

Annual Report of
the Fairfax County
Independent Police Auditor

2017



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Independent Police Auditor

2017 Annual Report of the Fairfax County Independent Police Auditor

Publication Date: January 31, 2018



A Fairfax County, Va., Publication

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SECTION I: OVERVIEW

The Office of the Independent Police Auditor (“OIPA”) was established by the approval of the Fairfax County Board of Supervisors (“BOS”) on September 20, 2016 in response to recommendations from the Ad Hoc Police Practices Review Commission.¹ OIPA’s mission is to bolster trust between the citizens of Fairfax County and the Fairfax County Police Department by providing accountability, fairness, transparency, and trust in the complaint system and investigative process.

In creating the OIPA, the BOS mandated that the Auditor shall review:

1. All investigations of death or serious injury cases conducted by the Internal Affairs Bureau (“IAB”) of the Fairfax County Police Department (“FCPD”); and
2. Use of Force (“UOF”) investigations which are subject of a public complaint made to the FCPD or the Auditor and which meet the definition of police use of force as incorporated in Police Department General Orders (“G.O.”) as of the date of the UOF or alleged misconduct.

The OIPA became operational on April 17, 2017; however, the decision was made that the Auditor would monitor and review any incident within the purview of the Auditor’s responsibility that occurred on or after January 1, 2017.

Much of 2017 was spent creating protocols for the OIPA, developing its infrastructure, policies and procedures, and hiring additional staff. Specifically, a Management Analyst II position was filled in November to provide a full range of support to the Auditor.

In creating the OIPA, the BOS mandated that an annual public report be prepared concerning the thoroughness, completeness, accuracy, objectivity, and impartiality of the IAB investigations reviewed by the Auditor. This is the first such annual report. In an effort to be

¹ <https://www.fairfaxcounty.gov/policecommission/>

fully transparent with the BOS and the community members in Fairfax County, this report also provides a description of key OIPA activities that occurred during 2017.

SECTION II: INDIVIDUAL CASE REVIEWS

The OIPA initiated case monitoring and review on seven incidents that occurred in Fairfax County on or after January 1, 2017. These incidents are listed in the chart below.

BRIEF DESCRIPTION OF INCIDENT	DATE OF INCIDENT
1. Herndon Officer Involved Shooting (“OIS”)	January 16, 2017
2. Electronic Control Weapon (“ECW”) Use²	April 14, 2017
3. Alleged excessive UOF³	April 16, 2017
4. Precision Immobilization Technique (“PIT”)	June 22, 2017
5. Alleged excessive UOF⁴	June 23, 2017
6. OIS of domesticated animal	October 24, 2017
7. Alleged excessive UOF⁵	October 28, 2017

Except for the January 16, 2017 OIS incident, the other six IAB investigations were monitored by the Auditor from their inception. The review and monitoring of two incidents (the April 16, 2017 alleged UOF and the October 28, 2017 alleged UOF) were initiated in response to a public complaint. The OIPA received multiple public complaints and requests to monitor the investigation of the October 28, 2017 alleged UOF incident. Those public requests were in addition to a request made by FCPD Chief Edwin C. Roessler, Jr., and a mandate to review the incident from Fairfax County Supervisor John C. Cook.

As per BOS Action Item 11) from September 20, 2016, “Absent good cause, the Auditor shall issue a public report with respect to each reviewed investigation within sixty (60) days of the

² The Auditor’s Public Report was released on December 29, 2017, and is included in the Appendix.

³ Initiated by public complaint.

⁴ Initiated by public complaint.

⁵ Initiated by public complaint; mandate from Supervisor John C. Cook; request from FCPD Chief Edwin C. Roessler, Jr.

Auditor's access to the complete Internal Affairs Bureau ("IAB") file (emphasis added). The IAB file cannot be considered "complete" until the internal PD review of each matter is complete, to include the Chief's approval of the investigation and the assignment of any discipline. The IAB investigation of the April 14, 2017 ECW use incident was completed during 2017; the OIPA public report was completed and published on December 29, 2017, and is included in the Appendix.

SECTION III: FCPD POLICY REVIEW

In addition to individual incident reviews, the BOS authorized the Auditor to make public recommendations to the Chief of Police, with copies to the BOS, concerning the revision of FCPD policies, training, and practices based on the Auditor's reviews. The ongoing review of individual incidents during 2017 required examination of several FCPD policies. Other policies were examined independent of an incident review. Policy recommendations are as follows:

General Order 540, et seq. Use of Force

The current Fairfax County Police Department Use of Force General Order 540 took effect on March 31, 2017. The first incident review undertaken by the OIPA was the Herndon OIS which occurred on January 16, 2017, when the prior G.O. 540 on use of force was in effect. The actions taken during that incident, therefore, were analyzed under the former G.O. During that review and subsequent incident reviews, the Auditor examined the revised G.O. 540 in its entirety. The current G.O. 540 modified and consolidated several past provisions of FCPD policy on use of force. These recent changes resulted, at least in part, from the "Use-of-Force Policy and Practice Review of the Fairfax County Police Department" report issued by the Police Executive Research Forum ("PERF") in June, 2015. While the new policy is more comprehensive and straightforward than the past policy, additional changes will improve the current policy, and at the same time may better protect the county and individual officers from exposure to liability.

Policy Recommendation #1: Revert to the use of the term “non-deadly” force, and eliminate the term “less-lethal” force.

It should be noted that this first recommendation is counter to PERF’s recommendation in its 2015 report. Also, many police department policies (as well as the January, 2017, “National Consensus Policy on Use of Force”) use the term “less-lethal,” often to the exclusion of “non-deadly;” or, as a third category of force together with “non-deadly” and “deadly.” FCPD eliminated the “non-deadly” category of force when the revised G.O. 540 went into effect on March 31, 2017, leaving only the two categories of “deadly” force and “less-lethal” force. The recommended change back to “non-deadly” is appropriate for two reasons.

First, the term “less-lethal” necessarily implies that those uses of force are a lesser form of lethal (or deadly) force when they are not. In making its recommendation to refer to any non-deadly force as “less-lethal” force, PERF pointed out that “even ‘less lethal’ weapons or uses of force *can sometimes* result in serious physical injury or death” (italics added). While this acknowledgment is accurate, it ignores the fact that most victims of gunshots do NOT die from being shot.⁶ Despite this fact, law enforcement officials still recognize the use of a firearm to be deadly force because it is reasonably foreseeable that a gunshot victim will suffer serious physical injury or death, not because victims of gunshots *can sometimes* suffer serious physical injury or death. Likewise, because it is reasonably foreseeable that a person upon whom non-deadly force is used will not suffer death or serious physical injury, those uses of force should be characterized as “non-deadly” rather than “less-lethal.”

PERF noted, when recommending to Fairfax County to adopt “less-lethal” as their standard, that “[w]hen *properly used*, ‘less-lethal’ weapons significantly reduce the probability of” death or serious injury (italics added). The proper use of non-deadly force must be addressed during

⁶ <http://www.gunviolencearchive.org/>. Gun Violence Archive (GVA) is a not for profit corporation formed in 2013 to provide free online public access to accurate information about gun-related violence in the United States. According to its figures, approximately 25% of people shot during a shooting incident in the United States die as a result.

police department training, and should include the remote possibility that properly deployed non-deadly force may sometimes result in death or serious physical injury. The remote possibility of death or serious injury should not, however, dictate the labeling of these tactics as a lesser form of deadly force.

The term “non-deadly” is not only a more accurate description of the force at issue, its use may also help defend against liability being imposed in future civil litigation. If “less-lethal” force is by definition just a lesser form of “lethal” (or “deadly”) force, then an officer testifying after having employed it may be challenged to explain whether he employed “lethal” or “deadly” force when he used empty-hand tactics, an electronic control weapon (ECW), oleoresin capsicum (OC spray), a kinetic energy impact weapon, etc. If these are each a “less-lethal” use of force, that officer will have difficulty explaining why a type of “lethal” force was deployed to gain control over, for example, a resisting subject who was NOT posing a risk of death or serious injury to the officer or to anyone else at the time the force was used. Using deadly force in that situation is not allowed because it would be unreasonable. Requiring an officer to explain why he chose a “less lethal” option of force in a non-deadly situation could be both difficult and problematic for that officer.

The second reason for the change back to “non-deadly” is that revised G.O. 540.1 I. I defines “Less-Lethal Force” as “[a]ny level of force not designed to cause death or serious injuries.” While this definition is accurate, does this then mean that “deadly force” is designed to cause death or serious injuries? An attorney using that argument in a deadly force dispute could phrase a question in such a way (e.g., “Was it your design to kill or seriously injure my client?”) that an officer may seem to be answering that question in the affirmative. Based on the “sanctity of human life” philosophy, the better analysis is that the use of deadly force is *designed to* eliminate the danger of death or serious injury being posed to the officer or to another person, not to cause anyone to die or to suffer serious injury. Eliminating any reference to “less-lethal” force (and therefore eliminating the definition in G.O. 540.1 I. I) removes any argument that it was a FCPD officer’s design to kill or seriously injure someone.

Therefore, it is recommended that the term “less-lethal” be eliminated from FCPD policy and replaced with “non-deadly”, and that all “non-deadly force” be defined in G.O. 540.4 2. as: “Any level of force not likely to cause death or serious injury. Non-deadly force includes, but is not limited to:

- a. Empty-hand tactics, such as strikes, kicks, takedowns, or any significant physical contact that restricts an individual’s movement
- b. Impact weapons
- c. Oleoresin Capsicum spray
- d. Electronic Control Weapons
- e. PepperBall System
- f. Patrol Dog
- g. Kinetic Energy Impact Systems”

If this recommended policy change is adopted, it will require that all reference in G.O. 540 (including G.O. 540.1 – 540.23) to “less-lethal” force be changed to “non-deadly” force.

General Order 540.5 Use of Force, Objective Reasonableness

Another significant proposed change to G.O. 540 addresses situations in which officers may be justified in using force (non-deadly or deadly) against individuals not involved in criminal activity. This recommendation was generated by the Auditor’s review of the April 14, 2017 ECW Use incident, as well as recent federal caselaw coming out of the Fourth and Sixth Circuit Courts of Appeals.

Policy Recommendation #2: Incorporate new factors into current policy which may be considered when determining whether a particular use of force used on an individual not engaged in criminal activity was reasonable.

Current FCPD G.O. 540.5 states that “[i]n determining whether force is objectively reasonable, an officer must give careful attention to the totality of the circumstances in each particular case including:

1. Whether the individual poses an immediate safety threat to the officer or others
2. The severity of the crime
3. Whether the individual is actively resisting or attempting to evade arrest
4. Weapon(s) involved
5. Presence of other officers or individuals
6. Training, age, size and strength of the officer
7. Training, age, size and perceived strength of the individual
8. Environmental conditions.”

The first three factors come directly from the United States Supreme Court decision in Graham v. Connor,⁷ and have become known collectively as the Graham factors. The April 14, 2017 ECW incident reviewed by the Auditor involved an arrest for an alleged criminal violation. Therefore, the traditional Graham factors applied neatly to the analysis into whether the officer’s use of force was reasonable.

As helpful as the Graham factors have proven to be in use of force situations involving an underlying crime, there has been an increasing number of incidents in which law enforcement officers throughout the country have used force against individuals who were not involved in criminal activity at the outset of the encounter between the officer and the individual upon whom force was applied. In fact, FCPD G.O. 540 already includes the stipulation that “[f]orce is to be used only to the extent it is objectively reasonable . . . to control an individual during an investigative or *mental detention*, or to lawfully effect an arrest” (italics added). In these non-criminal situations, the Graham factors may be inapplicable; and, conducting the

⁷ 490 U.S. 386 (1989).

reasonableness analysis using them may be like trying to place the proverbial square peg into the proverbial round hole. Consequently, it is recommended that the FCPD adopt a policy change that allows for different factors to be considered in analyzing uses of force when that force is used against individuals not initially involved in criminal activity.

Again, one example of such a situation would be when officers attempt to take custody of an emotionally disturbed person for whom there is a temporary detention order or an emergency custody order. While there is no underlying crime needed for the issuance of such orders, law enforcement officers are often called upon to execute them by taking the person into custody and transporting them to a medical facility. If force is used during the execution of the order, two of the three (if not all three) of the Graham factors simply will not apply. First, there is no crime at issue, so an officer cannot consider the “severity of the crime.” Second, the “individual is not actively resisting or attempting to evade *arrest*,” although he may be actively resisting or attempting to evade being taken into custody for something other than an arrest. Finally, an individual subject to a temporary detention order or an emergency custody order may be posing an immediate safety threat only to him or herself, but not to “the officer or others.” To analyze whether a use of force during this type of situation was reasonable, therefore, factors other than the traditional Graham factors should be considered. This dilemma has recently been addressed in two federal court decisions.

First, in Armstrong v. Village of Pinehurst,⁸ after a commitment order was issued for an uncooperative individual named Armstrong, police officers deployed an ECW (in drive stun mode) against Armstrong several times. The officers were trying to cause Armstrong to unwrap his arms from a stop sign post so that he could be returned to a nearby hospital. The Fourth Circuit Court of Appeals ruled that the use of an ECW on a stationary, non-violent (although resisting) subject was an unconstitutional use of excessive force. The judge writing the opinion for the appellate panel did so after applying (or at least trying to) the Graham factors to the incident. Of course, trying to apply the Graham factors was difficult because Armstrong was not involved in a crime, was not actively resisting arrest, and was not posing a safety threat to

⁸ 810 F.3d 892 (4th Cir. 2016).

officers or others, but only to himself. Like many law enforcement agencies, the FCPD issued guidance in the immediate aftermath of the Armstrong case. In a memorandum to the department dated January 20, 2016, FCPD Chief Edwin C. Roessler, Jr., mandated immediate changes to General Order 540.1 (subsequently revised and currently set forth in G.O. 540.16), explaining that “[e]ffective immediately the use of the Electronic Control Weapon (ECW), whether in ‘probe’ or ‘drive stun’ mode shall not be used on passive resisting subjects who pose no immediate risk of danger to themselves, or others. Additionally, effective immediately, the ‘drive stun’ mode should be used only to supplement the probe mode to complete the neuro-muscular incapacitation circuit, or in response to a subject’s assaultive behavior as a countermeasure to gain separation from the subject so that officers can consider another force option. Officers should not use drive stun solely as a pain compliance technique against someone who is not a threat to themselves or others.” That guidance was a necessary step to comport with the Fourth Circuit’s holding in Armstrong.

A second recent federal court case provides additional guidance on this issue. In April, 2017, the Sixth Circuit Court of Appeals decided Estate of Corey Hill v. Miracle.⁹ In Miracle, paramedics were attempting to insert an IV catheter into Corey Hill’s arm to stabilize his blood-sugar level. Ultimately, a sheriff’s deputy deployed an ECW (in drive stun mode) against Hill to calm him so that the catheter could be safely inserted. The incident was a medical emergency only; no criminal activity was occurring. However, before dying from complications from diabetes, Hill filed a lawsuit in federal court alleging, among other claims, a violation of his Fourth Amendment rights based on the ECW deployment on him. The Sixth Circuit Court of Appeals conducting the analysis of this use of force recognized the dilemma posed by trying to use the traditional Graham factors in a medical emergency context. As a result, the appellate panel posed a “more tailored set of factors to be considered in the medical-emergency context, always aimed towards the ultimate goal of determining ‘whether the officers’ actions are objectively reasonable in light of the facts and circumstances confronting them.’”¹⁰ The court suggested “[w]here a situation does not fit within the Graham test because the person in

⁹ 853 F.3d 306 (6th Cir. 2017), also No. 16-1818, United States Court of Appeals, Sixth Circuit.

¹⁰ 853 F.3d 306, No. 16-1818, p. 8, citing Graham, 490 U.S. at 397.

question has not committed a crime, is not resisting arrest, and is not directly threatening the officer, the court should ask:

1. Was the person experiencing a medical emergency that rendered him incapable of making a rational decision under circumstances that posed an immediate threat of serious harm to himself or others?
2. Was some degree of force reasonably necessary to ameliorate the immediate threat?
3. Was the force used more than reasonably necessary under the circumstances (i.e., was it excessive)?”¹¹

Just as the Armstrong case generated a change in FCPD policy, the Miracle case should generate a policy change to allow for the use of different factors when determining the reasonableness of a use of force in a non-criminal situation.¹² These new factors should be applied when FCPD officers use any type of force (not limited to the ECW) to determine whether that force was reasonably necessary in the non-criminal situation.

Body-Worn Camera Pilot Policy

On November 21, 2017, the BOS approved a pilot program for FCPD officers to wear body-worn cameras in two police district stations. A third district station has since been added. A pilot policy was crafted for the implementation of the body-worn cameras. During 2017, the Auditor reviewed the draft pilot policy and provided input during its finalization. This input focused primarily on whether an officer involved in a use of force recorded by a body-worn camera should be allowed to view the recording of the incident prior to providing a statement to investigators. The Auditor will continue to monitor the implementation of the body-worn camera pilot program in 2018.¹³

¹¹ 853 F.3d 306, No. 16-1818, p. 8.

¹² Virginia is part of the 4th Circuit Court of Appeals’ jurisdictional area, making the Armstrong case directly applicable to members of the FCPD. While the 6th Circuit Court of Appeals’ Miracle opinion does not set precedent for the 4th Circuit, its ruling can certainly help shape FCPD department policy.

¹³ See Section VI.

General Order 501.1 Operation of Police Vehicles, Pursuit of Violators

The Auditor's review of the June 23, 2017 Precision Immobilization Technique ("PIT") incident necessitated a review of G.O. 501.1, Operation of Police Vehicles, Pursuit of Violators. The review of the specific incident and the policy involved is ongoing; therefore, no policy recommendations are being made in this report.¹⁴

Racial Disparity in Use of Force Statistics

In late 2016, the FCPD released statistics on officer use of force in Fairfax County during 2015. The statistics showed that 222 (41%) of the overall 539 incidents in which force was used involved African-Americans, while African-Americans made up only 8% of Fairfax County's population in 2015. The statistics also revealed that 282 (52%) of the 539 incidents in which force was used involved Whites, but that Whites constituted 63% of the county population in 2015. At the BOS meeting on April 4, 2017, Supervisor John Cook moved that the Board "direct Police Auditor Richard Schott to review the statistical disparity between the level of African-American use-of-force incidents and the African-American population in the County. Upon completion of this investigation he should report his findings and any necessary recommendations." During 2017, the OIPA coordinated with FCPD IAB to identify, retrieve, and summarize the data elements needed for a closer examination of the racial disparity in the 2015 data.

SECTION IV: SUPPORT TO THE CIVILIAN REVIEW PANEL

On December 6, 2016, the BOS approved the Fairfax County Police Civilian Review Panel ("Panel"). The Panel is comprised of nine volunteer members, who were appointed by the BOS on February 28, 2017, to serve staggered terms. In the Panel's bylaws, which were approved by the BOS on July 11, 2017, the OIPA was tasked with providing all administrative support for the Panel. During 2017, the Auditor attended all of the Panel's public meetings, as well as the training sessions provided by the FCPD. Along with Panel members, the Auditor also

¹⁴ Section VI addresses the ongoing work of the FCPD to revise its "Operation of Police Vehicles" policy.

participated in several community meetings and public forums to inform the community that both the OIPA and the Panel were operational and to explain their respective functions. New OIPA staff also attended all Panel meetings and events starting in November, 2017, and began providing administrative support.

A key responsibility of the OIPA is to serve as an accessible, safe, impartial, and responsive intake venue for complaints against the FCPD and its employees. In 2017, the OIPA began receiving complaints and requests for review meant for the Panel, and corresponded with the public on behalf of the Panel. OIPA staff received and disseminated complaints to the FCPD for investigation and forwarded complaints and requests for review to the Panel.

The Auditor and a member of the Panel attended the annual conference of the National Association for Civilian Oversight of Law Enforcement (NACOLE) in September, 2017. During the conference, the Auditor participated in a panel discussion entitled “Building an Oversight Agency: Lessons Learned from Campaign to Launch,” helping to solidify Fairfax County’s position at the forefront of the emerging trend toward civilian oversight of law enforcement.

SECTION V: CITIZEN COMPLAINTS

When the BOS established the OIPA, it set out a requirement for the FCPD to provide a public report quarterly to the Auditor on the disposition of all citizen complaints made against the FCPD. The purpose was to enable the Auditor to determine that the FCPD is properly responding to and investigating complaints in a timely manner. The following chart depicts all citizen complaints lodged against the FCPD during 2017. At the end of 2017, 23% of active investigations were initiated by complaints received during January – June, 2017. Conversely, 77% of the active investigations at the end of 2017 were initiated by complaints received during July – December, 2017. The Auditor attended weekly IAB briefings during 2017, and will continue to do so to ensure that citizen complaints are being responded to and investigated in a timely manner.

2017 Quarterly Case Status by Received Date
Fairfax County Police Department
Internal Affairs Bureau

Citizen Complaint Status	Quarter 1 Jan/March	Quarter 2 April/June	Quarter 3 July/Sept	Quarter 4 Oct/Dec	Total
Active	9	15	37	44	105
In Compliance	41	32	37	22	132
Not Sustained	8	5	1	0	14
Sustained	2	1	2	2	7
Unfounded	5	3	2	0	10
Total	65	56	79	68	268

Last Updated: January 24, 2018
To be updated quarterly
Source: IAPro RMS System

SECTION VI: FUTURE 2018 ACTIVITIES

The OIPA will continue to monitor and review FCPD internal investigations, recommend changes in FCPD policies, training, and practices, and provide administrative support to the Police Civilian Review Panel. Anticipated OIPA activities in 2018 are set forth below.

Individual Case Reviews

During the first half of 2018, the Auditor expects to complete the review of the six incidents still underway at the end of 2017. New incident reviews in 2018 will include those that are monitored at the inception of the FCPD investigation and those that are initiated by a citizen complaint after the FCPD investigation has been conducted.

Policy Review

Body-Worn Camera Pilot: Along with the implementation of the pilot body-worn camera program, the BOS authorized the FCPD to enter an agreement with American University (“AU”)

to study the effects of the body-worn cameras on officer and community member behavior. The Auditor will continue to follow the progress of the pilot program and anticipates that the results of the AU study will inform future policy review for the program.

Operation of Police Vehicles, Pursuit of Violators: The FCPD has created a new draft policy on “Vehicle Pursuits” and a new separate draft policy on “Vehicle Stopping Techniques” (including the PIT) which will greatly enhance the current policy on “Operation of Motor Vehicles.” Both drafts were scheduled for presentation to the BOS during the January 9, 2018, Public Safety Committee meeting. The Auditor will continue to review the drafting and implementation of these policies during 2018.

Racial Disparity in Use of Force Statistics: On December 1, 2017, the FCPD released statistics on officer use of force in Fairfax County during 2016. The statistics revealed that during 2016, 198 (39%) of the overall 507 incidents in which force was used involved African-Americans, whereas African-Americans comprised 9.6% of Fairfax County’s population in 2016. By contrast, an identical 198 (39%) of the incidents in which force was used involved Whites, while Whites constituted 61.4% of the county’s population in 2016. On the surface, there is little change in the percentage of UOF incidents involving African-Americans between 2015 and 2016 (i.e., 41% versus 39%, respectively). During 2018, OIPA will examine the 2016 UOF incident statistics alongside its review of 2015 UOF incident statistics. The OIPA will seek to identify whether there are common factors for the racially disparate statistics for uses of force during both years. The OIPA will complete a review and publish its findings in 2018.

Civilian Review Panel

The Panel did not review any investigations during 2017, but scheduled its first review for January 4, 2018. OIPA staff will continue to support the work of the Panel by attending all reviews and regular business meetings, as well as any training sessions occurring in 2018. The OIPA will continue to provide ongoing administrative support required by the Panel in 2018, including developing meeting summaries, coordinating meeting logistics, and receiving and disseminating complaints, requests for review, and related correspondence.

APPENDIX:

OIPA PUBLIC REPORT ISSUED ON DECEMBER 29, 2017

April 14, 2017: Deployment of Electronic Control Weapon

A Public Report by the
Fairfax County Independent Police Auditor

Publication Date: December 29, 2017



A Fairfax County, Va., Publication

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INCIDENT

SEAN SMITH was interviewed during the administrative investigation of this matter. However, SMITH advised his interviewers that he has no memory of the incident other than arriving at 3066 Gate House Plaza in Falls Church on April 14, 2017, before waking up in the hospital the following day. The recitation of the INCIDENT, therefore, is based on information provided to investigators by others involved in the incident, those who were witnesses of it, and those who responded to it.

On April 14, 2017, members of the Fairfax County Police Department (“FCPD”) Organized Crime and Narcotics Unit planned an arrest of Subject SEAN SMITH (“SMITH”). SMITH had agreed to sell two pounds of marijuana to an individual at the Sweetwater Tavern located at 3066 Gate House Plaza in Falls Church. Upon his arrival at the parking lot adjacent to the tavern, SMITH was positively identified and the FCPD Street Crimes Unit (“SCU”) initiated the arrest.

When a member of the SCU verbally identified himself as a police officer, SMITH immediately ran away from him. However, his path was directly in the direction of Sergeant [REDACTED] (“[REDACTED]”), also a member of the arrest team who was approaching SMITH from the opposite direction. [REDACTED] attempted to get SMITH to stop running at him by aiming his electronic control weapon (“ECW”)¹ at SMITH. [REDACTED] also activated the red lights of the ECW on SMITH’s torso as a way to warn him that the ECW might be deployed. SMITH continued to run at [REDACTED], and when he got within 5-8 feet of [REDACTED],

¹ Fairfax County Police Department General Order 540.1 I.C. defines an electronic control weapon 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.

██████████ administered one five-second cycle of his ECW, striking SMITH in the front torso. SMITH lost control of his physical movements, causing him to fall forward on the parking lot. His face struck the concrete, resulting in a broken nose, a laceration on his forehead, and three dislodged teeth. After falling to the ground, SMITH appeared to lose consciousness and his body began to shake. When he regained consciousness, he began to fight (or flail) and several officers were needed to control his body movements so that medical treatment could be administered to him. Officers repeatedly informed SMITH that they were only trying to help him until medics arrived, and no additional force was utilized. Within approximately ten minutes, Fairfax County Fire and Rescue personnel arrived and took charge of providing care to SMITH.

The responding Fairfax County Fire and Rescue personnel administered sedatives to SMITH to calm him so that he could safely receive the necessary treatment. After being stabilized, he was transported from the scene to INOVA Fairfax Hospital. An extensive medical evaluation at the hospital revealed that Mr. Smith had not sustained any debilitating injuries. He was treated for the broken nose, laceration to his head, and missing teeth.

CRIMINAL INVESTIGATION

Initially both criminal and administrative investigations were commenced into the deployment of the ECW against SMITH. However, the FCPD discontinued its criminal investigation into the ECW deployment after detectives advised Commonwealth Attorney RAYMOND F. MORROGH of the status of the investigation and of SMITH's condition on April 15, 2017.

An arrest warrant was issued for SMITH and the warrant was served on him on April 15, 2017, charging him with Possession with Intent to Distribute Marijuana in violation of Virginia Criminal Code § 18.2-248.1(a)(2).

INTERNAL ADMINISTRATIVE INVESTIGATION

On April 14, 2017, an internal administrative investigation into this matter was initiated by the Internal Affairs Bureau (“IAB”) of the FCPD. IAB personnel responded to the scene, along with the members of the FCPD Criminal Investigations Bureau (“CIB”) Cold Case Unit who were responsible for the criminal investigation, and members of the FCPD Crime Scene Section (“CSS”).

All appropriate interviews were conducted, and all potential evidence was pursued. No videotape of the incident was captured by PD equipment or by business establishments in the vicinity. All potential witnesses of and responders to the incident were identified and interviewed. It is my opinion that the FCPD IAB administrative investigation into this matter was complete, thorough, objective, impartial, and accurate.

Based on the IAB investigation into this incident, the FCPD found that [REDACTED] acted in compliance with FCPD General Orders (“G.O.”), specifically G.O. 540 – Use of Force.

CONCLUSIONS

In relevant part, FCPD G.O. 540,² Use of Force, states 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

² G.O. 540 was recently amended and took effect on March 31, 2017.

an investigative or mental detention, or *to lawfully effect an arrest.*”³ G.O. 540 also dictates that “[f]orce shall not be used unless it is *reasonably necessary* in view of the circumstances confronting the officer.”⁴ I agree with the findings of the FCPD that ██████████’s deployment of his ECW against SMITH was reasonably necessary to lawfully effect the arrest of SMITH and to defend himself; and, therefore, complied with departmental policy.

To assess whether force is objectively reasonable, G.O. 540.5 explains that an officer must give careful attention to the totality of circumstances in each particular case including:

1. Whether the individual poses an immediate safety threat to the officer or others
2. The severity of the crime
3. Whether the individual is actively resisting or attempting to evade arrest
4. Weapon(s) involved
5. Presence of other officers or individuals
6. Training, age, size and strength of the officer
7. Training, age, size and perceived strength of the individual
8. Environmental conditions.

It is worth noting that the first three factors listed above come directly from the United States Supreme Court decision in Graham v. Connor,⁵ the momentous decision on law enforcement officers’ use of force. All three of these factors weigh in favor of ██████████’s ECW deployment being reasonable. First, SMITH is 6’2” tall and weighs 210 pounds. He was sprinting right at ██████████ – putting him at risk of physical harm - when ██████████ deployed his ECW. Second, SMITH was attempting to avoid arrest for attempting to sell two pounds of marijuana, a Class 5

³ G.O. 540 II (italics added).

⁴ *Id.* (italics added).

⁵ 490 U.S. 386 (1989). These three factors used to determine the reasonableness of an officer’s actions have become known collectively as the Graham factors.

felony which carries the potential for a term of imprisonment of not less than one year nor more than 10 years, or in the discretion of the jury or the court trying the case without a jury, confinement in jail for not more than 12 months and a fine of not more than \$2,500, either or both.⁶ Third, SMITH was actively resisting and/or attempting to evade arrest when ██████████ deployed the ECW. FCPD G.O. 540.4 delineates the amount of resistance offered by people into three different levels. SMITH clearly satisfied the intermediate level of resistance, if not the most extreme level of resistance. G.O. 540.4 I.A.2 and 3 describe “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,” and “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.” For all of these reasons, ██████████’s decision to deploy the ECW against SMITH so that SMITH could be safely arrested was objectively reasonable and complied with FCPD policy.

The unfortunate injuries suffered by SMITH after the ECW was deployed against him does not change the foregoing analysis. The aforementioned Graham v. Connor case makes clear that the “‘reasonableness’ of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight.”⁷ FCPD G.O. 540.12 I. C. mandates that officers “refrain from unwarranted infliction of pain or suffering.” Additionally, G.O. 540.12 I. E. requires that only those officers trained or certified by the Fairfax County Criminal Justice Academy shall be permitted to carry ECWs (among other force options). ██████████ received re-certification training on the carrying and deployment of the ECW on February 16, 2017, less than two months before deploying the ECW against SMITH.

⁶ VA Code § 18.2-10.

⁷ 490 U.S. at 396.

FCPD G.O. 540.16 IV.C. specifically addresses some safety concerns to consider before deploying an ECW by providing that “[p]rior to utilizing the ECW, officers should consider the totality of circumstances and the surrounding environment (e.g., persons standing in water) or the likelihood of injury when incapacitated by the ECW (e.g., persons on a ledge, building, or bridge).” ██████████ did not identify any of these or any other safety concerns prior to deploying the ECW against SMITH. He only deployed the ECW for one five-second cycle, and the ECW darts struck SMITH in his torso, the intended target for effective ECW use. Following other uses of the ECW by ██████████, ██████████ had observed only superficial injuries from falls. He did not anticipate the injuries sustained by SMITH. Clearly, ██████████ deployed his ECW to effect the arrest of SMITH in a reasonable manner, and was not trying to inflict pain or suffering. The unforeseen resulting injuries sustained by SMITH do not convert this reasonable use of force into an unreasonable one.

Additional parameters for the use of an ECW are set forth in FCPD G.O. 540.16.

██████████ complied with each of these parameters. Specifically, G.O. 540.16 IV. K. provides that “[w]hen practical, a warning should be given to the person prior to activating the ECW unless doing so would compromise any individual’s safety. Warnings may be in the form of verbalization, display, laser painting, arcing, or a combination of these tactics.” Although ██████████ estimated that only five seconds elapsed from the time SMITH began to run from the officer who first encountered him and the time ██████████ used his ECW, ██████████ was able to provide a visual warning to SMITH by “laser painting” his torso before activating the ECW. Furthermore, he only deployed the “ECW for one standard cycle (five seconds)”⁸ against an individual who [had] made active movements to avoid physical control”⁹ and was not merely

⁸ G.O. 540.16 IV. E.

⁹ G.O. 540.16 IV. B. 1.

“displaying passive resistance.”¹⁰ Finally, medical assistance was provided to SMITH following the use of the ECW, as is required by G.O. 540.16 VIII A.

RECOMMENDATIONS

Although I concur with the FCPD conclusion that ████████ violated no law or policy by his deployment of the ECW, I will put forth two recommendations for the FCPD to consider based upon my review of the incident. The first is a minor addition to the training being provided to individuals certified to carry and deploy ECWs. The second involves a more comprehensive addition to the FCPD policy’s list of factors to consider before deploying an ECW against an individual.

████████ received his most recent recurrent training on the ECW in February, 2017. FCPD G.O. 540.16 IV.C. cautions officers to consider environmental factors (e.g., when a person is standing in water) or the likelihood of injury (e.g., persons on a ledge, building, or bridge) when deciding whether to utilize an ECW. Based on the outcome of this incident, I recommend that the FCPD incorporate into that same policy provision, and into its training, the possibility that an ECW deployment on an individual running (especially on pavement) will result in significant injury to that person. The policy change and training should also include the possibility that injuries may result from any ECW-induced fall onto pavement, even when a person is not running at the time the ECW is used on him or her.

The more substantive policy recommendation is based on recent federal caselaw, and is not limited to the use of ECWs but should be incorporated into the overall Use of Force General

¹⁰ G.O. 540.16 IV. A.

Order (G.O. 540).¹¹ The incident under review involved an arrest for an alleged criminal violation. Therefore, the traditional Graham factors¹² applied neatly to the analysis. However, there has been an increasing number of incidents in which law enforcement officers throughout the country have used force against individuals who were not involved in criminal activity, at least not at the outset of the encounter between the officer and the individual upon whom force was applied. In fact, FCPD G.O. 540 already includes the stipulation that “[f]orce is to be used only to the extent it is objectively reasonable . . . to control an individual during an investigative or *mental detention*, or to lawfully effect an arrest.”¹³ In these type situations, the Graham factors may be inapplicable; and, conducting the reasonableness analysis using them may be like trying to place the proverbial square peg into the proverbial round hole. Consequently, I recommend adopting policy which incorporates different factors to analyze uses of force when that force is used against individuals not initially involved in criminal activity.

Again, one example of such a situation would be when officers attempt to take custody of an emotionally disturbed person for whom the FCPD has a temporary detention order or an emergency custody order.¹⁴ While there is no underlying crime needed for the basis of a temporary detention order or emergency custody order, law enforcement officers are often called upon to execute them by taking the person into custody and transporting them to a medical

¹¹ Because this recommendation is an overall policy change and does not relate to the specific circumstances analyzed in the situation under review, this recommendation will be more thoroughly outlined in a separate public report entitled USE OF FORCE POLICY RECOMMENDATIONS FOR THE NON-CRIMINAL CONTEXT.

¹² Note 5, *supra*.

¹³ G.O. 540 II (*italics added*).

¹⁴ VA Code § 37.2-808 A., for example, provides that a “magistrate shall issue an emergency custody order when he has probable cause to believe that any person (i) has a mental illness and that there exists a substantial likelihood that, as a result of mental illness, the person will, in the near future, (a) cause serious physical harm to himself or others as evidenced by recent behavior causing, attempting, or threatening harm and other relevant information, if any, or (b) suffer serious harm due to his lack of capacity to protect himself from harm or to provide for his basic human needs, (ii) is in need of hospitalization or treatment, and (iii) is unwilling to volunteer or incapable of volunteering for hospitalization or treatment.

facility.¹⁵ If force is used during the execution of the order, two of the three (if not all three) of the Graham factors simply will not apply. First, there is no crime at issue, so an officer cannot consider the “severity of the crime.” Second, the “individual is not actively resisting or attempting to evade arrest,” although he may be actively resisting or attempting to evade being taken into custody for a different reason. Finally, an individual subject to a temporary detention order or an emergency custody order may be posing an immediate safety threat only to himself, but not to “the officer or others.” To analyze a use of force during this type of situation, therefore, factors other than the traditional Graham factors should be considered. This dilemma has recently been addressed in at least two federal court decisions.

First, in Armstrong v. Village of Pinehurst,¹⁶ after a commitment order was issued for the commitment of an uncooperative individual named Armstrong, police officers deployed an ECW (in drive stun mode) against Armstrong several times. The officers were trying to persuade Armstrong to unwrap his arms from a stop sign post so that he could be returned to a hospital adjacent to where they were. The Fourth Circuit Court of Appeals ruled that the use of an ECW on a stationary, non-violent (although resisting) subject was an unconstitutional use of excessive force. The judge writing the opinion for the appellate panel did so after applying (or at least trying to) the Graham factors to the incident. Of course, trying to apply the Graham factors was difficult because Armstrong was not involved in a crime, was not actively resisting arrest, and was not posing a safety threat to officers or others, but only to himself. Like many law enforcement agencies, the FCPD issued guidance in the immediate aftermath of the Armstrong case. In a memorandum to his department dated January 20, 2016, FCPD Chief Edwin C. Roessler, Jr., mandated immediate changes to General Order 540.1, explaining that “[e]ffective

¹⁵ VA Code § 37.2-808 C.

¹⁶ 810 F.3d 892 (4th Cir. 2016).

immediately the use of the Electronic Control Weapon (ECW), whether in ‘probe’ or ‘drive stun’ mode shall not be used on passive resisting subjects who pose no immediate risk of danger to themselves, or others. Additionally, effective immediately, the ‘drive stun’ mode should be used only to supplement the probe mode to complete the neuro-muscular incapacitation circuit, or in response to a subject’s assaultive behavior as a countermeasure to gain separation from the subject so that officers can consider another force option. Officers should not use drive stun solely as a pain compliance technique against someone who is not a threat to themselves or others.” That guidance was a necessary step to comport with the Fourth Circuit’s holding in Armstrong.

A second recent federal court case provides additional guidance on this issue. In April, 2017, the Sixth Circuit Court of Appeals decided Estate of Corey Hill v. Miracle.¹⁷ In Miracle, paramedics were attempting to insert an IV catheter into Corey Hill’s arm to stabilize his blood-sugar level. Ultimately, a sheriff’s deputy deployed an ECW (in drive stun mode) against Hill to calm him so the catheter could be safely inserted. The incident was a medical emergency only; no criminal activity was occurring. However, before dying from complications from diabetes, Hill filed a lawsuit in federal court alleging, among other claims, a violation of his Fourth Amendment¹⁸ rights based on the ECW deployment on him. The Sixth Circuit Court of Appeals conducting the analysis of this use of force recognized the dilemma posed by trying to use the traditional Graham factors in a medical emergency context. Instead of continuing to struggle with the dilemma, the appellate panel posed a “more tailored set of factors to be considered in

¹⁷ 853 F.3d 306 (6th Cir. 2017), also No. 16-1818, United States Court of Appeals, Sixth Circuit.

¹⁸ 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.

the medical-emergency context, always aimed towards the ultimate goal of determining ‘whether the officers’ actions are objectively reasonable in light of the facts and circumstances confronting them.’”¹⁹ The court suggested “[w]here a situation does not fit within the Graham test because the person in question has not committed a crime, is not resisting arrest, and is not directly threatening the officer, the court should ask:

- (1) Was the person experiencing a medical emergency that rendered him incapable of making a rational decision under circumstances that posed an immediate threat of serious harm to himself or others?
- (2) Was some degree of force reasonably necessary to ameliorate the immediate threat?
- (3) Was the force used more than reasonably necessary under the circumstances (i.e., was it excessive)?”²⁰

Just as the Armstrong case generated a change in FCPD policy, I believe that the Miracle case should generate a policy change to allow for these different factors to be used when determining the reasonableness of a use of force in a non-criminal situation.²¹ These new factors, tailored to address a non-criminal situation during which force is used, should be applied when FCPD officers use any type of force (not limited to the ECW) to determine whether that force was reasonably necessary.

¹⁹ 853 F.3d 306, No. 16-1818, p. 8, citing Graham, 490 U.S. at 397.

²⁰ 853 F.3d 306, No. 16-1818, p. 8.

²¹ Virginia is part of the 4th Circuit Court of Appeals’ jurisdictional area, making the Armstrong case directly applicable to members of the FCPD. While the 6th Circuit Court of Appeals’ Miracle opinion does not set precedent for the 4th Circuit, its ruling can certainly help shape FCPD department policy.

