

To: **Chief Charles “Andy” Penn**
Arlington County Police Department
Justice Center Building, 1425 N. Courthouse Rd. Rm 7109
Arlington, VA 22201

CC: **Captain Albert Kim**, OPR Commander
Mummi Ibrahim, Independent Policing Auditor for Arlington County
J.D. Spain, County Board COB Liaison
Susan Cunningham, County Board COB Liaison
Aaron Miller, Deputy County Manager
Mark Schwartz, County Manager

Re: [2023CMP-056](#)

Dear Chief Penn:

This is to inform you that, pursuant to Arlington County Code Section 69, the Law Enforcement Community Oversight Board (COB) has reviewed the subject administrative investigation and has come to the following findings, assessments, and recommendations pertaining to the collaborative investigation conducted by the Arlington County Police Department Office of Professional Responsibility (OPR) and the Independent Policing Auditor (IPA).

SUMMARY OF THE INCIDENT

Location: parking garage of a grocery store

Persons Involved:

- Complainant – Black male, wearing a gray top and black pants
- Officer 1 (Arresting Officer) – white male, first on the scene
- Officer 2 (Responding Officer) – white male, investigated incident on the scene
- Officer 3 (Responding Officer) – white female

Summary:

In 2023, a community member (“Complainant”) contacted Arlington County Police Department (ACPD) to report that he was improperly detained and had a gun pointed at him by an ACPD officer.

The Complainant was shopping for-hire (e.g., DoorDash pick up) at a grocery store when he realized that his cell phone needed to be charged in order to complete the order. The Complainant spoke to a store employee who said he could charge his phone in the store if he had a charging cord. The Complainant left the groceries in the store and made multiple trips to his car looking for a charging cord, running between his car in the parking lot and the store.

Officer 1 was dispatched to the same grocery store in response to a call for service from the store manager, who described an employee-reported theft of energy drink powders including a description of a Black male wearing a gray top and black pants. The employee did not report the presence of any weapons or threat of violence, but that the suspect was heading to his car with the stolen energy drink powder.

Officer 1 drove into the parking garage and observed the Complainant running back and forth between the store and his car. He saw that the Complainant matched the description provided by the manager. Believing that the Complainant was the petty larceny suspect, Officer 1 got out of his car and immediately ran toward the Complainant, commanding him to stop. As he ran, Officer 1 unholstered his firearm and pointed it directly at the Complainant. The Complainant immediately

stopped and visibly raised his hands above his head as Officer 1 continued to approach with his firearm still pointed at the Complainant.

Officer 1 later stated that he could not always see the Complainant, both because Officer 1 was momentarily behind a pillar and because the lower half of the Complainant's body was obscured by the Complainant's car. Officer 1 also later reported that the Complainant's vehicle had tinted windows, such that it was not immediately evident whether there were other people in the car who may have been armed, although that turned out not to be the case.

Within ten seconds, Officer 1 commanded the Complainant to sit on the ground as the Complainant called out to anyone else in the garage for help, stating that he was afraid of getting, "Black Lives Mattered." The Complainant attempted to explain his actions and asked Officer 1 for more information. Officer 1 continued to issue commands and forced the Complainant to the ground, despite the Complainant's immediate and full cooperation with Officer 1's commands. Officer 1 then handcuffed and detained the Complainant. Officers 2 and 3 arrived on the scene after the Complainant had been detained.

While detained, the Complainant explained his actions, including the urgency of charging his phone to complete the pick-up order. Critically, the employee who initially reported the theft to the manager confirmed to other officers that the Complainant was not the suspect and had no role whatsoever in the theft. The Complainant was released approximately ten minutes after being detained. None of the officers explained the misidentification to the Complainant or offered an apology.

Summary of Investigation and COB Review Findings

The four possible outcomes of a complaint investigation review are:

1. Exonerated: the incident occurred but was lawful and proper;
2. Not Sustained: there is not enough evidence to either prove or disprove the alleged policy violation;
3. Sustained: the alleged policy violation is supported by enough evidence to justify a conclusion of guilt; and,
4. Unfounded: the allegation is false or the action did not involve a police employee.

Alleged Policy Violation(s)	OPR Finding(s)	IPA Finding(s)	COB Finding(s)
Policy violation – Use of Force (Officer 1)	Exonerated	Sustained	Sustained
Policy violation – Bias-free policing (Officer 1)	Exonerated	Exonerated	Not Sustained

Explanation of COB Findings for Alleged Policy Violations:

- [538.04 – Use of Force](#) (Officer 1) – **Sustained**

This Policy requires that officers "may only use the level of force that a reasonable officer on the scene would use under the same or similar circumstances to bring an incident or non-compliant suspect under control, detain or arrest a person, prevent an escape, and/or protect the lives or personal safety of themselves or others." They do so by "[determining] the necessity for force... based upon the officer's evaluation of the situation in light of the totality of the circumstances" by considering "the severity of the crime; the immediate threat

posed by a suspect to the officer or others; the level of resistance presented by a suspect; the potential danger to the community posed by a suspect; and rapidly evolving circumstances and/or the rapidly changing dynamics of a situation.” Included in its Use of Force Policy, ACPD’s Use of Firearms Policy states **“the pointing of a firearm[...] is a serious act” that must be noted in the report and “tactically justified.”** The absence of an objectively reasonable explanation for pointing a firearm could constitute a violation of this policy.

In assessing whether pointing the firearm was justified under ACPD’s policy, the COB looked first at the severity of the crime. The reported crime was a very minor (petty) larceny, worth only a few dollars. (We note that, although Officer 1 could not have known this and thus it does not factor into COB’s assessment, Complainant in fact had nothing whatsoever to do with the reported larceny and was completely innocent of any crime.) Second, the immediate threat posed by the suspect to the officer or others was also very minor. There was no indication that Complainant had engaged in either physical violence or a verbal altercation. Nor was there any indication that Complainant was armed in any way. Third, the level of resistance presented at the time Officer 1 pointed his firearm was zero. Complainant immediately threw up his hands and stopped when he saw Officer 1 approaching with his firearm drawn. These factors led the COB to conclude that pointing the firearm was unjustified under the policy.

ACPD and Officer 1 emphasized the “safety to others” and the “rapidly evolving, dynamic situation” factors under the policy. They articulated the following concerns that they believe informed Officer 1’s perspective and justified his pointing the firearm: (1) Complainant was running toward his car, (2) the car had tinted windows, (3) the parking lot environment constrained visibility and movement, (4) that particular Safeway gets numerous calls for larcenies, and (5) at other locations there have been infrequent instances of suspects being armed and injuring officers during arrests for petty crimes.

The COB believes that Complainant’s running toward a car justified Officer 1 in believing (erroneously) that Complainant was fleeing the scene. But there was no reason to think Complainant was armed, violent or impaired, or was leaving with valuable merchandise. Thus, flight from the scene in this situation does not justify pulling, let alone pointing, a firearm. Nor does the fact that the car had tinted windows. It is unclear from the facts how darkly tinted the car windows were, but even assuming that Officer 1 could not see into the car, that minor level of uncertainty does not justify pointing a firearm at Complainant. Indeed, adding the fact that pillars in the parking lot may have constrained Officer 1’s visibility, that uncertainty, if anything, should have led Officer 1 to slow down rather than speed up. ACPD’s de-escalation training emphasizes the need to increase the amount of time and space available for an interaction, but, by running at Complainant while pointing his firearm, Officer 1 did just the opposite.

Finally, the fact that the Safeway where this happened has relatively frequent calls for petty theft, and the fact that at other times and other places ACPD officers have been surprised by a petty crime suspect who is armed and dangerous does not justify pointing a firearm here. If it did, that would mean ACPD treats apparently benign law enforcement encounters as dangerous situations based on the minute possibility that it could be something other than what it appears to be. We all want ACPD officers and the public to be safe. But by treating this situation as far more dangerous than it actually was, ACPD made the situation less safe.

As a separate matter, the COB evaluated whether the force used by Officer 1 to handcuff and detain the Complainant was justified. Considering that the Complainant attempted to get back up after Officer 1 holstered his firearm and commanded the Complainant to get down, the COB determined that this use of force used was reasonable. The IPA noted in their report that, while this force was not excessive, it was likely avoidable if Officer 1 had investigated the situation before the initial interaction with the Complainant by employing de-escalation tactics.

- [531.06 – Bias-Free Policing](#) (Officer 1) – **Not Sustained**

As defined by the Policy, bias is “a tendency, inclination, or prejudice toward or against something or someone often based on stereotypes rather than actual knowledge of an individual or circumstance.” Officers are required to conduct law enforcement activities “in a bias-free manner” and such activities must be “based on a standard of reasonable suspicion or probable cause.”

The COB recognized that Officer 1’s pursuit of the Complainant was informed by the fact that the Complainant closely matched the description of the suspect. Though there was no definitive evidence that Officer 1 was acting with bias, the COB found that ACPD’s investigation of this allegation was perfunctory. OPR interview protocols do not adequately investigate the possibility of racial or other bias in officer behavior – investigators failed to ask Officer 1 open-ended questions or probative questions that would have helped them better unpack and understand his underlying assumptions for escalating the situation and whether bias was involved. The COB believed that Officer 1 entered the situation with the preconception that more danger was present than was justified by any available information. That could indicate implicit racial bias.

Without definitive evidence of specific bias in the circumstances, which could have been explored further in the OPR interview, the COB could neither sustain the allegation nor exonerate Officer 1 and, consequently, voted to “not sustain” this allegation against Officer 1.

Summary COB Assessment of ACPD OPR Investigation

Assessment Metric	Guiding Questions: Did ACPD’s OPR Investigation/Report...	COB Assessment
Comprehensive	...explore all alleged and other identified possible policy violations?	Yes
Thorough	...pursue all relevant evidence available for all involved officers?	No
Complete	...analyze all lines of inquiry to a meaningful resolution?	Yes
Accurate	...correctly record the facts presented in available evidence?	Yes
Objective	...assess all evidence without assumptions or preconceived notions about the outcome?	Yes
Impartial	...demonstrate balanced consideration for all parties involved? (i.e., regardless of rank, position, demographic, etc.)	Yes
Credible	...promote public trust in the investigation process?	Yes
Sufficient Discipline	...include sufficient discipline for any sustained allegations?	N/A

COB Assessment of ACPD OPR Investigation

Does this investigation warrant a training recommendation? If so, was one made by OPR or the IPA?

Yes. The IPA recommended, and the COB agrees, that:

- Officer 1 should undergo additional use of force training, specifically regarding drawing and pointing a firearm at a community member;
- All involved officers should receive further training on how to display restorative professionalism and empathy when they discover that a community member has been mistakenly detained; and,
- ACPD further develop department-wide training on implicit bias.

Does this investigation suggest policy/procedure issues that were not adequately addressed by OPR?

Yes. The IPA recommended, and the COB agreed, that ACPD should provide officers with additional policy guidelines around unholstering or pointing a firearm at someone. They recommended the Department do so within the Use of Force policy as a reportable use of force, which would necessitate an administrative review of associated body-worn camera footage to ensure actions were within policy. The IPA also recommended that ACPD begin to track the number of occurrences related to officers drawing and pointing a firearm.

The COB agrees with the IPA suggestion that ACPD consider expanding current officer training to include specific indicators of non-compliance compared to a community member being shocked or asking questions when suddenly being apprehended by an officer, as was the case in this incident. Additional training on how to effectively de-escalate and positively restore an interaction with a community member, once a tense interaction has been concluded, would be beneficial as well.

Finally, the IPA and COB recommend that ACPD further develop the OPR's investigation and analysis surrounding implicit bias, particularly when asking leading questions that are not likely to elicit an in-depth response that would allow the Department to determine whether implicit biases influenced decision-making.

Other relevant comments, commendations, or concerns:

- The IPA and COB formally requested that ACPD provide data showing when firearms are unholstered and pointed at a member of the public by officers during incidents, including information on the incident/crime type and the race and gender of the involved individuals and officers. **At the time of this report publication, ACPD has added a data entry field to incident reports to explicitly identify when firearms are pointed at an individual; however, no analysis, supervisory review, or other use of that data has been implemented. These instances are also not included in ACPD's reporting of Use of Force incidents to the IPA and COB and they do not currently require ACPD to conduct a Use of Force review. The COB recommends that ACPD develop a protocol to use this data, report it, and use it for training and supervisory purposes. It should be included in ACPD's reporting of Use of Force incidents to the IPA and COB.**
- As in other case reviews, the COB noted that ACPD interview protocols do not adequately investigate the possibility of racial or other bias in officer behavior. Asking simple, and sometimes leading, yes-or-no questions does not equip investigators with the necessary insight into the officers' motivations and beliefs to identify implicit bias, resulting in gaps in ACPD's ability to address and prevent implicit biased actions by officers. The COB suggests additional training for OPR staff members on how to investigate potential bias-based cases.

- In its report, the IPA stressed the disparity between the lack of severity of the crime and the severity of Officer 1's response. The entire situation could have been avoided with more investigation conducted upon Officer 1's arrival on the scene, especially given that the reported allegation was petty theft, did not indicate the presence of a weapon, and there was no indication of an immediate threat to Officer or public safety.
- Though not required by policy, none of the involved officers offered an explanation or apology to the Complainant. In the aftermath of such a traumatic encounter, offering an explanation or apology would have been a professional and humane gesture.

We submit this report on behalf of the entire COB and we appreciate your attention to this report; please contact us if you have any questions.

Sincerely,

Julie Evans, Chair and Case Co-Reviewer
Arlington County COB
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David Smith, Case Co-Reviewer