

Independent Civilian Panel
CASE REVIEW:2023-0002
Of
MDPD Files 2020-0479 and 2020-0374

The Miami-Dade County Independent Civilian Panel (ICP) is an impartial entity. Its mandate is to conduct independent investigations and review and hold public hearings regarding concerns or grievances made against sworn officers of the Miami-Dade Police Department any successor agency or any other law enforcement agency established by the Board. The ICP provides transparent assessments of the MDPD's work, progress, and obstacles. Based on those assessments, the ICP provides the MDPD with detailed recommendations on policy and practice. Most importantly, at the center of the ICP's work is the community. The ICP is responsible for issuing public reports to the people of Miami-Dade County and the MDPD regarding the state of policing in New Orleans. This case review is one such example and is created in conformity with the Miami-Dade County Code of Ordinances Chapter 2 – ADMINISTRATION, ARTICLE IC. - INDEPENDENT CIVILIAN PANEL Sec. 2-11.41.

The purpose of case reviews is to examine the misconduct investigations conducted by the MDPD to ensure they are compliant with law and internal policies, including CHAPTER 15 - PART 4 - COMPLAINT, COUNSELING AND DISCIPLINE

The Miami Dade County of Ordinances Chapter 2 - ADMINISTRATION, ARTICLE IC. - INDEPENDENT CIVILIAN PANEL, Sec. 2-11.48 requires the panel to publish a final report with regard to each matter investigated or reviewed. “Said final report shall be transmitted simultaneously to the Board, the County Mayor or County Mayor's designee, and the director of the Miami-Dade Police Department or any successor agency. **Within 45 days of receipt of the Panel's final report, the County Mayor or County Mayor's designee shall transmit a report to the Board and the Panel, which shall provide all actions taken in response to the Panel's final report and any related recommendations. The County Mayor or County Mayor's designee shall place such report on an agenda of the Board pursuant to Ordinance No. 14-65.** If the Panel has reason to believe that any public official, employee, or other person warrants criminal or disciplinary proceedings, it shall refer the matter to the appropriate governmental authorities.

PCB COMPLAINT TRACKING NUMBER (CTN): 2020-0374 and 2020-0479
ICP COMPLAINT TRACKING NUMBER(CTN): 2023-0002

COMPLAINANT: Jose Diez

INVOLVED MDPD EMPLOYEES: Officer Michael J. Mundy, Officer Armando Marquez, Officer Ruben Borja, and Officer Rachel Meadors

DATE OF INCIDENT(S): September 10, 2020

INVESTIGATING OFFICER: 2020-0374 Jenkins, Alan J.; 2020-0479 Major Gina Beato-Dominguez

INTRODUCTION

Mr. Diez was involved in a dispute with an employee of Enterprise Rent-A-Car on September 10, 2020. The police were called and were dispatched to a “violent customer trouble.”¹ Officers Mundy, Marquez, Borja, and Meador responded. During the interview conducted by Officer Mundy of Mr. Diez, Mr. Diez put his hands in his pockets. Officer Mundy told him three times to remove his hands from his pockets and Mr. Diez did not comply. Officer Mundy grabbed Mr. Diez by his arm and patted down each of his two pockets. He reached in and touched his wallet. Mr. Diez objected and asked why he been patted down and Officer Mundy said that it was for “officer safety.”²

Mr. Diez requested a supervisor and Sergeant Wehking responded and spoke with Mr. Diez at the scene. Sergeant Wehking reported that Officer Mundy was within the scope of his duties to pat down Mr. Diez³. He determined that no crime was committed nor were any policies or procedures violated by the officer. On the same day, Mr. Diez telephoned Lieutenant Brian Pfeiffer (Kendall District)⁴. Lieutenant Pfeiffer explained that he determined that Officer Mundy was within the scope of his duties and the pat-down was appropriate and that no crime was committed. Lieutenant Pfeiffer provided Mr. Diez with the telephone number for the Professional Compliance Bureau (“PCB”). Later that day, Mr. Diez called the PCB and spoke with Sergeant Mohamed on the phone. Mr. Diez claims that Sergeant Mohamed told him that he would conduct some research and call him back. According to Mr. Diez, during the conversation, Sergeant Mohamed told him that, “this would never have happened to me.”⁵ Mr. Diez explained that he wanted to file a formal complaint and it was not clear that the phone call was sufficient to initiate that process. He did not receive a call back from anyone on September 10th.

1 MDPD C

2 MDPD K

3 MDPD N

4 Correspondence from Lt. Pfeiffer is inside MDPD Case File # 2020-0374_R MDPD Exhibit A

5 MDPD A p. 4

On September 11, 2020, Mr. Diez went to the Internal Affairs Office but was not permitted entry due to Covid restrictions.⁶ He met with Sergeants Mohamed and Riggerbach outside of the building. While Mr. Diez explained the nature of his complaint, one of them said that they knew about this and to wait outside and the officers went into the building. Mr. Diez waited 20 minutes, and no one returned. He left and submitted a complaint to Mayor Carlos Gimenez. He complained that he was grabbed by his arm, patted down and the remark by Sergeant Mohamed.

On November 6, 2020, Mr. Diez filed an additional complaint.⁷ He had reviewed the body worn camera footage from the incident and found that Officer Borja had not activated his body worn camera at the onset of the call and that Officers Mundy and Marquez did not record the entire incident on their body worn cameras. A new Contact Report was initiated (CR2020-0479). Officer Borja was counseled. However, Officers Mundy and Marquez and Sargent Wehking were not investigated or found to be in violation.

Independent Civilian Panel Recommendations:

Upon review of the above referenced matter, the Independent Civilian Panel identified several areas of policy that the panel will study further. In addition, the Panel has prepared several recommendations for Miami Dade Police Department.

The Panel has directed the ICP staff to conduct the following reviews of MDPD data and is formally requesting access to information listed in **bold**:

1. Search, Pat Downs, and Reasonable Suspicion – The ICP staff recommends a review of all departmental training and directives related to articulation of reasonable suspicion incident to a pat down. ICP staff further recommend that we review all training for discussions of what is legally permissible to preserve officer safety.
 - a. **ICP requests access to training documentation for academy and in service training regarding Searches, Pat Downs, and Reasonable Suspicion. Documentation should include curriculum, tests, exercises, and any available training materials including recordings. If expedient, this request can be satisfied by having an ICP staff person attend academy and in service training on these subjects. Please provide these materials on or before July 15, 2023.**
2. Contact Reports Process – The ICP staff recommends a review of all policies governing the use of Contact Reports in lieu of formal investigation based on civilian complaints

⁶ ibid

⁷ MDPD B

and referrals from other agencies, including but not limited the State Attorney, other police jurisdictions, and Department of Children and Family Services. This review may include reviews of individual files and investigations.

a. The ICP requests access to all complaints that resulted in Contact Reports or Memos to File for January 2021- May of 2023

3. Civil Matters – The ICP staff recommends a review of MDPD policy and training relevant to instructions to officers responding to civil disputes to determine if a) officers understand their obligations in such disputes b) officers are properly trained to remain neutral between two parties engaged in a civil dispute and c) officers are properly trained to exclusively enforce law and to avoid engaging in the enforcement of a private business policies and to comply with Standard Operating Procedure Chapter 24, Part 3,⁸ Section which requires officers to remain neutral.

a. ICP requests access to training documentation for academy and in service training regarding Civil Matters. Documentation should include curriculum, tests, exercises, and any available training materials including recordings. If expedient, this request can be satisfied by having an ICP staff person attend academy and in service training on these subjects. Please provide these materials on or before July 15, 2023.

4. Access to Complaint Processes – The ICP staff is charged with reviewing the Miami Dade Police Department’s complaint procedures and their accessibility to the public.
- a. The ICP requests copies of complaint forms available to the public as well as the location of those forms, both digital and hard copy.**
- b. The ICP notes no requirements in Policy Chapter 15 regarding updates to the complainant or a final notice of disposition. The ICP requests any directives detailing the rights of complainants outside of Policy Chapter 15.**

The Independent Civilian Panel Further Recommends Miami Dade Police’s Professional Compliance Bureau open the following investigations into violations of the listed policies for each of the officers below. The Panel emphasizes that an investigation into the conduct of supervising officers is particularly appropriate.

ACCUSED OFFICER	ALLEGATION
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⁸ MDPD I

Michael J. Mundy	<p>Officer Mundy may have violated policy <i>CHAPTER 25 - PART 02 - SEARCH PROCEDURES</i>, Section II Paragraph B when he conducted a pat-down search of complainant Jose Diez without a reasonable suspicion that he was armed.</p> <p>Officer Mundy may have violated policy chapter 33 Body Worn Camera, Part I, Section II (F) when he muted his body worn camera without articulating an acceptable reason.</p>
Armando Marquez	<p>Officer Armando Marquez may have violated policy <i>Chapter 33 Body Worn Camera, Part I, Section II (F)</i> when he muted his body worn camera without articulating an acceptable reason.</p>
Sgt. Andrew Wehking	<p>Sargent Andrew Wehking may have violated policy <i>CHAPTER 15 - PART 04 Complaint, Counseling, and Discipline - Section C2</i> when he did not document a complaint from Jose Diez on the scene and instead instructed him to call the district Lieutenant or go to PCB to get a brochure.</p> <p>Sargent Wehking may have violated policy <i>Chapter 33 Body Worn Camera Part I, Section II (F)</i> when he muted his body worn camera without articulating an acceptable reason.</p> <p>1) Sargent Wehking may have violated policy <i>Chapter 02-Part 01- Management, Section 3, Paragraph F</i> When Sergeant Wehking did not question or correct his supervisee's arguably incorrect understanding of departmental policies regarding searches.</p>

REVIEW OF BODY WORN CAMERA

On September 10, 2020, Complaint Joe Diez was at the Enterprise Rental Car location at 9800 South Dixie Hwy. He and the clerk on duty had a disagreement about how much gas the car contained when it was rented at another location several months prior. The complainant states that, when he told the clerk that he was recording the conversation and followed the clerk inside the location, the clerk said he would call the police. Dispatch recordings indicate officers were dispatched for a “violent customer”.

Several officers including Officer Michael Mundy, Officer Armando Marquez, and Officer Rachel Meadors responded. While talking with the three responding officers, Mr. Diez put his hands in his pockets. Body worn camera footage from all three officers confirms that Mr. Diez had his hands in his pockets and Officer Mundy commanded him to remove his hands from his pockets. The complainant argued that he did not have to do so, and Officer Mundy can be observed grabbing his arm and removing his hand from his pocket. Officer Mundy then stated he would perform a pat down. Officer Mundy did not articulate a reasonable suspicion that Diez was armed. Body worn camera footage shows Officer Mundy stating that he is performing a pat down for reasons of “officer safety.”

The complainant asked for a supervisor to come to the scene. The body worn camera review confirms that Mr. Diez articulated two allegations. 1. That he was improperly searched because a) the responding officer had no reasonable suspicion to justify a pat down and b) that the officer conducting the pat down reached into his pocket, constituting a search. 2. The complainant also argued that no one asked him any questions but responded to the scene assuming he was a threat and had to be removed from the premises. The footage also shows Sergeant Wehking responding to these allegations by explaining the officers’ actions were for “officer safety” and instructing the complainant that, should he want to file a complaint, he should go to professional compliance bureau and “get a brochure.” Sergeant Wehking’s recording concluded with him giving the complainant the number for his police district and the name of his Lieutenant.

ICP ANALYSIS

I. Are there disciplinary charges not included in the PCB investigation which ICP asserts could have been brought?

Yes.

⁹ MDPD C

- 2) CHAPTER 15 - PART 04¹⁰ - Section C2 Complaints, Counseling and Discipline
Section C2 states,

“Whenever a complaint against an MDPD employee is received, the following will apply... 2. The information will be recorded on the Preliminary Complaint Report (Annex B) by a supervisor who will determine the urgency for follow-up action. If the concerned employee's supervisor is available at the time the complaint is received, he/she will personally respond and receive the information from the complainant. If the concerned employee's supervisor is not available, any supervisor within that employee's element will respond and record the complainant's information. If a supervisor is not available to record the complaint, any supervisor may authorize a non-supervisory employee to record the complaint. If a non-supervisory employee records the complaint, a supervisor will review the complaint to determine the urgency for follow-up action.”

The complainant spoke with a Sargent Wehking on the scene, Lieutenant Pfeiffer by phone and a PCB investigator Mohamed by phone and in person. In all those conversations, he was not offered an opportunity to review a written summary of his complaint as required in this section.

The complainant articulated two allegations in the first complaint (0374) - a) illegal search b) failure to investigate and c) battery and one in the second (0479) violation of Body Worn Camera policy because of frequent muting of the camera. Despite his clear articulation of an illegal search allegation, no investigation beyond a review of the body worn camera footage was conducted.

Additionally, the on-scene Sergeant and Lieutenant did not follow the requirement that "Complaints against any MDPD employee will be accepted at all departmental facilities, from any source, regardless of the location of the alleged occurrence."¹¹ Instead, the Sargent told the complainant to go to a district office and get a professional compliance bureau brochure.

¹⁰ MDPD G

¹¹ Ibid.

3) **CHAPTER 25 - PART 02 - SEARCH PROCEDURES¹²**

Section II, Paragraph B states:

"During a Terry stop, if there is reasonable suspicion to believe that the subject is armed with a dangerous weapon, the subject may be frisked or patted down only to the extent necessary to disclose, and only for the purpose of disclosing, such weapon. Some factors that may cause an officer to believe that the subject is armed with a dangerous weapon, which would allow for a frisk or pat-down, include:

- a. The subject's inability to account for his presence in the area.*
- b. The subject's behavior, attitude, or demeanor upon being stopped.*
- c. Bulges that may be indicative of a concealed weapon.*
- d. Whether the suspected crime (i.e., purpose of the stop) involves the use of weapons."*

Officer Mundy and Sargent Wehking both articulated that the reason for the frisk was "officer safety" but neither articulated a reasonable suspicion that Mr. Diez was armed. In fact, in Sargent Wehking's body worn camera recording, time stamp 5:30¹³, the complainant argues that the responding officer misinterpreted Terry v Ohio and Sargent Wehking disagreed with him for several minutes. Although the search policy mentions "officer safety" three times, it never names it as a justification for a frisk.

Officer Mundy may have violated this policy when he conducted a pat-down and can be observed reaching into a pocket. Sargent Wehking did not violate policy but may have improperly advised his supervisees.

4) **Policy Chapter 33-01 Body Worn Camera (Published 07/08/2020)**

In ICP review of body worn camera footage, we noted several incidents of the camera being muted. Policy 33-01, Section 3, Paragraph II-B-F states,

"While on the scene of an incident, officers engaging in an administrative, investigative, or legal conversation with a supervisor, officer, police legal advisor, union attorney or employee

¹² MDPD F

¹³ MDPD N

representative shall activate the “mute mode” as follows:

- 1. State the reason for muting the conversation. For example, say “I am about to mute my conversation with my union attorney.”*
- 2. If the conversation is in person, turn the BWC camera away from the conversation (i.e., point the camera down).*
- 3. Mute the conversation.*
- 4. Once the conversation is over, deactivate “Mute Mode” and continue recording until the conclusion of the incident.*

Officer Mundy, Officer Marquez, Sargent Wehking muted their cameras (timestamps attached)¹⁴ but none of them articulated a reason why.

5) Chapter 02-Part 01- Management

Sergeant Wehking did not question or correct his supervisee’s arguably incorrect understanding of departmental policies regarding searches.

Section 3 – Management, Paragraph F states “*A field supervisor is the first level of supervision and has a primary responsibility to guide, train, direct, and motivate subordinates.*” The Sargent’s conduct in this matter may constitute a violation of departmental policy in his alleged failure to correct or investigate his supervisee’s conduct related to searches.¹⁵

II. Were there any other ICP concerns with the investigation and if so, what allegation do they pertain to?

Because this was a Contact Report, no investigation beyond review of Body Worn Camera was conducted.

¹⁴ ICP F

¹⁵ MDPD I

III. Should training or other programs have been required of the accused employee?

Yes. Although Officer Borjas received supervisory counseling about activating his body worn camera when he receives a call for service, no other officers were counseled about departmental directives regarding the muting of body worn camera, about directives regarding proper frisks and searches, or about departmental directives regarding supervisors' responsibilities to process complaints.

IV. Does the investigation suggest policy/procedure, other risk management or liability issues that were not adequately addressed by the Department?

a. Treatment of Civil Disputes

This dispute was related to a civil matter. Despite dispatch using the phrase "violent subject", there was no evidence of the calling employee articulating a reasonable threat. [Note: ICP requested a copy of the 911 call but the recording from 2020 was not retained.] At most, the potential "crime" was trespassing. Responding officers got very involved in matters of private business policy and did not really ask any questions to determine if trespassing was occurring. Florida State Statute 810.08¹⁶ defines trespass as, "Whoever, without being authorized, licensed, or invited, willfully enters or remains in any structure or conveyance, or, having been authorized, licensed, or invited, is warned by the owner or lessee of the premises, or by a person authorized by the owner or lessee, to depart and refuses to do so, commits the offense of trespass in a structure or conveyance." The BWC footage did not contain any officer asking the Business's employee if he had asked his customer to leave. The complainant stated that he was told not to enter the building and that he filmed from the doorway. There was no allegation of theft from the Enterprise employee, yet officers spent 20-30 minutes getting keys returned. Further, at least three officers remained on scene for over 40 minutes to resolve this civil dispute and took a default position in favor of the Enterprise employee by assuming that the customer/complainant Diez was trespassing.

b. The use of "Contact Reports" in lieu of Investigations:

This Reviewer assessed MDPD Policy CHAPTER 15 - PART 04 - COMPLAINT, COUNSELING, AND DISCIPLINE for guidance about contact reports. Specifically, a) who can decide that a contact report is sufficient, and no investigation is required b) what are the information gathering standards for contact reports and c) in the instance where a complaint was classified as a contact report, what recourse does the complainant have to appeal and ask for a full investigation. The phrase "Contact Report" does not appear in this policy.

¹⁶ ICP H

Professional Compliance Bureau Standard Operating Procedures, INTERNAL AFFAIRS OPERATIONS AND PROCEDURES SECTIONS 7, Section III covers contact reports¹⁷. It states:

“Whenever a contact is made wherein the criteria for a PCR [Preliminary Complaint Report] does not exist, when the complainant prefers to have their complaint investigated informally at the District or Bureau level, or when it is determined to be in the best interest of the complainant, a Contact Report will be prepared.”

The policy further states that, when a contact report is deemed appropriate, it is the Duty Sargent’s responsibility to complete it and route it to Internal Affairs Section Lieutenants for review and signature.

ICP has made inquiries to the Professional Compliance Bureau to determine where the criteria for a Preliminary Complaint Report are recorded. In an email dated May 11, 2023, Captain Y. Sosa wrote “48 - 50 of the PCB SOP will list the criteria for incidents that are fully investigated by PCB. Additionally, Annex FF has the callout criteria.¹⁸” The relevant standards are listed as follows:

5. Memo to File (MTF)

a. A memorandum completed under circumstances when the completion of a formal investigation is not appropriate. Investigators should notify their supervisor at the earliest opportunity that a case meets the criteria of a MTF. The PCB command staff must approve all MTF. A MTF may be sent out of the Bureau for review at the PCB Major's discretion and becomes public record after PCB staff review.

b. Close out letters will be sent to the complainant if notification has not been documented in the MTF. If allegations are detrimental, the PCB Major may find it appropriate to notify the subject officer of the existence of the file.

c. A MTF can be prepared when:

(1) The allegation(s) do not include a violation of law, departmental rules, policies, or procedures. The complainant voluntarily signs a Complaint Resolution Form and/or provides a recorded statement withdrawing the complaint, and no further investigation is deemed appropriate. Complaint Resolution and Non Prosecution Forms should only be utilized when the complainant recants the allegations and advises the incident did not occur. The complainant's lack of cooperation with an investigation is not sufficient enough to

¹⁷ MDPD H

¹⁸ ICP I

obtain the signatures on the forms. If the complainant recants the allegations both forms need to be signed by the complainant. Additionally, the complainant will be requested to provide a recorded statement to the same. All investigations whereby Complaint Resolution and Non-Prosecution Forms are obtained, or the complainant refuses to cooperate further, will be presented to PCB command staff for determination of appropriate action. (See IAS Annexes H and I)

(3) There is insufficient information to objectively investigate the allegation(s) at this time.

(4) At the discretion of the PCB command staff when in the best interest of the Department.

(5) Other investigations assigned as deemed necessary by the PCB Major, PCB Captain or IAS Lieutenant.¹⁹

This policy suggests that Mr. Diez's complaint was not appropriate for a memo to file. According to Captain Sosa, these same standards apply to a contact report. Further, the policy also does not define, as it does in Section IV Complaint Procedures, what the work quality and investigative standards are for a Contact Report. Investigations are required to interview witnesses and collect evidence. No such standard is articulated for contact reports.

This process merits further review as it runs the risk of denying complainants due process of their complaints and exposes the Department to risk by failing to address policy violations and misunderstandings of law and constitutional rights by its officers.

¹⁹ MDPD P