

Investigative Log 12-21

Administrative Investigation:

Summary of Facts – Initial Incident Response

On December 27, 2012, at 1834 hours, ECPD units were dispatched to a report of a suspicious circumstance. According to the dispatch log, the following were the details of the Call For Service # 171 and Case Number 2012-23364.

PR RESD CALLING FROM THIS 10-20, CAN HEAR A FEMALE OUTSIDE SHOUTING "HELP", SOUNDS TO BE IN THE EMPTY PARKING LOT TO THE RIGHT IF FACING NOTHING SEEN OR NOTHING ELSE HEARD

ANOTHER CALLING ADV TRO OF CHEVERON THERE IS THE FEMALE EMPLOYEE BEING ASSALTED

SUSP BM, 35 YO, 5'8", BLK JACKET PUFFY, BLUE JEANS NO WPNS SEEN

Patrol Team 2 was on-duty with the following Line-Up:

Watch Commander – Sergeant Lauren Caputo

Beat 10 – Officer Elder

Beat 11 – Officer Guzman

Beat 12 – Officer Thepkaysone, Reserve Officer Lee was riding along with Officer Thepkaysone

Cover Unit – Officer Alvarez, with applicant James Fortune on a ride-along

Corporal Tang was on vacation

Officer Guzman and Officer Thepkaysone (with Reserve Officer Lee) responded first to CFS 171.

Officer Guzman and Reserve Officer Lee encountered (A) Johnson who was beating (V) about the head with a handgun.

Officer Guzman and Reserve Officer Lee confronted (A) Johnson to stop what they perceived as a potentially lethal assault. He did not stop the assault.

Officer Guzman and Reserve Officer Lee fired their duty weapons at (A) Johnson to stop the assault, in defense of (V)

Officer Thepkaysone was on scene but did not fire any rounds. He summoned EMS via police radio which simultaneously served as a supervisory notification and hence began the post shooting investigation.

Officer Elder, Officer Alvarez and Sergeant Caputo arrived at the scene. Officer Elder secured Johnson's firearm in Officer Guzman's patrol car.

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Post Shooting Internal Actions:

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3 Within minutes of the shooting; Sergeant Caputo told dispatch to call the county and inform
4 them that we were invoking the Contra Costa County Law Enforcement Involved Fatal Incident
5 Protocol.

6
7 He notified ECPD Administration via cell phone. Many more notifications were made by both
8 he and other ECPD personnel, primarily via cell phones from personnel at the scene.

9
10 Lt. Keith was the first member of the Command Staff to arrive and he became the Incident
11 Commander. Chief Moir was at the Public Safety Building at the time of the shooting and heard
12 the call over the police radio.

13
14 Lt. Bonini and I both responded to the scene from our homes. Lt. Bonini was part of the Incident
15 Management Team and the assigned PIO.

16
17 I was also on the Incident Management Team and the designated Administrative Investigator and
18 simultaneously the Investigations manager.

19
20 Detective Schillinger was the first Detective to arrive at the scene. Per instruction from Det. Sgt.
21 Cliatt, he took Officer Guzman to the Courtyard Marriot Hotel while Reserve Officer Hickman
22 took Reserve Officer Lee and Officer Thepkaysone to the same location. The objective was for
23 them to be sequestered there prior to their formal interviews. Det. Sgt. Cliatt (Also the PEA
24 President) called the hotel and made the arrangements for them. He also called PORAC and
25 arranged for LDF attorneys to respond to the hotel to represent the involved employees.

26
27 While Detective Schillinger was at the hotel and pursuant to Det. Sgt. Cliatt's instruction, he
28 took possession of Officer Guzman and Reserve Officer Lee's duty belts. He secured them in
29 brown bags and handed them to Officer Hubbs (CSI) when he arrived.

30
31 Officer Cheng was summoned while off-duty. He was sent to the hotel as well and helped
32 sequester personnel. He also drove officers from the hotel back to the ECPD after their
33 interviews.

34
35 At the hotel; as part of the investigative team and pursuant to the CCC Fatal Incident Protocol;
36 Detective Strang and Senior Inspector Jackson conducted the interviews with Officer Guzman,
37 Reserve Officer Lee and Officer Thepkaysone. Their transcribed statements are included herein.

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40 On **December 28, 2012**, at 0322 hours and 0402 hours, Det. Matsui witnessed a voluntary blood
41 withdraw by a CCC Phlebotomist (Duff) from the left arms of both Officer Guzman and Reserve
42 Officer Lee. Det. Matsui took possession of both samples and logged them into evidence at the
43 ECPD.

44
45 At approximately 1630 hours, I called Dr. _____ regarding a psychological review with
46 the involved personnel. He said that he performs "Critical Incident Debriefings" for other
47 agencies and he recommended that we do so as well.

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1 He scheduled them for each involved officer for Wednesday **January 3, 2013**. Officer Lee's for
2 0900 and Officer Guzman's for 1100 hours. I completed written notifications of each and
3 emailed them to them. Additionally, Lt. Keith called Officer Guzman on the telephone and told
4 him of the appointment. I did the same with Reserve Officer Lee.
5

6 As I was talking to Dr. , Lt. Keith called the department's Employee Assistance Program,
7 known as MHN [Mental Health Network]. He arranged for a Team Debrief for Team 2
8 personnel to take place on **January 3, 2013** at 1800 hours. He and I told Officer Guzman and
9 Reserve Officer Lee about this event during our phone calls.
10

11 At the suggestion of the Police Chief, I contacted Mr. Rick Buys at the Municipal Pooling
12 Authority. I sent him an email to inquire as to whether or not his organization would like to be
13 officially notified of incidents such as this one right away as opposed to much later when civil
14 litigation is imminent. He agreed to call me next week.
15

16 On Thursday **January 3, 2013** the Command Staff had a meeting regarding this incident.
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23 On Friday **January 4, 2012**
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26 Also on this date, Dr. emailed me reports on Officer Guzman and Reserve Officer Lee. I
27 copied them and provide to Command Staff on Monday **January 7, 2013**.
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4 On **January 10, 2013**, the Crime Lab notified Sgt. Cliatt that the ECPD handguns used in the
5 event are ready to be returned to the custody of the ECPD.
6

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10 On **January 14, 2013**, I talked to Lt. Bonini. He said that he now had possession of the duty
11 weapons used by Officer Guzman and Reserve Officer Lee.
12

13 He opened the crime lab packaging in my presence so I could inspect them as part of this
14 investigation. I noted that both weapons were stock Sig Sauer P226's. Neither had a laser sight,
15 mounted flashlight or aftermarket grips.
16

17 On **January 23, 2013**, I asked Officer Hubbs (since he took physical custody of both of the
18 involved officers' firearms) about the ammunition that was in each. He visually confirmed that
19 both had department issued, Federal HST .180 grain ammunition at the time of the shooting.
20

21 Within a few days of the shooting, a DDA asked Det. Sgt. Cliatt how the ECPD wanted official
22 notification that they had found the shooting to be justified; via written letter or via a command
23 staff briefing. I told him that we preferred a letter.
24

25 During the first week of February, I asked Det. Sgt. Cliatt to contact the D.A.'s Office regarding
26 their shooting investigation.
27

28 As of mid-February I still had not received anything so I asked him to call the D.A.'s Office
29 about it. Barry told him that it was still coming but wasn't done yet.
30

31 On **March 6, 2013** I got a follow up email from Rick Buys from MPA regarding this case. We
32 exchanged emails and then spoke on March 13, 2013. I briefed him on the case and we decided
33 that no action was needed at this time.
34

35 On **March 13, 2013** I also inquired with Det. Sgt. Cliatt to again inquire with the District
36 Attorney's Office regarding the disposition of their investigation as it has not yet been received.
37 He got a response indicating that their disposition letter would be coming the next week.
38

39 In late May, I asked Chief Moir to ask the District Attorney for the letter. She did so.
40

41 On **June 12, 2013** she met with the Chief of Inspectors and asked about the letter. He told her
42 that the District Attorney's Office no longer issues letters for the disposition of Officer Involved
43 Shooting cases. He told her that they found no criminal wrongdoing on the part of the involved
44 officers and that their investigation into the shooting was closed.
45

46 On **June 13, 2013**, now having the information that nothing further was coming from the D.A.'s
47 Office regarding this matter, I notified Lt. Keith that he needed to convene a shooting review
48 board in accordance with Policy 302.

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Training Records:

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On **December 31, 2012** I sent an email to Lt. Bonini requesting copies of the training records for both Officer Guzman and Reserve Officer Lee.

I reviewed those records on **January 7, 2012**.

At the time of this incident; both were in compliance with ECPD Policy for firearms training, defensive tactics training and use of force scenario training.

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Policy Issues:

The ECPD Policy Manual has the following Policies which are applicable to incidents such as this:

312.2 AUTHORIZED WEAPONS

Both Officer Guzman and Reserve Officer Lee were carrying a department issued Sig Sauer P226 .40 handgun which was issued to them by the ECPD.

312.2.4 AMMUNITION

Both Officer Guzman and Reserve Officer Lee were carrying a department issued Sig Sauer P226 .40 handgun which was issued to them by the ECPD, loaded with department issued ammunition. This was confirmed by Officer Hubbs' inspection and the crime lab report.

USE OF FORCE 300.2 POLICY

300.2.2 FACTORS USED TO DETERMINE THE REASONABLENESS OF FORCE

(a) The conduct of the individual being confronted (as reasonably perceived by the officer at the time).

(b) Officer/subject factors (age, size, relative strength, skill level, injury/exhaustion and number of officers vs. subjects).

(c) Influence of drugs/alcohol (mental capacity).

[No law enforcement toxicology test was done on (A) Johnson.]

(d) Proximity of weapons.

(e) The degree to which the subject has been effectively restrained and his/her ability to resist despite being restrained.

(f) Time and circumstances permitting, the availability of other options (what resources are reasonably available to the officer under the circumstances).

(g) Seriousness of the suspected offense or reason for contact with the individual.

(h) Training and experience of the officer.

(i) Potential for injury to citizens, officers and suspects.

(j) Risk of escape.

(k) Other exigent circumstances.

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300.3 DEADLY FORCE APPLICATIONS

While the use of a firearm is expressly considered deadly force, other force might also be considered deadly force if the officer reasonably anticipates and intends that the force applied will create a substantial likelihood of causing death or very serious injury. Use of deadly force is justified in the following circumstances:

(a) An officer may use deadly force to protect himself/herself or others from what he/she reasonably believe would be an imminent threat of death or serious bodily injury.

(b) An officer may use deadly force to stop a fleeing suspect when the officer has probable cause to believe that the suspect has committed, or intends to commit, a felony involving the infliction or threatened infliction of serious bodily injury or death, and the officer reasonably believes that there is an imminent or future potential risk of serious bodily injury or death to any other person if the suspect is not immediately apprehended. Under such circumstances, a verbal warning should precede the use of deadly force, where feasible.

300.4 REPORTING THE USE OF FORCE

Proper reporting was documented after the incident.

300.4.1 NOTIFICATION TO SUPERVISORS

Officer Thepkayson notified other on-duty ECPD personnel of the fact that shots had been fired and in doing so, notified the on-duty Watch Commander (Sgt. Caputo). The Watch Commander made proper notification to the Field Operations Lieutenant.

300.4.2 MEDICAL ATTENTION FOR INJURIES SUSTAINED USING FORCE

EMS was summoned immediately. Paramedics from the ECFD responded, as did the RFD and a medical helicopter. The injured suspect was flown to the trauma center (John Muir Hospital) and was hospitalized.

300.5 SUPERVISOR RESPONSIBILITY

Sgt. Caputo obtained a brief summary of events and was able to pass it on to responding investigators in compliance with the policy. He did not interview the suspect but invoked Contra Costa County Law Enforcement Fatal Incident Protocol as was necessary.

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1 SHOOTING POLICY 304.1.1 POLICY

2 3 304.1.1 POLICY

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5 It is the policy of this department to resort to the use of a firearm, when it reasonably appears
6 to be necessary, and generally:

7
8 (a) An officer may use deadly force to protect himself/herself or others from what he/she
9 reasonably believe would be an imminent threat of death or serious bodily injury.

10 11 310.2 INVESTIGATION RESPONSIBILITY

12
13 This department conforms to the The Police Chiefs' Association of Contra Costa County for
14 Law Enforcement Involved Fatal Incidents for investigating officer-involved shootings.

15
16 [This protocol was enacted and investigated consistent with this policy.]

17
18
19 ECPD Policy dictates that determination Policy compliance for the use of force being determined
20 as follows:

21 22 **Deadly Force Review**

23 24 302.1 PURPOSE AND SCOPE

25
26 The purpose of this policy is to establish a process to review the use of deadly force by
27 employees of this department.

28 29 302.2 REVIEW BOARD

30
31 The El Cerrito Police Department is charged with the important responsibility of objectively
32 evaluating the use of deadly force. It is the policy of this department to convene a Use of
33 Deadly Force Review Board when the use of deadly force by an employee results in injury
34 or death to a person.

35
36 The Use of Deadly Force Review Board will also investigate and review the circumstances
37 surrounding every accidental or intentional discharge of a firearm, whether the employee is
38 on or off duty, excluding range training or recreational use.

39
40 The Chief of Police may convene the Use of Deadly Force Review Board to investigate the
41 circumstances surrounding any use of force incident.

42 43 302.2.1 COMPOSITION OF THE BOARD

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45 The Use of Deadly Force Review Board shall be comprised of the following persons:

- 46
47 • Command representative of each division
48 • Administrative Lieutenant
49 • Non-administrative supervisor

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1 The senior ranking member not of the same division of the involved employee will serve as
2 chairperson.

3
4 The chairperson will convene the Use of Deadly Force Review Board as necessary. It will
5 be the responsibility of the division or unit commander of the involved employee(s) to notify
6 the appropriate bureau commander of any incidents requiring board review. The division
7 or unit commander will also ensure that all relevant reports, documents, and materials are
8 available for consideration and review by the Board.

9 10 **302.2.2 RESPONSIBILITIES OF THE BOARD**

11
12 The Use of Deadly Force Review Board is empowered to conduct an administrative
13 investigation into the circumstances of an incident. The board members may request
14 further investigation, call persons to present information, and may request that the involved
15 employee appear before the board. The involved employee will be notified of the meeting
16 of the board and may be represented by legal counsel and/or other representation through
17 all phases of the review process.

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20 Absent an express waiver from the employee, no more than two members of the board may
21 ask questions of the involved employee (Government Code § 3303).

22
23 The review shall be based upon those facts which were reasonably believed by the officer
24 at the time of the incident, applying legal requirements, department policy and procedures,
25 and approved training to those facts. Facts later discovered but unknown to the officer at
26 the time, can neither justify nor call into question an officer's decision regarding use of force.

27
28 If it appears that the actions of the employee may result in criminal charges or disciplinary
29 action by the Department, the board will conduct the interviews in accordance with
30 department disciplinary procedures. The board does not have the authority to recommend
31 discipline. The board shall make a finding and such finding will be limited to one of the
32 following:

33
34 (a) The employee's actions were within department policy and procedures.

35
36 (b) The employee's actions were in violation of department policy and procedures.

37
38 A finding will represent the consensus of the board. After the board has concluded, the
39 board chairperson will submit written findings of the board to the Chief of Police. After review
40 by the Chief of Police, a copy of the findings will be forwarded to the involved employee's
41 Division Commander for review and appropriate action.

42
43 At the conclusion of the review process, a copy of all relevant reports and information will
44 be filed with the Chief of Police.

45
46 Once the board has reached its specific finding, the Administrative Lieutenant may convene
47 a separate training committee to address training needs and to make recommendations for
48 this department without specific reference to the facts of the incident considered by the
49 board.

50
51

EL CERRITO POLICE DEPARTMENT MEMORANDUM

To: Chi Lee, Officer
From: Paul Keith, Lieutenant
Date: 7/24/13
Re: Review Board

On July 24, 2013, at 0800 hours, the department convened a review board to examine your use of force on a subject, documented in El Cerrito case #2012-23364. The board consisted of Sergeant David Hartung, Sergeant David Wentworth and me.

The board reviewed the incident and determined that your actions were within the guidelines of the department's use of force policy.

The board felt that your use of your firearm, in this incident, was appropriate for the situation at hand.

*T. CONNER
MWR 07/25/13*

EL CERRITO POLICE DEPARTMENT MEMORANDUM

To: Mario Guzman, Officer

From: Paul Keith, Lieutenant

Date: 7/24/13

Re: Review Board

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The board reviewed the incident and determined that your actions were within the guidelines of the department's use of force policy.

The board felt that your use of your firearm, in this incident, was appropriate for the situation at hand.