



County of Fairfax, Virginia

MEMORANDUM

DATE: 2/4/2021

TO: Fairfax County Board of Supervisors
Mr. David M. Rohrer, Acting Chief, Fairfax County Police Department
Mr. Richard G. Schott, Independent Police Auditor

FROM: Fairfax County Police Civilian Review Panel

SUBJECT: Report of Panel Findings for Complaints CRP-20-19 and CPR-20-27

I. Introduction

The Panel held a Panel Review Meeting on December 10, 2020, to review an investigation resulting from a complaint (CRP-20-19) first submitted to the Panel on July 20, 2020. The requested review resulted from a disposition letter issued on July 10, 2020, after FCPD received a complaint from a community member (the “Complainant”) at the Franconia District Station on June 26, 2019 and turned over to IAB for investigation (the “Investigation”). A later complaint (CPR-20-27) was also reviewed in conjunction with CRP 20-19 as allegations were from the same Complainant. This resulted in a separate IAB investigation (the “Second Investigation”) and requested review resulting from a disposition letter issued on September 15, 2020. This report encompasses both CRP-20-19 and CRP-20-27.

After reviewing both investigation files, speaking with members of the FCPD along with the Investigating Officers, and speaking with the Complainant, Panel Members voted 8-1 that the Investigation and the Second Investigation (sometimes collectively the “Investigations”) were both complete, thorough, accurate, objective, and impartial, and concurred with the findings of the FCPD.

II. Background Facts

On April 28, 2019, the Complainant's vehicle was parked when a uniformed FCPD Officer (the "Subject Officer") pulled up behind the vehicle for what he characterized as a "consensual contact." However, the Investigation revealed that the Subject Officer initiated contact with the Complainant in an undercover capacity using an unauthorized social media application (the "App") to arrange the purchase of narcotics prior to the encounter.¹

The Subject Officer reported that, upon contacting the Complainant, and calling for backup, he could see the Complainant trying to conceal something under the front passenger seat. The Complainant rolled down his window and the Subject Officer said he smelled an odor of marijuana coming from within the vehicle.

The Subject Officer asked the Complainant to step out of the vehicle. The Subject Officer searched the vehicle and found illegal drugs (including marijuana) and drug paraphernalia.

A backup Officer ("Officer 2") arrived to assist with the stop. The Investigation revealed Officer 2 was made aware that the Complainant's arrest had been orchestrated using the above-mentioned App. It further revealed that Officer 2 had previous knowledge of the use of the App to contact suspected drug dealers.

The Subject Officer took the Complainant before a magistrate and procured several misdemeanor and felony charges. A preliminary hearing for these charges was set for June 11, 2019.

On June 26, 2019, the Complainant contacted the Franconia District Station to inquire about the process for filing a complaint because he believed "the Subject Officer" "broke the law" when he arrested Complainant. He alleged being criminally assaulted by "the Subject Officer" twice while in custody following the April 28, 2019 arrest.

According to the Complainant, the first assault occurred in the interview room at the Franconia District Station and the second upon arrival at the Fairfax County Adult Detention Center. Both matters fall within the jurisdiction of the Independent Police Auditor (IPA) who investigated these specific allegations of use of force.²

In addition to these use of force allegations, the complaint included several allegations that fell within the jurisdiction of the Panel. The Complainant said he was told "bad things" were going to happen to him. He claimed he was detained longer than necessary to get him to cooperate with a narcotics investigation. The Complainant said he was given personal information during detention which appeared to be an Officer reaching out for help, but the Complainant said he took the brunt of the Officer's frustrations with life. The Complainant also said he asked to be buckled into his seatbelt on the transport to the Franconia District Station, but his request was refused.

¹ The App is used by specialized undercover units within the FCPD for the purpose of interdiction of narcotics traffickers; however, use of the App is not authorized for the rank-and-file FCPD patrol officers.

² The IPA's reports are available on its website: [IPA-20-07](#) and [IPA-20-08](#).

The Investigation revealed an acknowledgement by the Subject Officer that during on the transport to the Franconia District Station the Subject Officer lost his temper with the Complainant and that he used vulgar language when addressing the Complainant.

Further, the Subject Officer acknowledged that water was taken from the Complainant at the District Station and that he failed to activate the camera in the interview room during a custodial interrogation of the Complainant.

III. Procedural Background and Investigative Findings

Due to the serious nature of the allegations that included possible criminal conduct, the Franconia District Station Commander referred the matter to the Major Crimes Bureau on July 1, 2019. A Lieutenant from that Bureau was assigned to investigate to determine if any criminal acts had been committed in dealing with the Complainant. A parallel investigation was conducted simultaneously by a Lieutenant from the Internal Affairs Bureau (IAB). These two officers simultaneously interviewed a number of witnesses.

On August 16, 2019, the Deputy Commonwealth's Attorney for Fairfax County decided that no probable cause existed as it related to the assault alleged in the Complainant's statement, and no Probable Cause existed for the charge of perjury citing the "high bar" for proving that charge. Based on the decision from the Office of the Commonwealth's Attorney, the criminal investigation concluded with no charges being filed.

The IAB continued its investigation which was substantial and thorough. The IAB interviewed the Complainant, the Subject Officer, the Supervisor of the Subject Officer, two Detectives, and at least four Patrol Officers. IAB reviewed the reports which documented the arrest and the In-Car Video (ICV) footage from the Subject Officer's cruiser. Review of the ICV revealed that the body microphone was not synced, and the interior microphones were not functional. As a result, there was no audio for the ICV.

The IAB attempted the retrieve video from inside the sally port of the Fairfax County Adult Detention Center. However, no footage was obtained because those cameras only show footage in real-time but make no recording. The Investigation addressed all misconduct alleged.

The Investigation also revealed the Subject Officer failed to disclose the use of the App to the Commonwealth's Attorney which led to that information not being turned over in pretrial discovery as required by the United States Supreme Court case *Brady v. Maryland*.³ This omission ultimately lead to the Office of the Commonwealth's Attorney obtaining dismissal of charges against the Complainant on September 20, 2019. Additionally, and for similar reasons, several other cases involving the Subject Officer were dismissed by motions of the Commonwealth's Attorney. The Subject Officer was later added to the Brady List⁴ by the

³ *Brady v. Maryland*, 373 U.S. 83 (1963) which held that withholding evidence violates due process "where the evidence is material either to guilt or to punishment."

⁴ This is a list of police officers deemed unreliable by local prosecutors.

Commonwealth's Attorney. The FCPD Investigation into CPR-20-19 found a total of 34 Sustained Violations.

On July 10, 2020, the FCPD informed the Complainant that it had "completed its investigation into the allegation of your complaint." It said it included a "comprehensive examination of the facts and circumstances surrounding the incident and the actions taken by the Police Officer on April 28, 2019." The letter goes on to address the alleged complaint that the Complainant had been "criminally assaulted and otherwise mistreated during your arrest and interrogation."

The letter states in relevant part the following:

"[B]ased upon my review and the opinion of the Office of the Commonwealth's Attorney for Fairfax County, there was insufficient evidence to establish the elements of a criminal act." However, "based upon the recommendation of the Commander of the Patrol Division, I have concluded that the facts demonstrate that the Subject Officer was in violation of our policies and procedures."

Significantly, the Investigation revealed that at least one FCPD Detective ("Detective 1") had direct knowledge of the use of the App by the Subject Officer, and another FCPD Detective ("Detective 2") had suspicions of its use by the Subject Officer. Moreover, at least four officers either knew or heard of the use of the App, the use of which, could have placed other officers in danger or compromised investigations.

At the time of the Investigation, the FCPD offered no clear guidance regarding required actions by FCPD officers aware of the use of an App by a fellow officer (not in a specialized unit) to make contact with community members.⁵

On July 20, 2020, the Complainant requested a review by the Panel asking, "what specific measures were taken to prevent this from happening again." Also, he wanted to know, "why there wasn't sufficient evidence of criminal activity."

IV. The Second Investigation

While the Investigation was pending for several months, the charges for Complainant's second arrest – that occurred on June 11, 2019 (the "June 11 Charges") the same day as his preliminary hearing for his arrest by the Subject Officer – proceeded through the court process. On November 7, 2019, the Complainant made additional complaints to IAB including:

1. A detective in charge of the investigation of the June 11 Charges provided insufficient discovery to Complainant's attorney;
2. During his arrest for the June 11 Charges, the FCPD allegedly deployed too many officers displaying guns and violently threw him from his car causing scratch on his knee⁶;

⁵ FCPD has since created a Policy 501.2 Investigative Responsibilities to address this issue.

⁶ Again, the IPA handled all use of force complaints lodged by Complainant.

3. The FCPD improperly seized Complainant's vehicle; and
4. One of the arresting detectives made inappropriate and unprofessional comments to Complainant about a search of the Complainant's living quarters that happened to be in his parent's home.

Collectively, all four complaints will be referred to as the Second Complaint. The FCPD assigned another detective (Det. Giacco) to investigate the Second Complaint. Det. Giacco interviewed Complainant who refused to cooperate with the Second Investigation in the fall of 2019. The Complainant stated he was focused on his claims against the Subject Officer outlined above. Consequently, the Second Investigation sat dormant until July 21, 2020 when the FCPD noted – in the course of making his complaint on July 20 to the Panel about the outcome of the Investigation – the Complainant's alleged knee injury outlined in the Second Complaint.

Det. Giacco began in July 2020 his investigation of the four items in the Second Complaint. As to the lack of discovery, Det. Giacco interviewed the Detective who provided discovery and concluded that the information provided was appropriate and complied with law.

As to the manner of the arrest, Det. Giacco determined that two officers had guns drawn and two officers had tasers at the ready, and that this high level of control was appropriate for a narcotics arrest. As to vehicle seizure, the officer met all standards: the FCPD returned Complainant's vehicle in a reasonable period and charged him no fees for storage or towing.

As to the complaint that the officer made inappropriate comments, Det. Giacco concluded the detective in question merely explained what could happen if Complainant's residence was searched, warning that others there could be hurt in the process. The questions – though forcefully asked – were designed to keep the community safe.

Det. Giacco noted that Complainant made no complaints about the arresting officers involved in the June 11 Arrest until *after* Complainant had his charges dismissed related to the Subject Officer. The timing of the Second Complaint was very suspicious. Complainant could document no injury alleged and no request for treatment contemporaneously with June 11 arrest. Det. Giacco did call the nurse who treated Complainant at the ADC, and she confirmed she provided a Band Aid but would not release any additional information without a release. The Complainant neglected to provide one, even after requested by IAB to do so.

V. Panel Meeting and Finding

A subcommittee of the Panel met on October 14, 2020 to discuss the request for review of both CRP-20-19 and CRP-20-27. The subcommittee determined that both matters involved allegations of abuse of authority and serious misconduct. The full nine-member Panel met on October 22, 2020 where the Panel accepted the subcommittee's recommendation and determined to review the Investigation and the Second Investigation.

Due to the size of the file and time needed to review it, along with the number of matters on the agenda for the November Panel meeting, the Panel Chair moved the review of CRP-20-19 and CRP-20-27 to the December Panel meeting, which was held on December 10, 2020.

The Complainant was present for the Panel Review. Also, both IAB Investigators were present along with other members of the FCPD. Major Lay was the primary spokesperson for the Department who introduced Captain Hanson who in turn introduced Lt. Giacco and Lt. Ferreira.

Due to audio technical difficulties, the Complainant was not able to address the Panel at first, which is the regular order of presentation. When able to do so, the Complainant shared that while he could not be heard, he was able to hear the entirety of the meeting and the presentation by the FCPD. The Panel Chair explained that this was the Complainant's opportunity to share with the Panel why he filed his complaint.

The Complainant shared that he was satisfied with the outcome of the Investigation. He stated he learned for the first time from the FCPD presentation that the Subject Officer had been fired. He complained that he never knew what happened because the disposition letter he received from the FCPD was vague. However, he shared that he was not satisfied with the length of time that it took to conduct the investigation and once it was completed, he did not understand why it took so long to notify him.

The Panel had no questions for the Complainant. However, the Panel had a number of questions for the FCPD.

Some members of the Panel were concerned about what appeared to be a wide use of the App by patrol officers to contact community members to set-up narcotics buy busts. Also, one member wanted to know whether the witnesses interviewed were aware of the technique being used, and if the FCPD had concerns that this technique was being used at other stations within the FCPD. Major Lay interjected that when the issue of the use of the App was brought to the attention of the FCPD, it created a Policy 501.2 Investigative Responsibilities (the "Policy") which specifically addressed appropriate uses of the App within the FCPD. However, pending formal roll-out of the policy, the FCPD issued a verbal directive to all station commanders that the use of this procedure should not be done in the field. Major Lay said a copy of the Policy would be shared with the Panel.

There were concerns expressed by Panel members that the Subject Officer was involved in an earlier Panel Review. Panel Members asked if the FCPD tracked officers involved in previous Panel reviews. Lt. Ferreira informed the Panel that each investigation stands on its own. Therefore, while he was aware of the previous investigation, it was not a part of the Investigation. Major Lay shared that the FCPD has an Early Warning System in place to alert commanders about problem officers.

Another Panel member asked if the Early Warning System would have caught the officer in this case if there had not been a complaint. The FCPD responded that the Early Warning System checks for a certain number of triggering events and once that threshold is met a report is generated and sent to the officer's supervisor. Capt. Hanson interjected to say that the Subject Officer had already been identified as having some issues with his written reports and the lack of details and his failure to properly use ICV. The supervisor was working with the officer to correct these and other issues when the complaint was brought.

A Panel Member inquired about FCPD protocol regarding observation and recording of interviews at the various district stations. The FCPD said it is a policy for another officer to observe all station interviews via CCTV at a minimum. Maj. Lay informed the Panel that this is no FCPD requirement that officers record stationhouse interviews.

A Panel Member asked how the FCPD ensures that its officers turn on ICV and how the FCPD prevents officers from disabling the ICV. The FCPD responded that escalating discipline encourages compliance with policy and that supervisors conduct ICV audits. In addition, IAB inspects ICV records to identify noncompliance. Also, the FCPD possesses multiple layers of technology to track officer locations including radios, cellphones and body-worn cameras.

Panel Members expressed concerns about the officers failing to report policy violations by fellow officers since it was clear several were aware of questionable use of the App by fellow officers followed by failure to report policy violations. The FCPD explained that, before the Policy was in place, officers were uncertain about reporting obligations.

The Panel heard extensively from the FCPD and from the Complainant. Based on the statements made and responses to questions along with each Panel Member's review of the file, the Panel voted 8-1 that the Investigation and the Second Investigation were both accurate, complete, thorough, objective, and impartial after lengthy open deliberation. The Panel Member who voted Nay noted that his objection related to the Second Investigation (CRP-20-27). He did not agree that one element was thoroughly investigated, but otherwise he concurred with the FCPD's findings.

VI. Recommendations

1. The FCPD should create a policy requiring all district station interviews be recorded.
2. The FCPD should ensure that all FCPD Officers are informed of its policy 501.2 Investigative Responsibilities.
3. The FCPD should encourage the Fairfax County Sheriff to record and preserve video taken from inside the Fairfax County Adult Detention Center.

VII. Comments

1. FCPD disposition letters to Complainants should uniformly meet the high standards that the FCPD now requires.

CC: Complainant