

**Ad Hoc Police Practices Review Commission
Use of Force Subcommittee
August 12, 2015, 7:00PM
Room 232, Fairfax County Government Center**

Subcommittee members present:

George Becerra
Sal Culosi
Mary Kimm
Chip Moncure
Phil Niedzielski-Eichner
Joseph Smith
Adrian Steel
Jodi Shlesinger
Mike Shumaker
Bernard Thompson

Not present:

Hassan Aden
Joe Cammarata
Brad Carruthers

Ralph Cooper
Randy Sayles

Others present:

Clayton Medford
Anita Culosi
Katie Boyle
Alex Horton
Mike Curtis
Michelle Bash
Gordon Dean
Tim Peterson
Tom Ryan
Gervais Reed
Mike Kline

Mr. Niedzielski-Eichner opened the meeting at 7:00pm. He welcomed the public, reviewed the agenda, and thanked the Subcommittee members for responding to the informal survey on the preliminary recommendations.

SUBCOMMITTEE BUSINESS

Later in the meeting Mr. Smith moved approval of the minutes of the July 29th meeting, with multiple seconds. The minutes were approved unanimously.

Mr. Niedzielski-Eichner noted the following:

- A portion of the previous meeting was posted on YouTube and to anticipate that the evening's meeting would likely also be captured on video by a citizen.
- Mr. Alex Horton, the subject of a police vagrancy call, has asked to speak during the public comment period of the meeting.
- Chief Roessler will not attend the meeting since officer-involved-shooting (OIS) synopses have been posted and the subcommittee will instead use its time to work on finalizing recommendations.
- The Subcommittee members are encouraged to review the OIS synopses and offer any policy or practices recommendations that become apparent.

OFFICE INVOLVED SHOOTING SYNOPSES

Ms. Kimm indicated that she had reviewed the synopses and found that they did not have enough information from which to draw policy conclusions. A discussion followed relative to meeting the

charge to the Subcommittee to review recent use of force incidents. Mr. Steel recommended the subcommittee have a session where it reviews the summaries and ask for specific information it deems necessary for public release. He said the Subcommittee/Commission are not responsible to determine whether discipline of an officer was appropriate.

Mr. Niedzielski-Eichner asked what level of effort would satisfy the Subcommittee – e.g., Mr. Steel’s idea to convene a meeting to hear from FCPD?

Mr. Culosi offered that the FCPD staff that prepared the summaries are in the best position to help the subcommittee identify what policy issues are presented (what policies were followed and found to be sufficient/deficient, etc.). If FCPD cannot tell us that, the subcommittee cannot make that determination either.

Ms. Shlesinger noted that the Police Executive Research Forum (PERF) had access to reports to which the subcommittee does not have access. Mr. Ryan said PERF reviewed but did not remove records from Internal Affairs; he noted that this arrangement was also available to members of the Subcommittee.

Mr. Niedzielski-Eichner said Mr. Ryan’s offer to view reports or receive a briefing would be of value and asked Ms. Kimm to lead this review, with support from Mr. Steel and Mr. Smith. They agree to report back to him by Wednesday, August 19th, of any policy and practice issues the team identifies.

Ms. Kimm asked about Use of Force Committee reports. Mr. Ryan said there is only one other that has not been released and he does not believe it would offer much benefit to the subcommittee (no controversy). Mr. Ryan said he will try to get this third report to the subcommittee. Mr. Ryan also confirmed that the OIS webpage will be updated as incidents occur – *i.e.*, adding synopses will be the future practice.

Mr. Niedzielski-Eichner acknowledged that he has been troubled by the time it has taken to get this information but also respected the amount of effort it took by FCPD to produce ten years history of OIS cases. He indicated that FCPD appears committed to writing and posting incident synopses for any future OIS.

SUBCOMMITTEE RECOMMENDATIONS – “UNANIMOUS CONSENT”

Mr. Niedzielski-Eichner introduced the results of the informal survey he asked members to complete, the purpose of which was to gauge where the members are in agreement and where they differ. The hope is that the mapping of views will facilitate more efficient discussion and decision-making. The survey preliminary results are attached to these minutes.

He indicated that the Subcommittee decisions on recommendations will go through a “validation” review to ensure that the direction is clear and that what is recommended is already FCPD policy or does not contradict best police practice.

He proposed that five sets of recommendations be considered for “unanimous consent, as follows, as the survey results suggested that these had widespread Subcommittee support:

- Philosophy, policy, programs and practices | Definition of UOF (#3, 4, 5, 6, 7, 31)
- SWAT (#18, 19, 21)
- Training (28, 29)
- UOF Reporting and Transparency (30, 33, 34, 35)
- Reconstitute UOF Committee (36)

He indicated that any of the recommendations he was proposing in this context could be pulled by expressed request of any member and emphasized that Subcommittee members should take as much time as needed to review the proposed items.

Mr. Culosi supports recommendation #30, which includes a set of transparency-related options, but believes it is outside scope of this Subcommittee and within the scope of the Investigations and Oversight Subcommittee. Recommendation #30 was therefore removed from the set and will be considered separately.

After review and discussion, all recommendations but #30 identified by the Chairman for “unanimous consent” were approved by voice vote after Mr. Shumaker moved to adopt them and the motion was seconded by Mr. Moncure.

Relative to reconstituting FCPD’s Use of Force Committee (Recommendation #36) , Mr. Steel reiterated that FCPD had previously assured the Subcommittee that it will be provided a copy of the UOF Committee updated charter for review. Lt. Col. Ryan provided assurance that the revised Charter would be provided to the Subcommittee.

SUBCOMMITTEE RECOMMENDATIONS REVIEWED AND CONSIDERED

PERF Recommendations

Mr. Niedzielski-Eichner introduced Subcommittee consideration of the PERF recommendations and identified that the Subcommittee broadly supports all of them, with the exception of two, related to #5 (“duty to intervene”) and #54 (precision immobilization technique [PIT]).

Mr. Smith withdrew his objection to #5. Relative to #54, the option considered in the survey was that FCPD be directed to complete an analysis of the use of PIT and provide a report to the Board of Supervisors on its use.

Mr. Culosi advocated that the Subcommittee focus on whether or not to support #54, since Chief Roessler committed to implement all PERF recommendations except the PIT recommendation and that he committed to completing a study of its use.

Mr. Shumaker advocated that the Subcommittee recommend eliminating PIT as an option for police response to a vehicle that does not stop at police direction. He further indicated that high speed chases are not justified.

Mr. Niedzielski-Eichner asked how PIT differs from high speed chases. Mr. Ryan said the two are different issues based on a number factors. Most significantly the use of PIT is not to be used above

40mph unless a supervisor approves greater speed. He also indicated that FCPD has already undertaken and an analysis of the merits of using PIT.

Other comments included the following:

- Mr. Moncure asked about the use of the PIT maneuver when a woman fled from the hospital during the fugitive case earlier in 2015.
- Mr. Steel said there are separate recommendations on PIT and high speed chases. He said the subcommittee shouldn't oppose the chief doing an analysis and reporting the results to the Board of Supervisors.
- Mr. Shumaker said there is no need for PIT.
- Mr. Kline said FCPD uses PIT about eight times per year.
- Mr. Culosi said it might be dangerous to advertise there are no police chases. Subcommittee should leave it up to chief how to handle.

Mr. Niedzielski-Eichner asked for a motion.

Mr. Smith moved that the Subcommittee recommend approval of all PERF recommendations, with the exception of #54 related to eliminating the use of PIT, for which the Chief should conduct a study and report to Board of Supervisors. The motion was seconded by Mr. Culosi. [Note: Mr. Niedzielski-Eichner clarified that a 'no' vote supports approval of all PERF recommendations and not setting aside PERF recommendation #54 for study].

The motion was approved by the following vote:

Aye: Culosi, Steel, Moncure, Smith, Niedzielski-Eichner, Thompson

No: Shlesinger, Shumaker, Kimm, Becerra

Therefore, subcommittee supports all PERF recommendations except #54, where the subcommittee supports the FCPD studying it and reporting his findings to the Board of Supervisors.

Medical Assistance | GO 201.6 (#10) and GO 540.1 (#13)

Mr. Steel said there is not implementing language in use of force policy that specifically addresses an officer's responsibility relative to medical treatment, hence the need for this recommendation. Mr. Smith asked for clarification of what medical attention specifically would be required by the officer and emergency response personnel.

Mr. Steel moved to adopt 13, seconded by Mr. Becerra. Approved unanimously.

Mr. Steel moved to adopt 10, seconded by Mr. Becerra. Ms. Shlesinger moved amendment to change "provide medical assistance" to "assure medical assistance." Seconded by Mr. Shumaker. Approved unanimously. Main motion called. Approved unanimously.

BOS Review of Chief Determination in All Lethal UOF Cases (#15)

Mr. Ryan was asked to clarify what the Chief determines and he indicated that the Chief has the final say on any disciplinary action relative to the lethal UOF. The Subcommittee discussed the impact of having the Chief's decision on lethal UOF cases be reviewed by the Board of Supervisors. Mr. Culosi said the Board does not have a role because they cannot direct any action. Mr. Steel said the subcommittee does not know whether the Board can take action – wording should be "shall" instead of "should." Mr. Smith said he assumes if the Board hears this, it will be in closed session. Mr. Niedzielski-Eichner asked whether this issue was an appropriate role for the BOS or more appropriately the responsibility of an oversight board.

Motion to approve made by Mr. Steel. Mr. Culosi moved amendment to add to the motion “and go on record with approval or disapproval of the action.” Seconded by Mr. Shumaker. Approved unanimously. Main motion called. Approved unanimously.

VA Attorney General Review of Commonwealth Attorney’s Decision on Prosecution (#16)

Mr. Shumaker moved to adopt, Ms. Shlesinger seconded. Mr. Shumaker explained the rationale behind this recommendation. The PERF report recommends the local attorney not prosecute the case. It was noted that the Commonwealth’s Attorney is a separately elected constitutional officer and does not have to abide by Attorney General’s opinion. Ms. Kimm said Mr. Morrogh has said the Attorney General does not do criminal work. Involving the Attorney General is a different question than whether a local Commonwealth Attorney should prosecute the case. Mr. Smith said if there is a conflict, the Commonwealth’s Attorney can seek special prosecutor through the circuit court. Mr. Moncure said Attorney General looks at whether law was applied fairly and does not investigate cases as a Commonwealth’s Attorney would. Mr. Culosi asked if whether all use of force cases would go to Attorney General. Mr. Steel said Mr. Morrogh said if there is a conflict, he will ask for court appointed prosecutor and further that it is his responsibility to prosecute criminal cases. Mr. Thompson asked whether #16 is meant to address potential conflicts of interest, as it does not seem to do that.

Motion to approve failed with Mr. Shumaker voting in the affirmative.

Drug and Steroid Testing (#14)

Mr. Culosi moved, with multiple seconds, to approve this recommendation, but modified as follows: “General Order 540.1 should include the following statement: Drug and steroid testing will be conducted on police officers involved in incidents that result in death or serious injury as soon as possible after the incident but not longer than “T” hours where “T” is determined by medical experts as the time to detect drugs or steroids were present in the officers at the time of the incident.”

Motion to approve was approved unanimously.

Vulnerable citizens (#17)

Mr. Shumaker moved to adopt, Mr. Becerra seconded. Approved unanimously.

Taser (#24, 25, 26)

Reclassify electronic control weapons (tasers) as “less-lethal weapons” rather than “non-deadly weapons.” (#24).

Mr. Moncure moved adoption of #24, Mr. Shumaker seconded. Approved unanimously.

Moved by Mr. Shumaker and multiple seconds that all uniformed officers be mandated to carry a taser (#25). Mr. Smith said Mr. Carruthers has pointed out that Taser is not necessarily the next option to a firearm and some officers are averse to carrying it as it does not de-escalate the situation. Mr. Moncure said the subcommittee is not mandating the use, but the carry. Mr. Steel said the Philadelphia settlement with DOJ was to move to 100% carry. Mr. Thompson said he was told by one of the firearms instructors during the simulator exercise that the taser is relied upon too much.

Question called on **#25**. The motion was approved with Mr. Smith voting in the negative. Mr. Shumaker moved adoption of recommendation that all detectives and plainclothes officers be mandated to carry a taser in their vehicles when on duty (**#26**). Mr. Thompson seconded. The motion was approved unanimously.

Body Cameras (#27)

This recommendation calls for mandating that all FCPD police patrol officers employ body cameras to record all interactions with members of the public. Various options are also recommended to mitigate concerns such as protecting the privacy of citizens. Mr. Smith said he would like to know what the opinions of the rank-and-file are as far as when an officer can turn the camera on or off. He believes the privacy of the individual speaking with the police should be a consideration. Mr. Shumaker pointed that one of the options specifies that the use be “contingent on the passing of laws, policies and procedures that protect the privacy of citizens.” Mr. Thompson said in his research, most departments say keep the camera running unless...and the policy spells out those instances. The key aspect is the officer must say on camera why he is turning it off and then explain what happened when he turns it back on. He said policy must have flexibility. Mr. Smith said his worry is the language seems iron clad. The Subcommittee discussed alternative language to allow flexibility.

Mr. Ryan said FCPD is going to use PERF guidelines – record all, but some kinds of recording are shielded from public release. Ms. Kimm said question of whether it should turn it on and off at all will lead to gaps. If it’s feasible, it should be on all the time.

Mr. Smith moved adoption, seconded by Mr. Moncure, of recommendation #27, revised as follows: Mandate that FCPD police patrol officers employ body cameras to record all interactions with members of the public, contingent on the following:

- **The enactment of laws, policies and procedures that protect the privacy of citizens.**
- **Police patrol officers being consulted, with feedback provided as to how their concerns and recommendations were considered.**
- **Implementing a training program not only for all police officers, but the wide-ranging personnel who will oversee, process and manage the digital data, as well as prosecutors who will use the data in criminal prosecutions.**

The motion passed unanimously.

Oversight (#s 37, 38, 39, 40, 42)

Mr. Steel moved, with multiple seconds, approval of #37 calling for Fairfax County to implement independent investigative oversight and civilian review of UOF incidents. The motion was approved unanimously.

Mr. Shumaker moved, seconded by Ms. Shlesinger, approval of #38 calling for the BOS to promote with the County Sheriff the need to undertake a review similar to that of the Ad Hoc Commission. The motion was approved unanimously.

Mr. Shumaker moved, seconded by Ms. Shlesinger, approval of #39 calling for the BOS to assume direct oversight of the Chief of Police. Mr. Culosi said this is out of the scope. Mr. Steel concurred with Mr. Culosi. Mr. Becerra clarified that this responsibility would be taken away from Deputy County

Executive of Public Safety and asked who does the hiring and firing now. The Subcommittee understands that the Board does this now. Mr. Shumaker said it is within scope because the Board needs a mechanism to deal with Chief if they do not approve of his actions regarding use of force. Mr. Niedzielski-Eichner said he disagrees with the recommendation as the potential exists for political interference with police responsibilities, which is protected against by accountability through the County Executive. Mr. Shumaker said Chief is not responsible to the public like the Board is.

Mr. Steel moved substitute motion to transfer this to Oversight Subcommittee, seconded by Mr. Moncure. Approved unanimously. Mr. Shumaker objected to vote as the process was not clear. The substitute motion was recalled. Substitute motion was approved with Mr. Shumaker voting in the negative.

Mr. Shumaker moved, seconded by Ms. Shlesinger, approval of #40 calling for the BOS to immediately initiate a search for a new Chief of Police. Mr. Shumaker read from a prepared statement in support of #40 (statement in part is included in <http://www.fairfaxcounty.gov/policecommission/subcommittees/materials/prelim-benchmark-subcom-recommendations.pdf>). Mr. Becerra said he applauds Mr. Shumaker's passion and advocacy, but he is looking for constructive recommendations such as performance evaluation. Mr. Niedzielski-Eichner read from a prepared statement in opposition to #40, stating that there is no compelling evidence that this action is called for and citing Chief Roessler's initiation of the PERF review as evidence of his openness to change. Mr. Moncure said the Chief has only been in office two years and a lot of the issues in play, he is on the receiving end of and that he has made an effort to correct problems.

The motion failed with Mr. Shumaker voting in the affirmative.

Mr. Shumaker moved, seconded by Ms. Shlesinger, approval of #42 calling for the BOS to request a DOJ review of UOF by FCPD. Mr. Becerra said he would support. Mr. Culosi said DOJ is reviewing Geer case and that will be sufficient review. Mr. Smith said there are two ways to make a referral to DOJ – pattern-and-practice (civil) or criminal review. He understands Geer to be a criminal review, but poor communications related to the case were not. He does not see statutory predicate for pattern and practice – no systemic abuse of people of a protected class, no abuse of Garrity. Mr. Steel says Commission could lose credibility if it recommends referral. Mr. Smith said he does not see the need but understands the purpose behind the request; this is what the democratic process is about. Mr. Shumaker said DOJ would provide independent and objective review, have greater ability to get information, more experience than the commission. Could be a good precautionary measure if it finds no wrongdoing. Fairfax has been fortunate that the officer-involved shootings did not receive national attention. Mr. Niedzielski-Eichner does not believe such a review is called for and noted that PERF noted that FCPD is doing a commendable job meeting or exceeding best practices. Mr. Steel asked what DOJ could tell Fairfax that hasn't been proposed by the Commission or PERF. Mr. Shumaker said commission cannot be sure it got all the information we needed.

The motion failed with Shlesinger, Shumaker, Becerra, Thompson approving and Culosi, Kimm, Steel, Niedzielski-Eichner, Moncure and Smith not approving.

Amendment to Use of Force General Order 540.1, Use of Force (#8)

Mr. Niedzielski-Eichner asked for and received unanimous consent to approve the first option to amend GO 540.1 to clearly state an unambiguous “sanctity of life” philosophy be in the forefront of every officer’s mind.

Mr. Shumaker moved, seconded by Mr. Culosi, approval of the second option calling for “reasonable” to be replaced throughout the GO with “objectively reasonable.” The purpose of the motion was discussed and whether it is appropriate to make this change throughout the General Order 540.1. The suggestion was considered of substituting “throughout” in III.B., line 2. Mr. Culosi noted that in the Cleveland DOJ Report, the term “particularized and supported” were used.

Mr. Steel moved, seconded by Ms. Shlesinger, a substitute the GO 540.1 be revised to reflect that “objectively reasonable” is the standard to be used with regard to all references to “reasonable” as the standard to be followed in the use of force. The motion was approved with Mr. Shumaker voting in the negative.

Mr. Shumaker moved, with multiple seconds, approval of the third option calling for the "reasonable" definition to include: "...use of force is based on the totality of circumstances known by the officer at the time of the use of force and weighs the actions of the officer against the rights of the subject, as well as safety of all." The motion was approved unanimously, with Mr. Steel abstaining.

Mr. Shumaker moved, seconded by Mr Culosi, approval of the fourth option calling for incorporating the text regarding “Objectively Reasonable and the Totality of Circumstances” in I.B.1-3 (p. 2) in the Use of Force Policy, Guidelines and Procedures Handbook, Office of Training Development, HB 4500-01C of the U.S. Custom and Border Protection. Mr. Steel stated his opposition due to not knowing the specifics of the language being recommended. Mr. Smith cautioned against overloading.

The motion failed, with Shumaker, Shlesinger, Thompson, Becerra and Culosi approving and Smith, Moncure, Steel, Niedzielski-Eichner and Kimm disapproving.

Ms. Kimm moved, seconded by Mr. Shumaker, approval of the fifth option calling for the act of having a police officer unholster his or her weapon in the presence of a suspect or where it is observed by a citizen, being a reportable action. Mr. Culosi said the issue of pointing at a subject is relevant and unholstering at ready gun should be reportable; just unholstering, however, may not need to be. Ms. Kimm said it is a significant event for someone to be in the presence of an officer who has unholstered the firearm. Mr. Moncure said if someone witnesses an officer entering a nearby building, that should not be reportable. Mr. Niedzielski-Eichner asked Mr. Ryan his opinion. Mr. Ryan said unholstering is very common compared to pointing and patrol officers may find the documenting requirement cumbersome.

Noting the late hour, Mr. Niedzielski-Eichner asked that further consideration of this option, as well as the remaining overall recommendations, be tabled until the next meeting scheduled for August 26th. A motion to table consideration of the fifth option was made by Mr. Moncure, seconded by Mr. Steel. The motion passed with Mr. Shumaker and Ms. Shlesinger voting in the negative.

Out of respect for guests attending the meeting and given the lateness of the hour, Mr. Niedzielski-Eichner had earlier opened floor to public comment before returning to consideration of the remaining recommendations.

Before asking for a motion to adjourn, Mr. Niedzielski-Eichner said the Subcommittee's schedule may need to be adjusted given the release of the officer-involved shooting synopses and the additional work undertaken by Ms. Kimm's review team. Drafting of the Subcommittee's report will be undertaken in the interim.

Minutes prepared by Clayton Medford, Office of Chairman Sharon Bulova
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