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Mayor

Department of Police · City of Chicago  
3510 S. Michigan Avenue · Chicago, Illinois 60653

David O. Brown  
Superintendent of Police

April 25, 2022

Andrea Kersten  
Chief Administrator  
Civilian Office of Police Accountability (COPA)  
1615 W. Chicago Ave., 4<sup>th</sup> Floor

Re: Superintendent's Non-Concurrence with COPA's findings  
Log # 2021-0001161  
Officer Evan Solano #12874 and Officer Sammy Encarnacion #11790

Dear Chief Administrator Kersten:

Based on a review of the above-referenced complaint register (CR), the Chicago Police Department (CPD) does not concur with the recommended findings and penalty for Officer Solano as related to four sustained findings as well as three sustained findings against Officer Encarnacion. CPD does concur with three of the sustained findings against Officer Solano and Officer Encarnacion, but has an alternate penalty recommendation. In accordance with Municipal Code of Chicago, MCC 2-78-130, the Superintendent provides the following comments when there is a disagreement as to the investigative findings and proposed penalty.

### USE OF FORCE

COPA sustained an allegation in that Officer Solano's used of deadly force was not objectively reasonable. The evidence, however, does not bear out this conclusion and is therefore legally insufficient.

In their Summary Report of Investigation (SRI), COPA summarized the evidence reviewed, including all reports, videos, and statements, and concluded that events unfolded in essentially the manner as related by the accused, Officers Solano and Encarnacion.<sup>1</sup> Video substantiated the various statements, and Officer Solano and Encarnacion gave an honest accounting of what transpired.

The evidence demonstrates that Officer Solano and Encarnacion observed [REDACTED] who'd fled in his vehicle from the officers the night before after they observed [REDACTED] driving on a suspended driver's license, walking on Laramie Ave. After following [REDACTED] into a gas station lot, Solano and Encarnacion activated their emergency lights. At this point, [REDACTED] dropped the drink and bag he was carrying and fled on foot, holding his waistband, westbound on Addison. Upon [REDACTED] fleeing through an open gangway, Solano and Encarnacion both exited their police car and pursued [REDACTED] on foot. [REDACTED] continued eastbound down an alley, at which point Solano passed Encarnacion. [REDACTED] then fled southbound on Laramie and turned to continue westbound on the front lawns of the north side of Eddy Street. While turning the corner, [REDACTED] looked back at Solano, fell twice, got up twice, maintained possession of the firearm in his hand, and continued to flee while looking back at Solano a second time. Solano ordered [REDACTED] to drop his gun twice, both of which were ignored. [REDACTED] continued his flight with the firearm in his right hand, and made a move as if turning towards Solano. Solano fired his weapon at

<sup>1</sup> COPA Summary Report of Investigation #2021-0001161 at p. 37.

Alvarez, striking him 5 times. ██████ fell on the front walk of 5202 W. Eddy, and dropped the firearm from his Chief Administrator Kersten  
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right hand. The firearm that ██████ had been holding in his right hand was recovered and found to be loaded with 14, 9mm rounds, including one in the chamber. Encarnacion immediately rendered aid to ██████ and Solano requested an ambulance which transported ██████ to ██████ where he ultimately succumbed to his wounds.

The CPD use of force directive in effect at the time of this incident, General Order G03-02, states:

“The main issue in evaluating every use of force is whether the amount of force used by the member was **objectively reasonable in light of the totality of the circumstances faced by the member on the scene.** Reasonableness is not capable of precise definition or mechanical application. Factors to be considered by the member include but are not limited to:

- a. Whether the subject is posing an imminent threat to the member or others.
- b. The risk of harm, level of threat or resistance presented by the subject.
- c. The subject’s proximity or access to weapons.”

According to General Order 03-02, “a threat is imminent when it is objectively reasonable to believe that the subject’s actions are immediately likely to cause death or great bodily harm to the member or others unless action is taken; and the subject has the means or instruments to cause death or great bodily harm; and the subject has the opportunity or ability to cause death or great bodily harm.”<sup>2</sup> Based on the evidence presented, all three of the above factors were present and it was objectively reasonable for Officer Solano to use deadly force.

In their Summary Report of Investigation (SRI), COPA states it was not objectively reasonable for Officer Solano to believe that ██████ actions were not immediately likely to cause death or great bodily harm unless action was taken.<sup>3</sup> COPA, in the SRI, then goes on to spell out their rationale for why Solano’s use of force was not objectively reasonable.

First, COPA concludes it was not objectively reasonable for Solano to believe ██████ posed an imminent threat. COPA claims that ██████ gun was not pointed at, nor moving towards Solano at the time Solano shot. This statement is not supported by the video and even if it were, COPA’s analysis is still flawed. The totality of the circumstances – ██████ flight while holding a firearm in his right hand, falling to the ground twice, getting up twice while retaining possession of the firearm, looking back at Solano twice, ignoring to commands to drop his gun, and beginning to turn towards Solano, all while maintaining possession of a firearm in his right hand – taken as a whole form the basis for Solano’s actions. In his statement to COPA, Solano stated that during the foot pursuit he turned the corner (from Laramie onto Eddy) and saw ██████ “kind of on the floor and it -- his -- the gun was in his right hand and it looked like he was setting up for a possible ambush or to make himself a better -- to put himself in a better position to shoot me and my partner.”<sup>4</sup> When asked, Solano answered that he did not shoot ██████ solely because he was in possession of a firearm. Faced with the circumstances known to Solano, he reasonably believed he was confronted with a threat of death or great bodily harm.

<sup>2</sup> General Order 03-02(III)(C)(2)

<sup>3</sup> COPA SRI Log #2021-0001161 at Pg. 39

<sup>4</sup> Att. 217, lines 5-9

COPA opines that ██████ looking back at Solano while fleeing on foot is inherent to someone getting chased, and Chief Administrator Kersten  
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that if looks over the shoulder were sufficient to establish an imminent threat, officers would be justified in shooting every fleeing subject.<sup>5</sup> The act of looking back by ██████ was one of the several factors Solano considered during the encounter, not the only one. It is important to note, that during an incident months prior, ██████ fled on foot and was placed into custody by Solano without further incident.

Next, COPA states that a reasonable officer with police training would recognize that many subjects flee with firearms with the intention to escape and avoid criminal liability, not shoot police.<sup>6</sup> While this is certainly true, it has no place in the analysis of this incident. In this case there were no facts or circumstances present for Officer Solano to make that conclusion. On the contrary, Solano believed, based on ██████ actions, specifically holding the gun in his right hand, appearing to be setting up for an ambush, retaining possession of the gun after getting up from the ground two times, ignoring two orders to drop the gun, looking back at Solano two times, and turning while still holding the firearm in his right hand, that ██████ was going to shoot Solano or his partner.

In its SRI, COPA also helpfully points out that a reasonable officer would recognize that many subjects discard firearms during flight<sup>7</sup>. Again, this is true, but is not what happened. ██████ had ample opportunity to discard his firearm during flight, but didn't. COPA does not address what a reasonable officer would think when an armed subject maintains possession of an unholstered and unconcealed firearm, does not discard the firearm for the entirety of a foot pursuit though given ample opportunity, looks back twice at the pursuing officer, and ignores two verbal commands to drop a weapon. The reason COPA does not address this is likely because it is unreasonable to believe that a person attempting to only "escape and avoid criminal liability" would do what ██████ did.

Finally, COPA concluded that Officer Solano failed to use de-escalation techniques in violation of Department policy. According to the directive at the time:

"Members will use de-escalation techniques to prevent or reduce the need for force when it is safe and feasible to do so based on the totality of the circumstances..."<sup>8</sup>

De-escalation techniques are a useful tool if the officer has time to attempt them, and is in a location where a subject can be isolated and contained. Solano was outdoors chasing an armed offender down an alley, and then a city street. The opportunity to use any techniques to isolate and contain ██████ never presented itself. Solano stated that he used his verbal directions and commands to attempt to de-escalate. Solano also stated he attempted to create distance from ██████ to avoid his line of fire.<sup>9</sup> This was a tense, rapidly evolving situation that began as an attempted street stop, became a foot pursuit for a possible weapons violation, and concluded as an encounter with an armed offender. Solano was forced to make split-second decisions for this brief and dynamic encounter. The benefit of hindsight allows for COPA to proclaim that Solano should have used de-escalation techniques. However, as the General Order in effect at the time stated, those techniques are to be utilized only if safe and feasible. This situation was neither.

The Police Board, in a substantially similar case, determined that the officer's use of force was reasonable

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<sup>5</sup> COPA SRI Log #2021-0001161 at Pg. 40

<sup>6</sup> Id.

<sup>7</sup> COPA SRI Log #2021-0001161 at Pg. 40

<sup>8</sup> G03-02; in effect from 29 Feb 2020-15 Apr 2021

<sup>9</sup> Att. 217

and found that the Superintendent did not meet his burden of proof in seeking separation. (In the Matter of Charges Filed against Police Officer Brandon Ternand, No. 17 PB 2940). In that case, Officer Ternand pursued a teenager who he had observed with a gun in his waistband. At a certain point in the foot pursuit, the teen turned and reached for his side, and Officer Ternand, fearing the teen was reaching for the gun officers had previously seen in his possession, fired, striking the teen in the back of the head, killing him. It was later discovered that the gun was no longer in the teen's possession

While acknowledging that the incident was a terrible tragedy, the Board found that under the totality of the circumstances Officer Ternand's belief that the teen was armed and moving toward the gun in his waistband with intention to shoot him was reasonable, and Officer Ternand's use of deadly force was justified:

"The Board found the testimony of Respondent to be credible and persuasive that before he shot Mr. Bright, he observed Mr. Bright turn around, look at him, and reach for his left side, which gave rise to Respondent's reasonable fear for his safety and life in that he believed that Mr. Bright was reaching for the gun of which the officers had previously seen him in possession and was going to shoot him." (Id. at pg. 4)

COPA's proffered rationale for finding Solano's actions to be an unreasonable use of force — [REDACTED] was just trying to escape, [REDACTED] looking back at Solano are actions that a person trying only to escape would undertake are speculative and attenuated at best; they do not add up to a preponderance of evidence that Solano's belief that deadly force was necessary was not objectively reasonable. The evidence is legally insufficient to sustain COPA's allegation.

### FOOT PURSUIT

The allegations against both Officer Solano and Encarnacion that they acted inconsistently with their training when deciding to engage in a foot pursuit and when deciding to continue the foot pursuit are not supported by a preponderance of the evidence and are not legally sufficient.

First, it is debatable if a 5-page document listing "risks to be considered" as well as "factors to be considered" when engaging in foot pursuits, qualifies as training. It was incumbent upon each member to read this document on their own, with no opportunity to ask an instructor to clarify any confusing ideas or vague terms. Without opportunity to get clarification from an instructor on how to act consistently with the training, it is hard to conclude that Solano and Encarnacion acted inconsistently with their training. Moreover, the bulletin is littered with terms like "to be considered" "should consider" "factors to be considered" "when making the decision to pursue". These terms and phrases do not present as training that must be followed, but more as suggestions for the officer to consider before engaging in a pursuit.

Putting all that aside, COPA, in its SRI states that Officers Solano and Encarnacion did not properly apply the "balancing test" when deciding to engage in the foot pursuit.<sup>10</sup> First, Education and Training Bulletin 18-01 "Foot Pursuits Training Bulletin" states at the very top in bold letters "**Department members will engage in a foot pursuit only when they have reasonable articulable suspicion to conduct an investigatory stop or probable cause arrest.**" Next, the bulletin makes no mention of a "balancing test".

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<sup>10</sup> COPA SRI LOG #2021-0001161 pg. 42

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In their SRI, COPA states that Solano and Encarnacion “had probable cause to arrest Mr. [REDACTED] for driving while his license was suspended on the night prior.”<sup>11</sup> Based on that alone, the finding that Solano and Encarnacion acted inconsistently with their training when deciding to engage in a foot pursuit is not legally sufficient.

Ignoring that there is no “balancing test” laid out in the ETB that COPA relies on, it must be pointed out that Solano and Encarnacion in their 2<sup>nd</sup> statements to COPA both laid out factors they considered when deciding to engage in and continue the foot pursuit. Those factors include that there were two officers chasing one offender, the lack of vehicular and pedestrian traffic, there was no crossing of streets during the pursuit, the area of the pursuit was well lit by artificial light with clear weather, there was no hopping of fences or overcoming obstacles. Because none of these factors were present, many of which are listed as factors to be considered in the training bulletin, the Officers correctly decided to engage and continue their foot pursuit.

Next, COPA suggests that because Solano and Encarnacion had already identified [REDACTED] they should not have continued the foot chase and simply arrested him at a later time, due to the nature of the offense he was initially wanted for. This reasoning would be sound except for the fact that in addition for being wanted for driving on a suspended license, they were also investigating a possible weapons violation. In that case, immediate apprehension would be preferred as the possibility that [REDACTED] would hide or conceal the firearm he was carrying should he not be immediately apprehended is very high. Additionally, on the night [REDACTED] fled from Solano and Encarnacion in his vehicle, Solano and Encarnacion went to [REDACTED] listed address and [REDACTED] never returned. There was no way to be certain the [REDACTED] even lived at the address listed on his registration. Based on the above, the finding that Solano and Encarnacion acted inconsistently with their training by continuing to engage in the foot pursuit is not legally sufficient.

#### **ALTERNATE PENALTY FOR OTHER SUSTAINED ALLEGATIONS**

CPD concurs with the sustained findings that Officer Solano and Encarnacion failed to comply with S03-14 by failing to timely activate the body-worn camera, failing to properly load their firearms in violation of U04-02 (II) (H), and acting inconsistently with their training under ETB 18-01, Foot Pursuits Training Bulletin, by failing to make required notification to OEMC, but disagrees with the penalty recommendation.

Officer Solano and Officer Encarnacion have both received numerous awards for their exemplary service to the Chicago Police Department and the City of Chicago. In the case at hand, both officers attempted to administer first aid on Mr. [REDACTED] in accordance with their LEMART training, and continued to do so until relieved by other officers. While the sustained allegations need to be addressed and corrected, they are infractions for which separation or a substantial suspension are not warranted. Accordingly, CPD recommends an alternate penalty of a 20-day employment suspension for both Officer Solano and Officer Encarnacion.

Sincerely,

[REDACTED]  
David O. Brown  
Superintendent of Police  
Chicago Police Department

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<sup>11</sup> COPA SRI LOG #2021-0001161 pg. 42