




MEMORANDUM

Austin Police Department
Office of the Chief

TO: Community Police Review Commission
CC: Farah Muscadin, Director of the Office of Police Oversight
FROM: Joseph Chacon, Interim Chief of Police 
DATE: April 20, 2021
SUBJECT: Response to CPRC's Recommendations for Officer Involved Shooting
2019-0206

In November 2018, sworn members of the Austin Police Department (APD) voted to approve the *2018-2022 Meet and Confer Agreement Between the Austin Police Association and the City of Austin*, paving the way for the establishment of the Office of Police Oversight and Community Police Review Commission (CPRC). The results of the vote sent a clear signal that our employees recognized the importance of civilian oversight of the police.

The stipulations of the agreement permit the CPRC to, in part, provide non-binding recommendations to the Chief of Police on discipline for cases involving a “critical incident”—which includes officer involved shootings. In addition, the commission will provide prospective changes to departmental policies, procedures, and training. The recommendations of the CPRC and any response from the Chief of Police are matters of public record.

I have received and reviewed the CPRC’s memorandum, dated January 11, 2021, which outlines its recommendations related to the officer involved shooting documented under APD Internal Affairs Case 2019-0206.

Incident Overview and Ensuing Investigations

The following summary of the incident was excerpted from the “Recommendation to Close File” form drafted by the Civil Rights Unit of the Travis County District Attorney’s Office:

On March 2, 2019, an officer involved shooting occurred near 7th St. and Neches St. Patrol involving Officer [A] who was working downtown in a closed-off section of the local "bar district."

At approximately 1:30 a.m., a dark colored sedan headed northbound on Neches Street was observed driving past police barricades (orange and white standard

construction barricades with APD stamped across) and into an area designated for pedestrian use only. Several officers shined their flashlights at the vehicle and attempted to redirect the driver outside the barricaded area, but the driver did not stop and continued past Officer [A], almost striking him as it fled. Officer [A] then fired one shot towards the vehicle when the vehicle was in front of him. Moments later the driver engaged in a vehicle pursuit with an APD police unit and several TCSO units. The pursuit lasted approximately 7 minutes and was terminated when police lost sight of the vehicle...

HALO video captured the incident, and the dark colored sedan appeared to be headed in Officer [A]'s direction and nearly striking him. Numerous witness officers believed the vehicle may have struck Officer [A] based on his proximity to it and his having to jump out of the way of its path. Officers reported observing 3-4 people in the vehicle when they attempted to divert it away from the barricaded area and briefly observed the driver and passengers.

HALO video capturing the vehicle shortly before the shooting occurred depicts the right rear passenger getting out of the vehicle and getting back into the vehicle on Red River Street. While the video does show Officer [A] going towards the vehicle, there is no evidence to suggest that he intended to move into the vehicle's path, which would be against APD policy (and beyond the scope of our review).

Following the shooting, the APD conducted two concurrent investigations into the incident—a criminal investigation spearheaded by the Special Investigation Unit in conjunction with the Travis County District Attorney's Office (TCDA) and an administrative investigation conducted by the Internal Affairs Division with oversight from the Office of Police Oversight.

The criminal investigation was closed by the TCDA in December 2020¹ for the following reason: “Closed without court action – Evidence insufficient to show violation of law or policy.”

On January 12, 2021, former Police Chief Brian Manley (retired) closed the administrative investigation with no findings of wrongdoing for either the use of deadly force or shooting at a moving vehicle. The standard of review utilized by Chief Manley and his legal team was the “objective reasonableness” of the officer’s actions, as dictated by Fourth Amendment jurisprudence:

- *Graham v. Connor* (SCOTUS, 1989) is the seminal case for determining the “reasonableness” of a use of force
- The test used to determine whether a use of force was reasonable under the Fourth Amendment “is not capable of precise definition or mechanical application.”
- Rather, “its proper application requires careful attention to the facts and circumstances of each particular case, including (1) the severity of the crime at issue, (2) whether the suspect poses an immediate threat to the safety of the officers

¹ The two prosecutors that signed off on the case were retained by the new District Attorney and oversaw the investigation that resulted in the January 2021 indictment of two APD officers for allegations of excessive force in an unrelated case.

or others, and (3) whether [the suspect] is actively resisting arrest or attempting to evade arrest by flight.”

- “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.”
- “The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation.”
- Thus, the overarching question is “whether the officers’ actions are ‘objectively reasonable’ in light of the facts and circumstances confronting them.”

While Officer A was the only officer that fired a weapon, the other observations, actions, and locations of the officers in relation to the vehicle were compelling considerations when determining the appropriateness of Officer A’s use of deadly force, such as:

- One witness officer drew his firearm and targeted the vehicle but did not shoot because another officer stepped in his line of fire.
- Several of the other officers that did not draw their guns and fire were located behind Officer A or their line of sight was obscured by parked vehicles.
- Six of the witness officers stated they feared for the safety of pedestrians in the area.
- Four of the witness officers stated the vehicle almost hit officers.
- Two of the witness officers believed the vehicle may have hit an officer.
- Two witness officers stated they feared for their own safety.
- One witness officer stated there was a potential for mass casualties if the vehicle drove into the pedestrian crowds.

CPRC Recommendation 1: Officer Discipline—Indefinite Suspension

The CPRC determined Officer A’s use of deadly force was not objectively reasonable and that the moving vehicle that he fired upon did not present an imminent threat of death or serious bodily injury. The CPRC recommended that Officer A receive an indefinite suspension for his actions, citing the following APD policy and rationale for its decision:

GO 202.1.3 (d) stipulates that officers shall attempt to disable a moving vehicle using a firearm only under extraordinary circumstances in which the officer reasonably believes the deadly force is necessary to protect himself or others from what he reasonably believes would be an imminent threat of death or serious bodily injury.

The CPRC holds that the incident in question does not constitute an extraordinary circumstance given that:

- 1) *The driver of the vehicle not swerve in the direction of pedestrians or APD officers, nor did it hit pedestrians or APD officers;*
- 2) *The driver did not attempt to turn east or west onto East 6th Street to travel toward pedestrians;*
- 3) *The driver avoided the pedicab driver, APD officers and pedestrians when crossing the intersection;*
- 4) *By the time Officer A drew and fired his firearm, the vehicle had exited the intersection and was traveling through a pedestrian-free, barricaded street; and*

According to the Discipline Matrix in GO 903, this violation constitutes use of deadly force that was not objectively reasonable and merits indefinite suspension. The CPRC recommends that Chief Manley follows this course of disciplinary action, as stipulated in APD policy.

The above analysis of APD General Order 202.1.3 (d) omits salient and qualifying language contained in the introductory paragraph of the cited policy. GO 202.1.1 MOVING VEHICLES states:

This order is not intended to restrict an officer's right to use deadly force directed at the operator of a vehicle when it is reasonably perceived that the vehicle is being used as a weapon against the officer or others.

The below information provides additional information used by our department to show this incident was one of “extraordinary circumstances” per policy:

- The driver of the vehicle did, in fact, swerve in the direction of both pedestrians and APD officers during the incident².
- While the driver of the vehicle did not attempt to turn onto East 6th Street, he sped down Neches Street, in the direction of multiple pedestrians in the roadway, before fishtailing onto East 7th Street, causing one apparently startled individual to jump back from the curblin and narrowly missing another pedestrian crossing the roadway³.
- When Officer A drew and fired his weapon, there were at least three pedestrians walking in the barricaded street in the immediate vicinity of the vehicle.

In his interview with APD Internal Affairs investigators, Officer A provided his perspective on the “extraordinary circumstances” he encountered on the night of the shooting. According to Officer A—who had worked downtown for several years—it was not uncommon for vehicles to

² Perhaps the CPRC intended to convey their belief that that the suspect did not appear to intentionally swerve to attempt to strike anybody; if so, that should have been stated more plainly.

³ It is unclear whether or not Officer A saw what transpired on E. 7th St.—and it occurred after he had already fired his weapon—but it is clear from his post-shooting statements that his decision to shoot was informed by the reasonable inference that the vehicle was traveling toward an area inhabited by potentially vulnerable pedestrians.

inadvertently stray into restricted areas. On those occasions, without fail, the necessary corrective action was to get the driver's attention and redirect them out of the barricaded area. Officer A estimated, throughout his time working downtown, he and his shiftmates had successfully handled 100 previous incidents of vehicles going around barricades. Therefore, when the vehicle involved in the shooting erratically accelerated and sped away, the circumstances struck Officer A as truly unusual and remarkable, and he responded accordingly.

Based on all of the above information, an indefinite suspension was evaluated to be unwarranted in this case.

CPRC Recommendation 2: Review and Revise GO 202.1.3 Moving Vehicles

APD and the Office of Police Oversight have been engaged in on-going discussions on this topic, and it is anticipated that revisions to the policy will be adopted in the near future.

CPRC Recommendation 3: Adopt or Revise Policies Related to Barriers, Traffic Control Devices, Crowd Control, and Traffic Flow

The recommendations made by the CPRC are insightful and compelling. APD will explore the feasibility of adopting and implementing the recommendations at the earliest opportunity and notify the CPRC of the final outcome.

CPRC Recommendation 4: Issues Related to Body Worn Camera (BWC) Videos

The recommendations made by the CPRC are insightful and compelling. APD will explore the feasibility of adopting and implementing the recommendations at the earliest opportunity and notify the CPRC of the final outcome.

Access to Evidence

The *Meet and Confer Agreement Between the Austin Police Association and the City of Austin* provides the Office of Police Oversight with unfettered access to the Internal Affairs investigation process, including access to any and all evidence gathered during an investigation. The agreement also grants members of the CPRC full access—facilitated by the Director of the Office of Police Oversight—to all administrative and disciplinary files necessary to perform its functions.

I was surprised to read the following statement in the CPRC's memorandum: *Officer A's BWC footage was not made available to the CPRC for review in this case.* Email records indicate Internal Affairs personnel began coordinating with the Office of Police Oversight as early as December 18, 2020, to ensure all of the necessary files would be made available for the CPRC to review. On January 7, 2021, the Office of Police Oversight—which had access to all of the available BWC videos via APD's digital storage platform—asked Internal Affairs to confirm whether or not there was BWC footage from Officer A that captured the shooting, as the representative from the Office of Police Oversight had only been able to locate footage from Officer A that recorded the aftermath of the shooting. Later that same day, Internal Affairs personnel confirmed that there was no footage from Officer A that captured the shooting⁴.

⁴ APD GO 303.3.1(e) accounts for this scenario and states: *There may be instances in which an employee is required to take immediate action in response to an event which may not allow time to activate their BWC. In those situations, it may be impractical or unreasonable for employees to activate their BWC system before taking police action. It is expected that once the immediacy of the situation is over, employees will activate their BWC system to record the remainder of the incident. Employees*

In February 2021, realizing the need to explicitly outline the procedures for sharing BWC videos with members of the CPRC, Internal Affairs sent an email to the Office of Police Oversight that detailed multiple viewing options for subsequent meetings.

Conclusion

APD concurs with 75% of the recommendations made by the CPRC. I am fully committed to developing a positive and respectful working relationship with the CPRC moving forward, for there is no doubt both groups are determined to faithfully fulfill our duties and obligations to the community we serve.

Cc: Spencer Cronk, City Manager
Rey Arellano, Assistant City Manager
Troy Gay, Assistant Chief – Chief of Staff

shall articulate the reasoning for the delayed activation of their BWC in an offense report, supplement, or other form of Department approved documentation.