evidence” is the appropriate standard upon which to base findings in internal investigations. Therefore, I recommend that the “preponderance of the evidence” burden of proof standard be added to both the “Unfounded” and the “In Compliance” findings listed in FCPD G.O. 301 VI. That would leave only the “Not Sustained” finding without a burden of proof, which is appropriate since “Not Sustained” implies that “[i]nsufficient evidence exists to either prove or disprove the allegation.”¹⁵ Therefore, if this recommendation is adopted, FCPD G.O. 301 VI. will read (with proposed added language italicized):

VI. CLASSIFICATION OF ALLEGATIONS

After completion of an administrative investigation, each allegation shall be classified with one of the following findings:

1. Unfounded – *Based on a preponderance of the evidence*, the allegation is false, and did not occur.
2. In Compliance - *Based on a preponderance of the evidence*, the employee's actions were in compliance with the rules and regulations of the Department.
3. Not Sustained - Insufficient evidence exists to either prove or disprove the allegation.
4. Sustained - The allegation is supported by a preponderance of the evidence. Only findings in this category will be included in an employee's personnel file.

If the finding is sustained, disciplinary action will be imposed in accordance with General Order 310.2, Disciplinary Actions and Appeals.

A second recommendation based on the review of this incident is that, whenever possible, any vehicle used to transport an arrestee shall be equipped with forward-facing and

¹⁴ FCPD G.O. 301 VI. 4. (*emphasis added*).

¹⁵ FCPD G.O. 301 VI. 3.

rear-facing in-car video capability. While I believe that the preponderance of the evidence supports a finding that the alleged use of force did not occur in this incident, video footage showing PFC#1 seat belting YW in the vehicle may have provided even more conclusive evidence to make that determination.

If implemented this recommendation will also complement a decision made by FCPD command staff following the investigation into YW's allegation. It was noted by the Commander of the Fair Oaks District Station that the station's SET's¹⁶ cruisers were not equipped with safety partitions between the front and rear seats, and the commander determined that all Fair Oaks' cruisers would be equipped with such partitions in the future. While SET officers focus primarily on traffic enforcement and may infrequently transport arrested individuals, doing so in vehicles equipped with safety partitions as well as rear-facing in-car video systems benefits both officers and members of the community alike. Therefore, vehicles used for transporting individuals should be equipped with safety partitions between the front and rear seats, as well as forward-facing and rear-facing in-car video capability, across the entire FCPD.

¹⁶ Note 1, *supra*.

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

PepperBall System – defined in Fairfax County Police Department General Order 540.1 I. N. 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 540.4 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.

