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Civil Rights Division

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

January 18, 2012

Via Electronic Mail and First Class Mail

The Honorable Eric J. Kellogg
Mayor
City of Harvey
15320 Broadway Avenue
Harvey, Illinois 60426

Chief Denard Eaves
Harvey Police Department
15301 Dixie Highway
Harvey, Illinois 60426

Re: Harvey Police Department

Dear Mayor Kellogg and Chief Eaves:

On December 12, 2008, the Special Litigation Section of the United States Department of Justice Civil Rights Division initiated an investigation of the City of Harvey, Illinois Police Department ("HPD"), pursuant to the Violent Crime Control and Law Enforcement Act of 1994, 42 U.S.C. § 14141. We have completed our investigation. We do not make findings that there is a pattern or practice of constitutional or federal law violations and are closing our investigation. However, we do conclude that there are serious deficiencies in the operation of the Harvey Police Department that create an unreasonable risk that constitutional violations will occur. This letter details the results of our investigation and provides recommendations for reform.

We conclude that HPD's system for reporting, reviewing, and investigating use of force is grossly deficient and creates a high risk of excessive force. The continued failure to collect data and use it to identify problems and mitigate future risk creates the opportunity for constitutional violations from a resulting pattern of incidents of unjustified or excessive force. Addressing these deficiencies should be HPD's highest priority, as we believe that these lapses, if not corrected, may result in unnecessary injury and/or loss of life to officers or civilians. These deficiencies also could expose HPD to significant legal liability.

We have reason to believe that the leadership at HPD will take appropriate measures to address the deficiencies we detail in this letter. Chief Denard Eaves and HPD staff have been helpful and professional throughout the course of our investigation. The City has provided us with access to records and personnel, and responded to our requests, before, during, and after our onsite visit. If appropriate measures are not taken, we may re-open our investigation.

The recommendations provided below were developed in close consultation with our police practices experts and follow the productive dialogue we had with HPD supervisors and officers and Harvey officials. Going forward, we strongly urge HPD to consider the technical assistance recommendations contained in this letter and the attached technical assistance report in revising its policies and procedures. We would be happy to provide you with examples of policies used by other police departments.

I. RESULTS OF INVESTIGATION

HPD first came to the attention of the Special Litigation Section in 2007 when there were numerous press accounts questioning HPD's use of force practices. The City of Harvey is located in the Chicago Southland region, approximately 20 miles south of downtown Chicago, Illinois. According to 2010 census data, Harvey has a population of 25,282, of which 76% are African-American, 19% are Hispanic, and 4% are white.¹ HPD consists of 61 officers: 40 patrol officers, 9 sergeants, 5 detectives, 5 commanders, a Deputy Chief, and the Chief.²

On January 24, 2007, a task force of the Cook County State's Attorney's Office, the Illinois State Police Public Integrity Unit, and the Cook County Sheriff's Office conducted a raid of HPD searching for records and evidence related to dozens of unsolved murders and other violent crimes.³ Reportedly, investigators were focused on locating evidence held by HPD but never used to bring cases to trial.⁴ During this same time, there were numerous press reports and private lawsuits alleging that HPD officers routinely used excessive force during and after arrests. Many of the encounters resulted in serious injuries to the subjects, including a fractured spine, broken jaw, fractured bones in the face and neck, head injuries, a dislocated shoulder, facial nerve damage, and broken teeth. In an interview with a local newspaper, an HPD employee who ran the HPD's holding cell said that HPD officers routinely beat and choked suspects and hog-tied them on the floor of their cells where they soiled themselves.⁵

Against this backdrop, the Special Litigation Section, aided by its expert consultants, conducted an in-depth analysis of HPD's operational policies and of all reported use-of-force incidents, applying the legal standard of objective reasonableness articulated in Graham v. Connor, 490 U.S. 386, 388 (1989). Uses of excessive force by police officers in the course of an arrest, investigatory stop, or other seizure violate the Fourth Amendment.⁶ Id. at 394-95. The analysis requires a balancing of "the nature and quality of the intrusion on the individual's

¹ Illinois Census 2010, <http://quickfacts.census.gov/qfd/states/17/1733383.html> (last visited Jan. 18, 2012).

² City of Harvey, http://www.cityofharvey.org/site2/index.php?option=com_content&task=view&id=43&Itemid=54 (last visited Jan. 18, 2012).

³ Matthew Walberg, et al., State, County Raid Harvey Police Force, Chicago Tribune, Jan. 25, 2007.

⁴ Id.

⁵ Jonathan Lipman, A Different Law Reigns Inside Harvey's Lockup, Daily Southtown, Jul. 23, 2006.

⁶ A seizure – i.e., by means of physical force or show of authority – is the event that triggers Fourth Amendment protections. Acevedo v. Canterbury, 457 F.3d 721, 724 (7th Cir. 2006) (citing Terry v. Ohio, 392 U.S. 1, 19 n.16 (1968)).

Fourth Amendment interests” against the governmental interests. *Id.* at 396; Abdullahi v. City of Madison, 423 F.3d 763, 768 (7th Cir. 2005). The criteria courts apply to assess an excessive force claim include the severity of the crime at issue, whether the suspect presents an immediate safety threat to the officers or others, and whether the suspect is actively resisting or attempting to evade arrest. Abdullahi, 423 F.3d at 768 (citing Graham, 490 U.S. at 396). Courts judge the reasonableness of the use of force “from the perspective of a reasonable officer on the scene, rather than with the 20-20 vision of hindsight.” Cyrus v. Mukwonago, 624 F.3d 856, 862 (7th Cir. 2010) (quoting Graham, 490 U.S. at 396).

In applying these standards to HPD practices, the Special Litigation Section and its consultants reviewed arrest and incident reports, disciplinary investigations, and citizen complaints from 2009 and 2010. Our overall assessment of HPD is that its system for reporting, reviewing, and investigating use of force is grossly inadequate. As a result, HPD is a department devoid of supervisory oversight and accountability, that tacitly endorses heavy-handed uses of force that were likely avoidable. While we did not find a pattern of harm, the failure to have an adequate system in place creates unreasonable risk. The failure to collect data and use it to identify problems and mitigate risk can in some instances be part of a constitutional violation.

Current common practices in policing require, at a minimum, documentation from the officer using force and an investigation by a supervisor or internal affairs into each use of force beyond soft hands or compliant cuffing. Reports of all use of force incidents need a thorough account of the resistance and use of force in order to properly explain the reasonableness of each level of force as it was employed. HPD reports lack these elements.

First, HPD officers’ reports fail to provide a sufficient description of the nature of the resistance encountered. Instead of describing the arrestee’s physical actions and behavior, the reports simply contain a summary statement that the arrestee was uncooperative, resisted, pulled away, or became combative. These one-word descriptions do not make clear whether the resistance was defensive, active, or assaultive. In 20% of the cases reviewed, there was no description of the nature of the resistance that preceded the use of force.

Second, the description of the force used by the officer in HPD reports is inadequate. HPD officers failed to provide sufficient description of the force or compliance technique they used to gain control. Rather, they used summary descriptions such as “I used the force necessary to subdue him” or “I used the force necessary to effectuate the arrest.” In one example, the reporting officer indicated that he deployed OC Spray “to effect the arrest” when the suspect was already under arrest and was being finger printed in the cell area. An officer’s use of force report should contain specific information regarding the force or compliance technique used. Failure to do so evinces a lack of accountability by the officer and can amount to a department sanctioned failure to provide sufficient information. Further, such a description does not provide the arresting officer with the proper documentation to testify regarding the matter months or years following the incident.

Of the cases reviewed by our consultants, at best ten percent might be considered to include an adequate description of the arrestee’s resistance and the officer’s actions. HPD’s failure to insist that its officers thoroughly document each use of force helps to foster an environment in which constitutional violations are more likely, as officers will know they will not be held accountable. See Kopf v. Wing, 942 F.2d 265, 269 (4th Cir. 1991) (noting that a

department's policy of destroying use of force reports after a short amount of time and of forbidding photographs of injuries caused by police dogs may create an impression among officers that any wrongdoing will not be documented or punished).

The failure to properly describe the resistance faced or force used makes it virtually impossible for HPD to know whether officers are using the appropriate amount of force, or if they are applying force in a constitutionally-suspect manner. See Vetter v. Dozier, No. 06-CV-3528, 2010 WL 1333315, *2 (N.D. Ill. Mar. 31, 2010) (noting that a "deliberate indifference case can be maintained on a willful blindness theory," where an investigation into allegations of officer misconduct was "patently perfunctory"); see also McKnight v. Dist. of Columbia, 412 F. Supp. 2d 127, 133 (D.D.C. 2006) (stating that a municipality may be liable for a constitutional violation "for its failure to investigate incidents of force, and by extension, its failure to discipline officers for use of excessive force"); Brown v. City of Margate, 842 F. Supp 515, 517 n.2 (S.D. Fla. 1993) ("The City must, however, acknowledge that allegations of a police department's failure to maintain thorough and accurate records of [complaints of excessive use of force] could be considered as evidence of deliberate indifference."), aff'd, 56 F.3d 1390 (11th Cir. 1995) (emphasis omitted); Cox v. Dist. of Columbia, 821 F. Supp. 1, 13 (D.D.C. 1993) (finding that municipality's "patently inadequate system of investigation of excessive force complaints constitutes a custom or practice of deliberate indifference to the rights of persons who come in contact with District police officers"), aff'd, 40 F.3d 475 (D.C. Cir. 1994).

In most of the cases reviewed, HPD officers failed to state whether or not the arrestee sustained any injuries or received medical care. The identities of assisting officers, with the common exception of the arresting officer's partner, are not included in the case report. Though several of the narratives identified supervisors who were on the scene when the incident took place, none otherwise indicated a supervisor was notified or called to the scene. While supervisors sign the reports, there is no indication they have taken corrective action to address the lack of information in use of force reports. In fact, it appears that supervisors continue to sanction or rubber stamp the reports as written. We found no indication that any supervisor approved or disapproved any use of force and no indication that any supervisor recommended an internal affairs investigation into any level of force used.

For example, in an incident involving the use of an ASP baton "to effect the arrest," the narrative does not specifically state that the officer struck the arrestee in the head with the ASP, but there is a note that the subject had a head injury that needed treatment (CRN 9919C-09). An ASP strike to the head would constitute deadly force. The report does not provide any information that the officer thought his life was in jeopardy or that he was in danger of serious bodily injury. There is no evidence that a supervisor was notified, responded to the scene of the incident or the hospital, or conducted an investigation into the ASP head strike.

Due to the inadequacy of the use of force reporting and review, and the policy deficiencies described below, we have serious concerns regarding the potential for excessive uses of force by HPD officers. As outlined above, examples of important factors to consider when determining the reasonableness of the force used are: the severity of the crime; whether the subject poses an immediate threat to the officer; and how the subject was resisting. Abdullahi, 423 F.3d at 768 (citing Graham, 490 U.S. at 396). In the cases reviewed, the most common offenses charged were minor ordinance violations where the officer came upon the subject allegedly violating an ordinance and subsequently used force to arrest the subject. In

almost half of the cases reviewed, the subject was arrested for what the officer deemed a failure to respect the officer's authority, commonly referred to as "contempt of cop."⁷ Because there is no official charge for "contempt of cop," officers often explain the interaction by charging the person with disorderly conduct, resisting arrest, and/or assaulting an officer. These arrests may be designed to justify use of force or other excessive authority where there may have been no legitimate justification for that exercise of authority.⁸

While it is difficult to reach a final conclusion without the benefit of civilian and officer witness statements, it is apparent that, at best, some of those incidents could have had a better outcome if the officer had employed different tactics. At worst, some of these incidents constitute prosecutable excessive force. Though most of the force used, with two exceptions, was low level – OC Spray or hard hands – some of that force was likely avoidable. Further, from the events documented in the files, it appears that HPD officers have been trained to reach for OC Spray before placing even soft hands on the subject.⁹ Additionally, it appears that it is not a common practice for the officers to give (when practicable) a warning to the subject before using the spray.¹⁰ Finally, when OC spray was used, the narrative did not indicate the duration or number of spray blasts. Only a few of the narratives reported flushing the OC from the subject. These deficiencies increase the likelihood that excessive force persists unchecked.

II. RECOMMENDATIONS TO REVISE POLICIES AND PROCEDURES TO ADDRESS AREAS OF CONCERN

Basic elements of effective policing include clear policies, training, and accountability. HPD's failure to provide sufficient guidance, training, and support to its officers, as well as its failure to implement systems to ensure officers are wielding their authority effectively and safely, have created an environment that permits and promotes constitutional harm. Courts have long acknowledged that deficiencies in systems and operations can unequivocally lead or contribute to constitutional violations. In City of Canton v. Harris, 489 U.S. 378 (1989), the Supreme Court held a municipality liable for failing to adequately train its law enforcement officers, recognizing that a law enforcement agency's inadequate practices and decision-making can cause constitutional harm. Id. at 387. The deficiencies in policies and procedures identified below and in the attached Technical Assistance Report must be corrected for legitimate, sustainable reform to occur. Without this comprehensive reform, HPD will maintain a high risk of unconstitutional conduct.

⁷ See Human Rights Watch, Shielded from Justice: Police Brutality and Accountability in the United States (1998), available at <http://www.columbia.edu/itc/journalism/cases/katrina/Human%20Rights%20Watch/uspohtml/uspo20.htm>

⁸ Id.

⁹ OC Spray falls above soft hands on a use of force continuum. A use of force continuum, as more thoroughly described in the attached Technical Assistance Report, is a diagram, guide, or chart that illustrates a progression of various descriptions of use of force that may be employed consistent with policy.

¹⁰ Deploying pepper spray without a warning, when feasible, can constitute excessive use of force. See, e.g., Graham v. Hildebrand, 203 Fed. App'x 726, 731 (7th Cir. 2006) (denying officer's motion for summary judgment where the officer "simply shot pepper spray without warning" "because a jury could find that a reasonable officer . . . would have known . . . that dispersing pepper spray in their faces was an excessive use of force").

Policies and procedures are the primary means by which police departments communicate their standards and expectations to their officers. Clear and well-drafted policies are essential to ensuring constitutional police practices. Officers need to know what is permitted and what is prohibited. Police managers need policies to guide their work and hold officers accountable. Accordingly, it is essential that HPD's policies be comprehensive, comprehensible, up-to-date, and consistent with relevant legal standards and contemporary police practices. Outdated policies and ineffective external oversight can exacerbate a police department's failure to ensure constitutional policing and erode the public's confidence in its efforts.

As we discuss in the attached Technical Assistance Report, several of HPD's policies and procedures are inconsistent with generally accepted police practices and are insufficiently detailed to provide the appropriate guidance for officer conduct. These deficiencies – even in general policies – can have a significant impact on the scope, quality, and effectiveness of HPD's efforts to investigate and review officers' uses of force and will be barriers to effective use of force policies. The recommendations made in the Report include:

- Reworking HPD's policies on use of force, including adding specific prohibitions against the use of excessive force, unwarranted physical force, or verbal abuse by HPD members. The policy also must have a continuum of control/force that dictates which level of force is authorized in accordance with the level of the subject's resistance, and should define key terms such as lethal force, less lethal force, and force. Finally, the policy must also have clear instructions on documenting use of force incidents, including a requirement to document and investigate any use of force involving a firearm, or resulting in injury to a civilian or an officer.
- Requiring HPD Watch Commanders to respond to the scene of any incident in which HPD officers use deadly force or any force that results in serious injury, to ensure that all injured are provided care, that the scene is protected, and that a complete and thorough investigation is initiated.
- Implementing an Early Intervention System ("EIS")¹¹ that contains information on all investigations and complaints regarding HPD officers, including non-sustained complaints, complaints prior to final disposition, discipline, and other supervisory corrective measures. The EIS should also include all uses of force, arrests and charges, searches and seizures, service calls, training, awards and commendations, sick leave, civil lawsuits, and other items relevant to an officer's conduct. HPD supervisors, including command staff, should regularly review this data for every officer they supervise to ensure that patterns of possible misconduct are identified, analyzed, and addressed properly by command staff.

¹¹ An Early Intervention System ("EIS"), or Early Warning System ("EWS"), is a data-based police management tool designated to identify potentially problematic behavior and allow early intervention to correct misconduct and assist in identifying deficiencies in supervision, management, and policies. Police departments typically use EIS data regularly and affirmatively to promote best professional police practices, accountability, and proactive management; to manage the risk of police misconduct and potential liability; to evaluate and audit the performance of officers and units; and to identify, manage, and control at-risk officers, conduct, and situations.

- Modifying the parameters of the internal affairs investigation procedures to complement those of the Cook County Public Integrity Task Force, including requiring internal affairs to conduct investigations of injury to suspects or allegations of excessive force not involving firearms or serious injury, and requiring an administrative investigation even when there is an ongoing criminal investigation of an HPD officer (unless it would jeopardize the criminal investigation).
- Revising HPD's process of handling citizen complaints against officers, including eliminating restrictions on the acceptance of anonymous complaints, and eliminating language in the policy that permits HPD employees to disregard complaints from intoxicated or mentally ill individuals, or complaints they consider to be minor in nature.

III. CONCLUSION

We strongly urge HPD to consider and adopt the recommendations in the attached Technical Assistance Report. If you have any questions, please do not hesitate to contact me at (202) 514-5393, Special Counsel Laura Coon at (202) 514-1089, or Trial Attorney Alyssa Lareau at (202) 305-2994.

Sincerely,



Jonathan M. Smith
Chief

Enclosure

cc: Patrick J. Fitzgerald
United States Attorney
for the Northern District of Illinois
(via Electronic Mail)