

# Public Report

Jan. 18, 2021: Use of Force Complaint -  
Takedown (IPA-21-04)



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## INCIDENT

On January 18, 2021, a Loss Prevention employee of JC Penney, Springfield Towne Center location, saw two individuals (hereinafter “ND” and “MM”) shoplifting merchandise from the store. A call for service went to the Fairfax County Police Department (hereinafter “FCPD”). Master Police Officer #1 (hereinafter “MPO#1”) and Police Officer First Class #1 (hereinafter “PFC#1”) responded to the call and located ND and MM as they approached a car in the parking lot outside of JC Penney. MPO#1 and PFC#1 were not in FCPD police uniforms because they were working in plainclothes at the mall location; consequently, neither was wearing a body-worn camera (hereinafter “BWC”). They identified themselves and took ND and MM into custody and escorted them back into JC Penney to investigate the shoplifting.

As MPO#1 walked with ND down a hall toward the Loss Prevention Office, he verbally explained to ND that he needed to remove the keychain dangling from ND’s pants near her waist because of the small canister of pepper spray that was on the keychain.<sup>1</sup> When he reached for the keychain/pepper spray, ND (who was not handcuffed) immediately grabbed MPO#1’s arm and began to fight him. He reacted by trying to grab her arms and they both fell to the ground. At this point, MPO#1 felt a sharp pain in his left hand and realized ND was biting him. He grabbed her hair weave and pushed her head toward the floor, causing her to stop biting his hand. She continued fighting by trying to strike, kick, and again bite MPO#1. PFC#1 joined the struggle and utilized a knee strike to ND’s hip to help get control of her. MPO#1 and PFC#1 got control of ND’s arms. With the help of a third FCPD officer (hereinafter “PFC#2”), who was in uniform and equipped with a BWC,<sup>2</sup> they were able to secure ND in handcuffs. Even after being handcuffed, ND tried to kick the arresting officers.<sup>3</sup>

An FCPD Sergeant (hereinafter “SGT#1”) responded to the location due to ND complaining about the force used on her. She had no visible injuries and she declined medical treatment for herself. Regardless, ND was transported to the hospital so that blood could be drawn because of her biting MPO#1 and breaking the skin of his hand when she did. During an

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<sup>1</sup> MPO#1 recalled advising ND, and the JC Penney Loss Prevention employee confirmed that ND was advised.

<sup>2</sup> The day of this incident was the first day that PFC#2 was equipped with a body-worn camera, and he forgot to activate it until the struggle had been resolved and after ND was handcuffed. He did record the remainder of the incident.

<sup>3</sup> This occurred before PFC#2 activated his body-worn camera, but was detailed by both PFC#1 and the JC Penney Loss Prevention employee during interviews of them.

interview conducted on January 26, 2021, ND claimed she sustained injuries during the incident eight days earlier. She stated that she went to Alexandria Hospital on January 20, 2021, and that they recommended a CT scan, and to consult an orthopedic for her knee pain. However, after multiple requests, she did not provide the FCPD with access to any medical records to substantiate being injured.

## **CRIMINAL INVESTIGATION/ PROSECUTIVE DECISION**

The FCPD conducted only an administrative investigation into the use of force by MPO#1 and PFC#1. No criminal investigation was conducted nor were criminal charges considered against the officers.

ND was charged with Petit Larceny<sup>4</sup> based on the theft from JC Penney and with Assault on a Law Enforcement Officer<sup>5</sup> based on her assault of MPO#1.

## **INTERNAL ADMINISTRATIVE INVESTIGATION**

Initially, the administrative investigation of this incident was conducted at the Franconia District Station. Subsequent investigation was conducted by the FCPD's Internal Affairs Bureau (hereinafter "IAB"). The comprehensive investigation included a review of Incident Reports prepared following the incident, and of BWC footage from immediately after the use of force until the incident was fully resolved; plus, interviews of all witnesses,<sup>6</sup> to include ND, the officers involved, and the JC Penney Loss Prevention employee.<sup>7</sup>

The FCPD determined that MPO#1 and PFC#1 complied with departmental policy when they utilized force on ND to get control of and take her into custody. I agree with the FCPD's

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<sup>4</sup> Va. Code § 18.2-96 (2).

<sup>5</sup> Va. Code §18.2-57 (C).

<sup>6</sup> ND's acquaintance, MM, did not witness the use of force because she was already in the Loss Prevention Office when it occurred. However, MM made several comments directed to ND wherein she questioned ND's actions leading to the use of force. Those comments were made while MM and ND were together in the Loss Prevention Office and were captured on PFC#2's body-worn camera. MM was contacted several times by the FCPD to schedule a formal interview, but MM failed to reply to the requests.

<sup>7</sup> The Loss Prevention employee was in the hallway and directly behind ND and MPO#1 when the use of force happened.

conclusion; and, in my opinion, the overall investigation—which includes the initial investigation by the Franconia District station and the subsequent investigative steps taken by the FCPD’s IAB—was complete, thorough, objective, impartial, and accurate.

## CONCLUSIONS

In its landmark Graham v. Connor opinion,<sup>8</sup> the United States Supreme Court analyzed the use of force by law enforcement officers in this country and recognized that “police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation.”<sup>9</sup> In the same opinion, Chief Justice William Rehnquist firmly stated that the Fourth Amendment to the United States Constitution<sup>10</sup> is the standard by which an officer’s actions in these situations must be judged; and, the Fourth Amendment standard requires that an officer’s use of force must be objectively reasonable to be lawful. Specifically, Rehnquist wrote “that *all* claims that law enforcement officers have used excessive force—deadly or not—in the course of an arrest, investigatory stop, or other ‘seizure’ of a free citizen should be analyzed under the Fourth Amendment and its ‘reasonableness’ standard.”<sup>11</sup> He went on to explain that “[a]s in other Fourth Amendment contexts, however, the ‘reasonableness’ inquiry in an excessive force case is an objective one: the question is whether the officers’ actions are ‘objectively reasonable’ in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation.”<sup>12</sup>

The FCPD’s use of force policy mirrors the Graham v. Connor pronouncements. FCPD General Order (hereinafter “G.O.”) 540.0 II. provides that “[f]orce 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

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<sup>8</sup> 490 U.S. 386 (1989).

<sup>9</sup> *Id.* at 397.

<sup>10</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.

<sup>11</sup> *Supra*, note 8 at 395 (*emphasis* in original).

<sup>12</sup> *Id.* at 397 (citations omitted).

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 light of the circumstances confronting the officer.”

While it is unfortunate that any force had to be used during this shoplifting incident,<sup>13</sup> the force used by MPO#1 and PFC#1 was objectively reasonable, making it both lawful and within the parameters of FCPD policy. The force used was in direct response to ND's resistance—which very quickly progressed from “active” to “aggressive”<sup>14</sup>—to MPO#1's attempt to secure the keychain/pepper spray. ND explained in an interview with FCPD that she instinctively reacted because when MPO#1 reached for the keychain/pepper spray,<sup>15</sup> he brushed her buttocks. She did not allege that this was done intentionally or that it was sexual in nature, but, nonetheless, she reacted the way she did.

In spite of her explanation for her actions, the takedown<sup>16</sup> and strikes deployed on ND by the officers constituted “less-lethal” force,<sup>17</sup> which is allowed by FCPD policy when it is “reasonably necessary to gain compliance by individuals offering resistance”<sup>18</sup> so long as it was “objectively reasonable ... to control an individual during an investigative or mental detention, or to lawfully effect an arrest.”<sup>19</sup> That is what occurred during this incident.

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<sup>13</sup> While it is purely speculative, force may not have been necessary had ND been handcuffed outside of the mall and before being escorted to the Loss Prevention Office. However, at the time of the incident she was merely being detained and not handcuffing her earlier was reasonable and not a violation of either law or policy.

<sup>14</sup> FCPD G.O. 540.4 I. A. 2. defines active resistance as “[w]here an individual's verbal and/or physical actions are intended to prevent an officer from taking lawful action, but are not intended to harm the officer,” while FCPD G.O. 540.4 I. A. 3. defines aggressive resistance as “[w]here 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.”

<sup>15</sup> ND stated that she did not hear MPO#1 tell ND that he was going to reach for her keychain/pepper spray before he did so; however, both MPO#1 and the JC Penney Loss Prevention employee recalled her being advised.

<sup>16</sup> MPO#1 did not consider his actions to be an intentional takedown but explained that he and ND fell down due to the initial physical struggle. Regardless, even if it had been an intentional takedown, it would still be objectively reasonable.

<sup>17</sup> FCPD G.O. 540.4 II. 2. a.

<sup>18</sup> FCPD G.O. 540.4 II. 2.

<sup>19</sup> FCPD G.O. 540.0 II.

## **RECOMMENDATIONS**

Based on the comprehensive investigation conducted by a district station commander and the IAB, I believe this investigation was complete, thorough, objective, impartial, and accurate. Furthermore, FCPD policy thoroughly addresses the use of force and aligns with constitutional standards. FCPD provides its officers extensive guidance—through both policy and training—on the types of force that are typically considered objectively reasonable in different situations. The FCPD analyzed the actions of MPO#1 and PFC#1 during this incident by examining their actions against the policies in place, and I believe the department’s findings are appropriate. Therefore, I have no recommendations to make as part of this incident review.<sup>20</sup>

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<sup>20</sup> The requirement to timely activate an officer’s body-worn camera is now included in FCPD G.O. 509. At the time of this incident, it was included in a departmental standard operating procedure (SOP 18- 056). PFC#2’s failure to activate his body-worn camera earlier in this incident was addressed with him by his supervisor.

## **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. R. 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 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. O. 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.

