

Public Report

Review of BART PD Policies, Practices and Procedures Re: New Year's Day 2009

Submitted to:



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I. INTRODUCTION

This report provides a review and assessment of whether BART Police Department policies, practices and procedures relevant to the January 1, 2009 New Year's Day shooting incident at the Fruitvale BART Station conform to state and federal laws, as well as align with the best practices of the policing profession. Our review of BART's policies and general orders revealed a number of areas within the BART PD as a whole that can be improved. A summary of each of those areas and recommendations particular to each follows.

II. POLICY MANUAL AND GENERAL ORDERS

The BART Policy Manual contains policies, general orders, standard operating procedures and the fire manual. Several problems with the policy manual are noted in our report.

Most significantly, the manual has not been kept up to date in many areas. Although the manual's cover states it was updated in January 2008, many policies have not been updated since the late 1970's, 1980's or 1990's. The manual as a whole needs a complete review and all of the policies should be updated at least on an annual basis to insure compliance with current law and best police practices. This is a document that BART police officers should be trained on, receive updates to and to use as a reference to guide them in their daily activities.

III. TRAIN TACTICS

BART PD Operational Directive No. 67, dated April 18, 1986, outlines the basic tactics to be used when searching a train. The protocols, if followed, allow for a methodical, well thought out plan as to how to handle a hazardous situation on a train. The protocols outlined in the directive were not followed in the New Year's Day incident. The protocols delineate "Hazardous Train Searches" from "Non-Hazardous Train Searches." The subject incident can best be described as a hazardous situation, with large crowds and multiple combatants. BART PD protocols state:

- Responding officers should be provided with "all" available information about the call.
- At least three officers should be dispatched to the scene when possible and outside agencies should be used if necessary.
- Officers should use available cover or concealment whenever possible, work as a team to disembark patrons, maintain Station perimeter, etc.
- Search the train using a "leap frog" tactic from door to door working as a team.

These protocols were, in large part, ignored during the New Year's Day incident. These basic tactics should be reinforced with all BART PD officers and practiced and refined routinely.

IV. TEAMWORK, SEPARATION AND CONTACT – COVER

The tactical concepts of "work as a team," "stay together" and "contact – cover" are well known to law enforcement. There was minimal evidence of these concepts being applied during the New Year's Day incident. BART PD officers worked independently of each other, thus reducing their potential effectiveness and increasing their risk of being assaulted. While the environment of an incident can well cause officers to

want to “rush” through the incident, police work is best done when working together as a team in a methodical fashion.

During the New Year's Day incident, officers should have confronted a limited number of suspects, worked as a team, with at least one officer covering while the other(s) searched and/or handcuffed the individual(s). There were at least five detained persons, none of whom were searched. A more effective tactic is to line up all detainees facing away from the officers. While one or more officers guard the detainees, one officer pulls one detainee to the rear of the other detainees and completes a thorough search. The searching officer then goes down the line searching each detainee in a slow, methodical manner. While this tactic takes more time, it ensures a high degree of coordination and slows the tactical event down to assert control.

During this incident, the actions of most BART PD officers on scene did not appear to keep with the best practices of working as a team or contact – cover. For example, officers separated from each other and multiple officers attempted to search or control suspects. The more chaotic the situation, the more finely controlled police tactics have to be practiced.

V. TACTICAL COMMUNICATION AND LEADERSHIP

Leadership and communication within BART PD was lacking during the New Year's Day incident. No one appeared to be in charge of the situation. The first and/or senior officer on scene should have been the incident commander. The incident commander could then have calmed things by asserting command and control. The incident commander should have directed the activities of responding officers. He/she should not have been engaged with any detainee once other officers arrived on-scene.

In this case, on-scene command and control by a supervisor or senior officer would have slowed down the scenario, provided officers with direction, forced officers to work as a team and limited force used. Further, it would have communicated to the detainees and the witnessing passengers that the BART PD was well in charge of the incident. Instead, the lack of command and control communicated there was no control. BART PD should develop and publish a policy-level document that outlines department expectations that supervisors and senior officers assert command and control over a situation as a primary responsibility. Policy documents should be developed to institutionalize the four “A’s” of tactical leadership. Once command is established and asserted, the leader must:

- Assess: Determine what is happening, tactical resources needed, potential threats, etc.
- Announce: Request additional resources. Provide a mental image of what is occurring and also provide direction to responding personnel.
- Assemble: Take command of the personnel on-scene. Provide direction upon assemblage.
- Act: Enact the plan.

VI. TASER POLICY AND PROTOCOLS

BART PD policy and training is approved by the California Commission on Peace Officer Standards & Training (POST), which allows officers to carry the Taser on the strong side of the belt so long as the Taser is positioned for a cross draw with the off (weak) hand. However, having two similar feeling weapons, the Taser and the firearm, in close proximity is the less favored method in nationwide best practices. BART PD

should consider requiring a cross draw with the strong hand or a weak hand/weak side carry only for deployment. Industry experts opine that this will help prevent inadvertent deployment of the Taser when deadly force is intended and vice versa.

During the New Year's Day incident, the laser on the Tasers was often pointed in unsafe directions. The safety rules for firearms also apply to Tasers and must be followed.

Where BART PD officers deployed the Taser when they believed suspects may potentially be in possession of deadly weapons some issues were identified. The Taser is not a substitute for deadly force. If deadly resistance is anticipated, then the firearm should be deployed. If less than deadly resistance is anticipated, then the Taser may be deployed. The BART PD policy should be updated to reflect this enhancement. Arrest reports, particularly when force or threatened force is used, are a very useful tool to adjust and enhance tactics and manage risk. In the future, arrest reports should be more closely scrutinized.

BART officers should receive additional training in the use of the Taser. The training should include the concept of the "combative suspect control team." Under this tactical scheme, officers confronting a hostile person use a team approach when possible to handle that incident. Under the direction of a team leader, usually a sergeant, each officer deploys a different force option, such as a Taser, beanbag shotgun, deadly force and an arrest team. The officers then coordinate actions, using different force tools, to control the subject.

VII. INTEGRATION OF TACTICAL CONCEPTS

The above tactical concepts are not stand alone recommendations. They must be integrated with each other to properly enhance the training of BART PD officers. For instance, officers should approach a scenario on a train by applying the four "A's" and not by becoming involved in separate incidents. If they confront multiple suspects, then additional resources should be immediately requested. While awaiting those resources, the officers should work as a team and remain in a position of advantage. When other resources arrive, one officer must assume the role of the incident commander, and direct the responding officers to take various actions such as search suspects, locate witnesses, etc. Additionally, the detention, search and ultimately the arrests of the suspects must be achieved in the methodical manner previously described.

Furthermore, the Taser is only a singular force option that should be integrated into the tactical mesh of the operation. It is not a stand alone force tool. It is part of the array of force options that should be available to officers confronting suspects. BART PD should be trained in the combative suspect control team concept, again establishing on-scene command and control. This scenario will provide BART PD officers with tactical skills to deal with violent and aggressive subjects and also to slow the tactical scenario down to assert command and control over it.

VIII. COMMUNICATIONS AND SUPERVISORY RESPONSE

The New Year's Day incident was examined for not only what occurred but for what did not occur. Communication failures were prominent. The information provided by the train operator provided little insight to the responding officers. In effect, the initial officers responded to the call of a disturbance without

having a firm picture of what was taking place. It remains unclear if the right persons were detained, and in any event the officers had to determine that during very difficult circumstances. BART PD dispatch should insist on obtaining additional information whenever possible to provide responding officers with more information to better plan tactical responses.

In spite of the rapidly escalating nature of this situation that was evident on the radio, there were no BART PD supervisors on-scene. The escalation of the incident should have prompted a response by supervisors to assume command and control of this situation. BART PD provided no documentation that spoke to the expectations of supervision to establish on-scene command and control of such incidents. Plainly put, the expectation of supervision must be that they respond to tactical events, assume command of those events and assert field level control. In this case, an experienced supervisor would have proven invaluable in controlling the scene, managing resources, directing the force actions by officers, etc. Instead, the situation had no apparent leadership. Senior BART PD staff must communicate the expectation of field level supervision asserting command and control of the tactical situation.

IX. USE OF FORCE REPORTING

The institutional practices of reporting use of force incidents within BART PD are substandard. Current policy requires officers to report to a supervisor when they use force only in those circumstances where significant force was used. That policy allows for officers to immediately report the use of force or if necessary, report it before the end of watch. In practice, it allows officers to wait to report the force after the salient witnesses have left the scene. Further, there is no mandated commentary about the actions of field supervisors at the scene of a use of force incident.

Uses of force must be investigated more thoroughly. When a use of force incident occurs, a supervisor should respond and conduct an immediate on-scene investigation. The scene should be canvassed for witnesses and evidence, such as video. If a supervisor is there during a use of force incident, the actions of the supervisor should also be subject to review. Thereafter, the reports should be reviewed for training and risk management opportunities.

BART PD limits its use of force findings to justifiable and not justifiable. It is not known when the last unjustifiable use of force occurred within BART PD, however, the force used is only part of the equation. The tactics leading up to, during and after the use of force incident are critical to the evolution of the incident itself. The tactics of the involved officer often have a direct impact on the outcome or even the decision to use force. Those tactics should be reviewed and commented upon in every use of force incident.

The quality of the police report can be enhanced by describing and clearly reporting the use of force as well as addressing the Constitutional implications thereof. The evidence obtained during the use of force investigation then becomes a biopsy and opportunity for improvement by the BART PD. Further, a more robust investigation and examination of the tactics, reporting and use of force will provide the community with a greater sense of comfort that BART PD is using reasonable force.

In every case, the use of force incident should be debriefed with the involved officers. In cases where officers were deficient, the BART PD must make a decision to either remediate and retrain the officer or discharge the officer.

Use of force incidents should be used as a review of the operations of the BART PD and serve as a barometer to the Chief of Police on the condition of the agency. At present, the limited reporting requirements of the BART PD provide the Chief of Police with very little information about what is happening in the field. The Chief of Police should review and approve all use of force incidents generated by BART PD.

X. DEADLY FORCE INVESTIGATIONS

BART PD has had very few deadly force situations in its history. Because of that, there were some decisions made that could be improved upon in the future.

Percipient and witness officers should have been interviewed on the night of the incident. The officers should have been given the *Lybarger* Admonition,¹ afforded the right to counsel or a legal representative without being discouraged from doing so, and interviewed to define their roles in the events of the incident. The psychological implications of being involved in a deadly force incident are profound. It is understood that officers involved in a deadly force situation will have a very fragmented and oftentimes very narrow memory of the incident. An effective investigation will make sense of that memory.

Officers should not view video of an incident prior to being interviewed. Allowing involved officers to view video prior to an interview allows them to either subconsciously fill in the blanks where there are no memories of the incident or preplan for alibis for substandard conduct. Either way, allowing officers to view video of the event prior to the interview erodes the public's faith in the process and unnecessarily impacts the investigation.

Because current BART PD policy is only concerned with judging the use of force, specifically substantial force, the other actions of the involved officers were not adequately probed. Once tactics, supervisory actions, and lawfulness of the encounter are added to the adjudication scheme, these issues will become apparent.

The interviews of the involved officers were tightly confined, by both BART PD as well as other interviewers, to the use of force. Similarly the interviews of the witnesses, detainees, train operator and the like were too confined in their area of review. A training of all investigating officers in investigations and critical incident review is strongly suggested.

In instances where an officer uses deadly force against a suspect and the suspect dies or has a chance of dying, that officer should be mandatorily referred to a psychologist. Mandatory referral will remove the stigma of "going to the shrink" and become an accepted practice. Offers of counseling should not be delayed, deferred to others to communicate, or just not happen. This is an unacceptable practice. BART

¹ *Lybarger* confirmed that by virtue of a statute applicable specifically to peace officers (Gov. Code section 3303, subd. (h) (formerly subd. (g))), such an officer, before being required to answer an employer's investigatory questions, must be informed of his or her constitutional rights if there appears a possibility the officer will be charged with a criminal offense. (*Lybarger v. City of Los Angeles* (1985) 40 Cal.3d 822.)

PD should mandate that the involved officer as well as affected percipient witness officers be provided counseling within 48 hours of the incident.

XI. DUTY TO REPORT

BART PD should require officers to report their own use of force, as well as that observed of others. The tightly confined definition of a reportable use of force now required may contribute to not reporting all force used. BART PD policy should be amended to specifically include a statement that officers have a duty to report all pertinent facts known to them, including potential uses of force by their peers. Further, failure to report misconduct should itself be viewed as serious misconduct by BART PD.

XII. PERSONNEL COMPLAINT INVESTIGATIONS

BART PD's substandard practices/procedures for the use of force investigations and personnel complaint investigations may have contributed to the outcomes of the New Year's Day incident. If all BART PD officers knew that BART PD would relentlessly investigate use of force incidents, including pulling of video and canvassing the scene, it is doubtful that BART PD officers would use force when it was not reasonable to do so. There were no rigorous institutional reporting mechanisms to require reporting and officers are left to their own devices and reporting thresholds. And, there are no obvious consequences for under-reporting the use of force.

Personnel complaints should be examined and used as a risk management tool to not only review the actions of the officers, but the policies of the BART PD. Further, the pattern of conduct by police officers should be examined in the adjudication of any personnel complaint. Officers' conduct over a period of time will provide the BART PD with a very strong sense of training needs and possibly, the decision to retain an employee.

XIII. TRANSPARENCY AND ACCOUNTABILITY

The reporting requirements and quality of the reports by BART PD with respect to force and misconduct do not invite transparency. An independent evaluator would have noticed these deficiencies and changes could have been made before this incident occurred. The lack of significant reporting of use of force incidents, lack of critical analysis in personnel complaints, limited reporting requirements, no on-scene investigations, etc. contributed to the events on the morning of January 1, 2009. Best practices require other actions.

BART should consider retaining a reputable auditing or oversight firm, with experience in police matters, to conduct on-going meaningful audits and evaluations of BART PD. These audits and reports should be considered for availability to the public.

The greater the degree of transparency by BART PD, the better the agency will become. External audits and the responses to those audits are the basis for steady improvement that all police agencies desire. While the process is often difficult and burdensome, the fruit of such efforts will be worth it. The public will have a greater sense of comfort in the BART PD and the agency will constantly evolve towards excellence. If BART opts to develop a review committee to oversee BART PD policy, the committee must be highly versed in police issues and be free to act as independently as is reasonably possible. Such committees

should be fully versed in use of force issues such as *Graham v. Connor* and understand that policing is a very inexact craft practiced under rapidly changing and often escalating and chaotic circumstances.

XIV. CRISIS COMMUNICATIONS

Every law enforcement agency must be prepared for circumstances when the agency has a shooting or other critical incident that becomes the focus of public outrage. It is in the agency's best interests and the public's best interests that the subsequent investigation of that incident be as transparent as possible. Further, a highly refined investigative process put in place, coupled with the comfort that there is outside monitoring of the investigation will provide the community with a sense that the agency will conduct an honest and forthright investigation and analysis of the incident. Further, the entire agency's investigative and adjudicative process should be described to the media and the community who should be provided as much information about the incident as reasonably possible. Frequent updates to local politicians, clergy, community leaders and media will further provide the community with the sense that the investigation is going according to plan and is transparent in all aspects. In all cases, the communications of the adjudication protocols and transparency of the process, not necessarily all the facts, are what the public desires to know. That, followed up with responsible police management decision and improvements, will provide a much needed salve for the community concerns.

XV. DETENTION METHODS

The detainees in the New Year's Day incident described being held in police cars, offices and/or cells for extended periods of time. They have as a group all opined that they were in handcuffs for between four and six hours. If true, this is far too long to be handcuffed.

The detainees also said that they were told when interviewed that they "were not under arrest" and were "free to go." This characterization of their detention status could not have been understood if they were held for hours and in handcuffs.

BART PD should rework their detention policies to afford a more expedient turn around of detainees, better conditions for their physical detention and certainly not keep people handcuffed for between four to six hours.

XVI. FINAL RECOMMENDATIONS

It is important for BART PD, including officers, supervisors and managers to learn valuable lessons from the New Year's Day situation. The tactics of BART PD at the field level were seriously deficient. It is recommended that all officers receive a tactical debrief of the incident emphasizing learning points during that incident. The debriefing could use available video and PowerPoint presentations to paint a picture of the events as they emerged that night. In a non-punitive environment of a debriefing, all officers should be encouraged to identify the tactical strengths of the situation and areas where improvement was needed. Specific tactical decisions made during the incident should be analyzed along the continuum of those decisions. At each decision point, alternatives should be explored with the officers so that future decisions are better made.

Properly done, a tactical debriefing will teach officers to identify their own mistakes and improve future performance. Further, it is recommended that BART PD institutionalize a tactical debriefing in all possible scenarios to enhance future performance. One recommended method is known as the Tactical Operations Loop of Continual Improvement. Using this simple exercise, future performance may be enhanced. The loop consists of pre-planning for an event, rehearsing for an event, performing at the event and then debriefing to enhance future performance. Under this scheme, officers or trainers imagine potential dangerous scenarios that officers may face. Officers then pre-plan their tactics by using "what if" scenarios. Once the pre-planning is completed, officers then rehearse by going through the motions of the event, either physically or mentally, in a formal or informal setting, to test their pre-planning assumptions and preparations. When an incident occurs, officers will have pre-loaded their tactical actions allowing them to perform at a higher level than if they had to develop a tactical response in the middle of a critical event.

Once an event has come to a conclusion, officers then debrief the incident, examining the incident in retrospect with the mindset of doing better the next time around. BART PD should consider adopting this or another method of continuous improvement. By institutionalizing review and evaluation of use of force incidents as well as personnel complaints, it institutionalizes the continuous loop of improvement.

Management must overhaul nearly all its critical reporting mechanisms to include a more transparent examination of the events to ensure future problems are identified. The use of force reporting policy as well as surface level examination of complaints contributed to the New Year's Day situation. Policies should be developed, using best practices from other agencies and professional organizations, which will dramatically enhance the risk management practices of BART PD. Further, high risk reports, such as uses of force and personnel complaints should have chief-level review.

Finally, the BART PD Policy Manual needs substantial revision. While it largely meets POST standards and addresses the many "how" questions, it does not address the "why" questions. The policy manual should not only address technical competence, but also explicitly communicate the values of the organization. The policies should be framed in such a way as to institutionalize these values.
