

# Public Report

July 20, 2019: Use of Force - Choke



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## INCIDENT

On July 20, 2019, officers from the Fairfax County Police Department's (hereinafter "FCPD") Franconia District Station responded to the Kingstowne Towne Center for a reported assault. The officers learned that the incident involved two groups of people who both summoned police response. The involved individuals remained at the location while the initial police investigation was conducted. As the investigation was almost complete, one of the individuals involved, later identified by name bearing the initials J.P. (hereinafter "JP"), began to aggressively approach the individuals from the other group. JP had also been identified by the alleged victim of the initial assault as being the person who had punched him in the face. Based on this identification and his aggressive approach on the other individuals, the officers decided to detain JP. However, JP refused to identify himself and continued to approach the other group of individuals in spite of numerous police commands for him to stop. When he disregarded their verbal commands, the officers tried to physically restrain JP's movements. When he actively resisted their efforts, the officers and JP fell to the ground. Master Police Officer #1 (hereinafter "MPO#1") wrapped his arms around JP's upper torso, which allowed other officers to handcuff JP. One vocal bystander shouted her belief that MPO#1 was choking JP during the struggle to handcuff him.

Several onlookers from the shopping area had now converged on the increasingly chaotic scene. To avoid any additional confrontation or use of force, the officers arrested JP and transported him to the Fairfax County Adult Detention Center (hereinafter "ADC"). They continued the criminal assault investigation; and, based on a complaint of bias-based policing, immediately initiated an administrative investigation into the officers' actions. The complaint of bias-based policing was lodged by the mother (hereinafter "the complainant") of one of the individuals involved in the initial assault incident and who was part of the group that included JP. The complainant was not present during the encounter between the two groups or when JP was arrested. She based her complaint on how her daughter described what had transpired. The complainant also alleged that an officer had directed vulgar and unprofessional language toward her daughter.

## **INTERNAL ADMINISTRATIVE INVESTIGATION**

Throughout the FCPD's internal administrative investigation into the incident, FCPD Internal Affairs Bureau (hereinafter "IAB") investigators updated the complainant on their findings and allowed her to observe video footage of the incident prior to the FCPD officers' arrival as well as video footage of the officers' actions upon their arrival. She quickly acknowledged having a better understanding of the event and the reasons for JP's arrest. More important, she told the investigators that she no longer believed the officers' actions were based on any type of bias, and that she appreciated how the FCPD had responded to her complaint. She further advised that she no longer believed unprofessional language had been used by officers during the incident. Overall, the complainant stated that the department's response to the event, and to her subsequent complaint, was "extremely appropriate." Her belief coincided with the FCPD's determination that the allegations of bias-based policing and the use of improper language were unfounded.

Although the individual who lodged a complaint with the FCPD did not complain about the force used during the incident involving her daughter, FCPD Chief Edwin C. Roessler Jr. requested that I monitor and review the administrative investigation given that force was used during the arrest of JP. Based on my monitoring and review, I agree that the response to the initial event and to the complainant's allegations was appropriate, and I believe that the department's overall investigation was complete, thorough, objective, impartial, and accurate. All appropriate interviews were conducted, all available evidence was obtained, and all relevant video footage was reviewed. The department concluded that the officers used force in compliance with departmental and legal standards. I will explain why I agree with that conclusion in the following section of this report.

## **CONCLUSIONS**

The investigation found that the officers use of force was justified to detain and to arrest JP. I agree that the minimal amount of force used on JP to effect an investigative detention, and then an arrest, was objectively reasonable. An objectively reasonable use

of force satisfies the FCPD policy on use of force;<sup>1</sup> and, it satisfies the legal standard for a law enforcement officer's use of force in the United States.<sup>2</sup>

FCPD General Order (hereinafter "G.O.") 540.0, USE OF FORCE, PURPOSE AND POLICY, states in part: "Force is to be used only to the extent it is objectively reasonable to defend oneself or another, to control an individual during an investigative or mental detention, or to lawfully effect an arrest. Force should be based upon the totality of the circumstances known by the officer at the time force is applied, without regard to the officer's underlying intent or motivation, and weighs the actions of the officer against their responsibility to protect public safety as well as the individual's civil liberties. Force shall not be used unless it is reasonably necessary in view of the circumstances confronting the officer."<sup>3</sup> FCPD G.O. 540.1, USE OF FORCE, DEFINITIONS, defines "objectively reasonable" as "[t]he level of force that is appropriate when analyzed from the perspective of a reasonable officer possessing the same information and faced with the same set of circumstances. Objective reasonableness is not analyzed with the benefit of hindsight, but rather takes into account the fact that officers must make rapid and necessary decisions regarding the amount of force to use in tense, uncertain and rapidly evolving situations."<sup>4</sup>

The incident under review began when two groups of people involved in an altercation with each other both called 9-1-1. Officers responded to a dynamic situation and needed to determine what had occurred prior to their arrival. The officers developed reasonable suspicion to detain JP so that they could continue their investigation of the reported assault.<sup>5</sup> However, when the officers tried to detain him, JP resisted their efforts<sup>6</sup> and tried to aggressively approach the other group of individuals involved in the earlier encounter. The officers used force against JP to prevent him from continuing his approach on the other group and possibly escalating the situation with violence.

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<sup>1</sup> FCPD General Order 540.0, *et seq.*

<sup>2</sup> Graham v. Connor, 490 U.S. 386 (1989).

<sup>3</sup> FCPD G.O. 540.0 II.

<sup>4</sup> FCPD G.O. 540.1 I. L.

<sup>5</sup> In its landmark Terry v. Ohio, 392 U.S. 1 (1968) decision, the United States Supreme Court first recognized a law enforcement officer's authority to detain an individual, without probable cause, if the officer could articulate reasonable suspicion that the individual had been, was currently, or would soon be, involved in criminal activity.

<sup>6</sup> FCPD G.O. 540.4 I. A. defines varying levels of resistance individuals may present, to include active resistance which JP engaged in during this incident. See GLOSSARY for definitions of the levels of resistance.

FCPD policy defines “less-lethal” force, to include “empty-hand tactics, such as strikes, kicks, or takedowns,<sup>7</sup> as “[a]ny level of force not designed to cause death or serious injury that is reasonably necessary to gain compliance by individuals offering resistance.”<sup>8</sup> FCPD policy also specifically lists the “[e]ffecting of an investigative stop or arrest” as an “[i]nstance where less-lethal force may be effective.”<sup>9</sup> The officers used empty-hand tactics to detain JP as prescribed by departmental policy. Their use of force was objectively reasonable. Furthermore, there was no corroboration of the one accusation that MPO#1 choked JP, nor did anyone else (including the complainant, the complainant’s daughter, or JP) make an allegation of that nature.

Much of FCPD’s policy language on the use of force is taken directly from the United States Supreme Court’s 1989 Graham v. Connor decision.<sup>10</sup> In that seminal case, the Supreme Court pointed out “that the right to make an arrest or investigatory stop necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it,”<sup>11</sup> that such uses of force by law enforcement officers in this country are to be analyzed under the Fourth Amendment to the United States Constitution,<sup>12</sup> and that to be lawful under that Fourth Amendment standard, an officer’s use of force must be objectively reasonable. Consequently, for the same reasons the officers’ actions in this incident comported with FCPD policy, they complied with the applicable legal standards as well.

## **RECOMMENDATIONS**

Although I agree that there was no wrongdoing during the incident and that the investigation of the use of force and other alleged officer misconduct was complete, objective, thorough, impartial, and accurate, I do have minor recommendations to make

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<sup>7</sup> FCPD G.O. 540.4 II. A. 2. a.

<sup>8</sup> FCPD G.O. 540.4 II. A. 2.

<sup>9</sup> FCPD 540.6 I. A. 1.

<sup>10</sup> 490 U.S. 386 (1989).

<sup>11</sup> *Id.* at 396.

<sup>12</sup> Amendment IV to the U.S. Constitution: The right of the people to be free in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

regarding FCPD policy on bias-based policing.

Current FCPD policy prohibiting bias-based policing reads:

“Investigative detentions, traffic stops, arrests, searches, and property seizures by officers will be based on a standard of reasonable suspicion or probable cause in accordance with the Fourth Amendment of the U.S. Constitution. Officers must be able to articulate specific facts and circumstances that support reasonable suspicion or probable cause for investigative detentions, traffic stops, arrests, nonconsensual searches, and property seizures.

Except as provided below, officers shall not consider race/ethnicity in establishing either reasonable suspicion or probable cause. Similarly, except as provided below, officers shall not consider race/ethnicity in deciding to initiate even those *nonconsensual* encounters that do not amount to legal detentions or to *request consent to search*.

Officers may take into account the reported race or ethnicity of a specific suspect or suspects based on trustworthy, locally relevant information that links a person or persons of a specific race/ethnicity to a particular unlawful incident(s). Race/ethnicity can never be used as the sole basis for probable cause or reasonable suspicion.

Except as provided above, race/ethnicity shall not be motivating factors in making law enforcement decisions. *Violations* of this regulation will be investigated by the Internal Affairs Bureau.”<sup>13</sup>

There are three areas in this departmental regulation where I recommend revising the language. Two changes in the last sentence of the second paragraph are warranted to reflect that bias-based policing is prohibited even during consensual law enforcement activity. Therefore, that sentence should read: “Similarly, except as provided below, officers shall not consider race/ethnicity in deciding to initiate even those *consensual* encounters that do not amount to legal detentions, *or in deciding to ask someone for consent to search*.” These subtle changes better reflect that the officer cannot consider race or ethnicity even when deciding to engage an individual in purely consensual activity.

The third change I recommend is in the last sentence of the regulation. Rather than stating that “Violations of this regulation will be investigated by the Internal Affairs Bureau,” I recommend that the final sentence read: “*Allegations of bias-based policing* will

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<sup>13</sup> FCPD Regulation 201.22 (*emphasis added*).

be investigated by the Internal Affairs Bureau.” This reflects that the department’s IAB will investigate all allegations of bias-based policing in an effort to prove or disprove them.

If these recommendations are implemented by the FCPD, the revised Regulation 201.22 will read, in its entirety:

“Investigative detentions, traffic stops, arrests, searches, and property seizures by officers will be based on a standard of reasonable suspicion or probable cause in accordance with the Fourth Amendment of the U.S. Constitution. Officers must be able to articulate specific facts and circumstances that support reasonable suspicion or probable cause for investigative detentions, traffic stops, arrests, nonconsensual searches, and property seizures.

Except as provided below, officers shall not consider race/ethnicity in establishing either reasonable suspicion or probable cause. Similarly, except as provided below, officers shall not consider race/ethnicity in deciding to initiate even those consensual encounters that do not amount to legal detentions, or in deciding to ask someone for consent to search.

Officers may take into account the reported race or ethnicity of a specific suspect or suspects based on trustworthy, locally relevant information that links a person or persons of a specific race/ethnicity to a particular unlawful incident(s). Race/ethnicity can never be used as the sole basis for probable cause or reasonable suspicion.

Except as provided above, race/ethnicity shall not be motivating factors in making law enforcement decisions. Allegations of bias-based policing will be investigated by the Internal Affairs Bureau.”



## **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.

