



U.S. Department of Justice

Civil Rights Division

SYC:TMG:RAC:TC:BJ:AN:cac
DJ 207-62-4

Special Litigation Section - PHB
950 Pennsylvania Avenue, NW
Washington, DC 20530

June 13, 2006

VIA FACSIMILE AND U.S. MAIL

Mr. Stu Gallaher, Chief of Staff
Office of the Mayor
City of Easton
One South Third Street
Easton, Pennsylvania 18042

Re: Easton Police Department Investigation

Dear Mr. Gallaher:

As you know, the Civil Rights Division is conducting an investigation of the Easton Police Department ("EPD"), pursuant to the Violent Crime Control and Law Enforcement Act of 1994, 42 U.S.C. § 14141. We write today to provide you with our preliminary assessments of the following proposed EPD policies: (1) Arrest Procedures; (2) Mobile Video/Audio Recording Equipment; and (3) Administrative Investigations. We hope this letter will assist in our mutual goal of ensuring that EPD provides the best possible police service to the people of Easton.¹

I. Arrest Procedures (General Order ("GO") #4-22)

We are concerned that this policy provides little substantive guidance to police officers, instead referring them to the Pennsylvania Crimes Code. Moreover, the policy deals exclusively with the laws of arrest and does not establish guidelines for the proper handling and treatment of a person undergoing arrest. We recommend that EPD re-write the policy to

¹ The comments and recommendations provided are not intended to be our final assessment or to serve as an "approval" of the EPD's policies. We may find it necessary to provide additional comments and, as always, we urge EPD to obtain the input of the city solicitor's office prior to finalizing these policies (as well as periodically) to ensure consistency with applicable legal standards. We offer our comments as technical assistance.

clearly outline the proper circumstances under which it is appropriate to make an arrest, and include citations to relevant statutes or cases. For example, EPD might consider adding a reference to the seminal case regarding arrests See Michigan v. DeFillippo, 443 U.S. 31, 37 (1979) ("Probable cause' to justify an arrest means facts and circumstances within the officer's knowledge that are sufficient to warrant a prudent person, or one of reasonable caution, in believing, in the circumstances shown, that the suspect has committed, is committing, or is about to commit an offense.") The city solicitor or district attorney could be particularly helpful with this process, ensuring that the policy complies with the most current legal standard. We further recommend that the city clearly establish its policies for executing an arrest, e.g., verification of identity, pat-down searches, etc. We have enclosed, for your consideration, a copy of an arrest policy from a department similar to EPD in size.

II. Mobile Video/Audio Recording Equipment Installed in Vehicles (General Order #3-3)

This policy generally provides useful guidance to officers, but it could benefit from greater clarity and detail. Our recommendations regarding specific sections are detailed below as a matter of technical assistance:

3.3.01 Policy

If Pennsylvania law requires officers to obtain permission before recording any conversation, then EPD certainly must comply with that law. However, we recommend that EPD discuss the policy with counsel to ensure that the policy complies with the law but is no more restrictive than necessary.

3.3.03 Program Goals

Our experts suggest EPD consider specifying two additional goals: officer safety and enhancement of officer performance. Recording traffic stops, arrests, citizen interactions, etc. provide an opportunity for objective self-evaluation and supervisory evaluation; and such recordings are also extremely useful for training purposes.

3.3.04 Pre-Operational Procedures

A. Training

Training regarding the proper operation of the recording equipment should be rather straightforward and can be accomplished, given the size of the EPD, quickly. Accordingly, we recommend that all EPD officers be trained to use the equipment.

B. Inspection, Maintenance, and Repair

We recommend inspection of recording equipment be required at the beginning of each shift. Otherwise, an officer may attempt to record an important incident only to learn later that the equipment was not working, or the tape was full, etc.

3.3.05 MVR Operations

A. MVR Recording Features

As written, this provision could be construed to allow an officer to stop a recording at any time. We suggest the GO mandate that recordings should not be stopped except under limited circumstances, and those circumstances should be set clearly forth in the policy.

B. Utilization

We recommend that the words "whenever possible" be deleted from this paragraph. As currently written, personnel could use any justification for failure to utilize recording equipment. We further recommend that Subsection 9 be modified to require that the camera be aimed at, and used to, record the actions of any prisoner in a police vehicle.

C. General Recording Procedures

This section appears to conflict with Section 3.3.05.B(4), which states that field interviews, interrogations, or tests should be recorded. We recommend that recording equipment be used to record all encounters with witnesses or suspects to the extent permitted by Pennsylvania law.

3.3.06 MVR Tape/DVD Control

A. Use of MVR Tapes/DVD

As drafted, Subsection 2 does not establish sufficient administrative control over recordings. Tapes and DVDs should be issued to, and retrieved from, officers by designated supervisors who in turn should be required to maintain an inventory. We recommend that tapes and DVDs be kept either in the recording equipment or in an approved storage container, but we do not believe they should be left with the officer. Our experts further noted that Subsection 6(a) could be construed to require removal and storage of recordings of minor traffic violations as well as other misdemeanors and felonies. If so, this would require considerable storage space and EPD should be prepared to accommodate this necessity.

B. Reproduction of Tapes/DVDs

Subsection 1(f) states that the Chief or a designee "may" periodically review tapes and DVDs. We recommend that EPD require each supervisor to review, at least quarterly, a minimum number of events involving each officer under his or her command. This should improve officer performance, identify training needs, and reduce citizen complaints.

III. Administrative Investigations (General Order #2-5)

While the draft Administrative Investigations Policy contains several standard requirements of a contemporary complaint investigation policy, we believe it should emphasize a stronger commitment to thorough and fair investigations of *all* allegations of inappropriate police conduct. One cannot adequately determine the merit of a complaint prior to the investigation, thus we recommend abolition of the two complaint categories (full and limited) defined in Section 2.4.04 in favor of full investigations of all complaints.² We also suggest that EPD delete the "Non-Complaint Investigation Categories" (Section 2.05.06) and move that information to the Use of Force Policy or create a separate policy on internal investigations. Internal investigations of uses of force or motor vehicle accidents are substantially different from citizen complaints. Our recommendations regarding other sections are detailed below.

² An exception might be complaints wherein all the factual allegations, if accepted as true, do not reflect any wrongdoing.

2.5.02 Purpose

The purpose of administrative investigations should be to determine whether any inappropriate behavior actually occurred. The purpose should not be to strictly limit liability or reduce the inconvenience of handling a complaint. The current policy is correct in stating that performance inadequacies are a "function of supervision." However, when these infractions come to the attention of the department via a citizen complaint, they should be received, thoroughly investigated, and adjudicated in a consistent, prescribed manner. The proposed policy should be clear about this objective.

2.5.04 Definitions

A. Administrative Action

Reference is made to discipline or a "lesser sanction." We recommend deletion of this phrase, as any sanction is discipline. Alternatively, if the intended reference is to corrective or non-disciplinary action (e.g., training or a transfer), that terminology would be more appropriate.

2.05.06 Non-Complaint Investigation Categories

A. Legal Intervention

This section apparently deals with pursuit tactics involving ramming and roadblocks, and we recommend a title that more accurately reflects that. We further recommend that EPD cross-reference this section with its Pursuit Policy, General Order 5-1, Section 5.1.05 G-H (Roadblocks and Ramming).

E. Less Lethal Weapon Incidents

We recommend that references to the various non-deadly (less lethal) weapons be sequenced in the same order as in the proposed Use of Force GO 4-14, in order to reinforce the Use of Force policy.

2.05.07 Dispositions

A. Complaint Investigations

Subsection 5 implies that an investigation is terminated when a complaint is withdrawn. We recommend that EPD encourage the complainant to cooperate and attempt to dissuade him or her from withdrawing the complaint unless, of course, the complainant

admits the complaint was false. We further recommend that all complaints be investigated as thoroughly as possible, regardless of the complainant's wishes. The policy should state these objectives in clear terms.

We recommend that Subsection 6 be eliminated, i.e., the "suspended" disposition. In fairness to both the officer and the complainant, a disposition should be sought in all cases. In cases where evidence is lacking or the identity of the offending officer cannot be determined, it is perfectly acceptable to make a determination that the allegation is not sustained or is unfounded. Of course, any investigation may be re-opened or a new inquiry initiated upon the receipt of new information.

We also recommend another disposition category for findings of misconduct that were not based on the complaint. This category applies to misconduct that was not described in the complaint, but is found during the course of the resulting investigation.

2.5.08 Duties and Responsibilities

A. Chief of Police

The role of the Chief of police is not set forth clearly in the policy. In a department the size of Easton, the officer receiving a complaint or allegation is typically required to notify the Chief immediately, depending upon the seriousness of the complaint or allegation.

We recommend that the Chief or his or her designee be responsible for receiving complaints, assigning investigators, monitoring investigations, reviewing dispositions, insuring that appropriate action is taken, and notifying the complainant of the outcome. Subsection 2 assigns the Chief responsibility for initiating discipline where there is a sustained disposition, but it does not assign responsibility for initiating supervisory counseling, training, or other appropriate interventions or corrective action for other disposition findings. We recommend that such responsibility be assigned to the Chief or his or her designee. We further recommend that the investigating officer or his or her supervisor be responsible for adjudication of administrative investigations, rather than the Chief. The officer could then appeal those findings to the Chief if he or she disagrees with them. Subsection A3 also assigns the Chief responsibility for referring complaints to the criminal investigation division ("CID") when false information has been provided or the facts indicate criminal conduct by the

complainant. Such a referral of a complaint is always an option, but we are concerned that inclusion of this option as a duty of the Chief conveys an inappropriate message to officers, i.e., that complainants should be reluctant to file a complaint for fear of prosecution.

B. Shift Commanders

Shift Commanders may have specific knowledge about an event under investigation, may be a witness to the event, or may be complicit in wrongdoing; accordingly, shift commanders or supervisors should only conduct minor investigations and only if they were not witnesses or participants, and are not otherwise under suspicion. Subsection B.1 does not clearly establish what types of investigations should properly be assigned to a shift commander versus the Chief (see 2.5.08 A.1 above). Moreover, Subsection 2 is unclear. Shift commanders should not make notifications regarding the outcome of an investigation without a review by the chain of command and approval by the Chief.

According to our expert consultants, the prohibition on counseling found in Subsection B.2.a is unusual, and we believe it runs contrary to the purpose of internal administrative investigations. While a complaint or an allegation may not have occurred "as alleged," it does not necessarily follow that the officer performed as expected or that there was no alternative action that may have prevented the complaint. Counseling could be particularly useful in such circumstances, and we recommend that this important administrative option be permitted.

C. Commander, Administrative Services

The purpose of this GO is to set forth EPD's policy for the conduct of Administrative Investigations. Accordingly, we recommend that references to criminal investigations should be restricted to what should occur when possible criminal conduct is discovered during the course of an administrative investigation. Subsection C.4 states that reports should be provided in a "timely manner"; we recommend that this phrase be replaced and cross-referenced with the 30-day time limit specified in Section 2.5.10.D.13.

We further suggest that Subsection C.6 require regular contact with complainants including, at minimum, a written acknowledgment of EPD's receipt of the complaint and subsequent notification of the disposition. If an investigation is delayed beyond the normal 30-day period, the complainant likewise should

be notified. Finally, we recommend that EPD refrain from notifying witnesses about case outcomes. Administrative investigations should be confidential to the extent possible. However, if the witness notification provision remains, we recommend that all such communications be in writing.

D. Shift Commanders

We note that several provisions require the shift commander to make a determination, e.g., whether the complaint deals with performance inadequacies, before an investigation is conducted. As stated above, we recommend that a full and thorough investigation be completed before any such final determinations are made. Moreover, it is not clear whether shift commanders implement the remedial action ordered by others or decide upon and take remedial action that they deem appropriate. A copy of the remedial action report is retained, but it is not clear whether this action is noted in the officer's personnel history/record. We recommend that all of these issues be clarified.

E. Investigators

All complaints, particularly those of a serious nature, may be the subject of civil litigation. As stated before, the purpose of an administrative investigation is to objectively determine the merits of the complaint, not Chiefly to protect the department from liability. Accordingly, we recommend that Subsection E.5 be deleted. We further recommend that Subsection E.8 be divided so that Garrity and Miranda are not included in the same provision. Garrity applies to administrative investigations while Miranda applies to criminal investigations, and the two types of investigations should be clearly distinguished.

F. Personnel Receiving Complaints

We realize that this section is largely dictated by city ordinance, but we believe it discourages sincere citizens from filing complaints by insisting that they appear at the police station. It is certainly reasonable to encourage a complainant to appear at the police station to file a complaint, but should he or she decline, the officer receiving the call should attempt to arrange a meeting with an officer as soon as possible to receive the information in person. Mailing a form to a potential complainant may result in the loss of valuable information about improper police conduct.

G. Personnel Who are the Subject of an Administrative Investigation

We recommend clearer guidance on the use of instruments designed to detect deception. Subsection G.5 should state when an officer under investigation may obtain the results of such tests, preferably after the investigation is completed. To protect officer privacy, we recommend that Subsection G.6 specify that union representatives should not be provided test results without a written release from the officer whom they purport to represent. We further recommend that Subsection G.7 be amended so that such tests are not limited to occasions "when all other investigative measures have been exhausted or to cases involving allegations of a serious violation of regulations or criminal conduct." Such examinations typically are used when there is a distinct, unresolved contradiction between the complainant or a witness and an accused officer. Moreover, the examination may or may not be voluntary, as officer participation can be compelled in an administrative investigation but not a criminal investigation.

H. Personnel Who are the Subject of a Criminal Investigation

We recommend that Subsection H be deleted and a separate section or separate policy be created setting forth procedures to be followed when an administrative investigation discovers criminal conduct. As discussed previously, the standards of interrogation in an administrative investigation differ from those in a criminal investigation, and the varying standards should not be confused.

2.5.09 Investigative Assignment Criteria

A. Circumstances

We note that Subsection A.2 refers to "allegations of criminal conduct." Once again, we recommend that criminal matters be dealt with in a separate section or policy.

D. Complaints Initiated by Personnel

The purpose of the reference in bold to formal discipline is not evident, particularly since "formal discipline" is not defined nor distinguished from discipline in general. We note that it is difficult to determine whether the "substantiation of the allegation would give rise to formal discipline" without further investigation. Moreover, this determination should not

be made without reviewing the officer's personnel history to determine the appropriate disciplinary or other action in the event the allegation is sustained.

2.5.10 Complaint Processing

B. Receiving Complaints

As written, this Subsection suggests that an officer receiving a complaint should aggressively seek the completion of the complaint form by someone who wishes to make an anonymous or verbal complaint, and upon the complainant's refusal, should then seek his or her signature on the refusal form. This process likely intimidates complainants and is inconsistent with an open, welcoming complaint process. The department should acquire complaints in any way possible (anonymous, verbal or otherwise) so that possible wrongdoing can be investigated and appropriately adjudicated. The policy should advise officers that, when attempting to identify a complainant, the officer should avoid any statements or actions that might be intimidating.

C. Notifying Involved Individuals

The Chief's role in the notification process is not clearly stated.

D. Investigation Procedures

We refer to our earlier comments regarding full versus limited investigations. All complaints should be fully investigated. In Subsection D.3, we suggest deletion of the phrase "anonymous complaint shall not be automatically dismissed," as no complaint should be dismissed. Moreover, the phrase conflicts with the subsequent note that "no investigation shall be initiated into anonymous complaints unless ... give rise to formal discipline." Such a determination cannot be made prior to the investigation. Our experts report that anonymous complaints, which are sometimes incomplete and lack detail, nonetheless often reveal serious misconduct. We recommend that EPD abandon its focus on screening complaints and instead focus on fully investigating such complaints.

The policy presently does not require that interviews be tape recorded, and we recommend such recordings to the extent permitted by law. We note that Subsection D.7 requires the deployment of all available tools during an investigation, which would conflict with the limits on the use of deception detection equipment found in Section 2.05.08. We recommend that Subsection

D.8 specifically address searches of officers' lockers, and that Subsection D.10 be amended not only to permit but to require the collection of information regarding race/ethnicity. Our experts report that collection of such information is standard procedure in complaint investigations. Finally, we note that Subsection D.13 establishes no parameters for investigations that exceed the 30-day limit. We recommend that the policy require the captain of administrative services to apply for an extension in writing, which the Chief should approve or disapprove in writing.

E. Investigation of Non-Complaint Incidents

The purpose of an investigation into serious use of force cases, especially the use of deadly force, is not simply to assist in the development of "legal theories that can be advanced in defense of any resulting claims." We recommend that phrase be deleted, as the purpose of such an investigation is to determine the propriety of an officer using deadly force. Deadly force should always be a last resort consistent with applicable legal standards, and the policy should make clear that deadly force cases are unique and are not investigated the same way as are lesser uses of force. Any use of deadly force must be fully, thoroughly, completely and expeditiously investigated in accordance with clear, concise policy requirements. Such requirements may more appropriately be included in the Use of Force Policy.

We further recommend that officers involved in shooting events resulting in death or injury be placed on administrative leave and placed in an employee assistance program that includes counseling for the officer and his/her family. Our experts believe that an officer should not return to work until such time as a licensed, competent healthcare professional certifies the officer's fitness to return to duty.

We note that Subsection E.10.b may now conflict with the modified Use of Force Policy, which may need to be amended to permit such off-duty weapons usage. We recommend that Subsection E.10.c be amended to require investigations of duty-related animal shootings for other than humane reasons, as any such shootings can potentially endanger civilians or other officers. With regard to Subsection E.11, we are unaware of a situation in which it would be inappropriate to interview an aggrieved citizen, and we recommend that the policy require such an interview.

F. Limited Administrative Investigations

As stated previously, we recommend that the limited investigation category be eliminated and that all complaints be fully investigated.

G. Submission of Administrative Investigation Reports for Full Investigations

As stated above, we recommend that all notifications from the Chief, whether to the complainant or the subject, be in writing. We further recommend that all investigation reports be retained unless Pennsylvania law requires otherwise. An officer's work record should remain intact throughout his or her career (again consistent with Pennsylvania law).

IV. Attached Forms and Procedure

A. Complaint Report Form

Unless mandated by Pennsylvania law, we recommend that the notice on page two of this form regarding false reports to law enforcement be deleted. This notice, which begins with the phrase "[b]e aware," can be intimidating to complainants and is unnecessary.

B. Complaint Report Form Refusal

We believe it is counterproductive to request that a complainant sign a form that purports to release the city from any duty to investigate a complaint. This is inconsistent with the notion that EPD will receive, investigate, and adjudicate all complaints and allegations regarding inappropriate police conduct.³

C. EPD Citizens Complaint Procedure

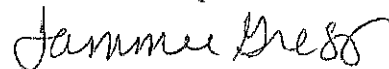
GO 2-5 makes no mention of this document, and its purpose is unclear. If this is an informational brochure prepared for the public, we recommend that it be rewritten with less police jargon and made more understandable to the general public. We recommend that the document make clear that EPD prefers that complaints be

³ We are providing comments on only three of the 15 attachments included with GO #2-5. We believe the other forms provided with this GO for our review are appropriate for use by EPD.

in writing, but that written complaints are not mandatory. We note that the document is somewhat confusing regarding the time frame for investigations, stating in one sentence that they may take "several weeks or longer" and in another that they shall be completed in 30 days. If the document is intended for public distribution, we recommend deletion of the section regarding officers' rights. Moreover, the discussion of Miranda and Garrity conflates administrative and criminal investigations and does not assist either officers or complainants. We reiterate our recommendation that all complainants be notified of complaint dispositions in writing. Finally, the notice at the end of the document is likely to discourage citizens from filing complaints, and we recommend its deletion.

Thank you for allowing us to review these policies and related documents. Please do not hesitate to contact me if we can be of further assistance. We look forward to working with you in your ongoing efforts to improve the quality of police services in Easton.

Sincerely,



Tammie M. Gregg
Principal Deputy Chief
Special Litigation Section

Enclosure

cc: Chief Larry Palmer
Easton Police Department

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