



City of Rochester - Police Department
INTER-DEPARTMENTAL CORRESPONDENCE

To: Lieutenant Michael Callari, Commanding Officer, Professional Standards Section
From: Sergeant Laszlo Tordai, Professional Standards Section
Date: September 3, 2013
Subject: Investigative Summary for P.S.S. Case #2013-0455

On May 13, 2013, Chief James Sheppard ordered the initiation of an investigation into the circumstances surrounding the arrest of Mr. Benny Warr by members of the Rochester Police Department (RPD). The incident occurred on May 1, 2013, at 8:14 p.m.

The foci of this investigation are Officers Joseph Ferrigno and Anthony Liberatore.

FACTUAL INFORMATION:

The Emergency Communications Department (ECD) printout for incident CR#13-115259 and #115300 indicate that Officers Joseph Ferrigno and Anthony Liberatore called out over the radio "with two" at the corner of Bartlett Street and Jefferson Avenue. Officers Ferrigno and Liberatore were working as a two-badge car and signed onto the Mobile Data Computer as unit 4933. The printout further indicates that at 8:15 p.m., the officers ask on the radio for another car, and Sergeant Mitchell Stewart responded to assist.

Police reports indicate the following: Officers Ferrigno and Liberatore, during their routine patrol duties, responded to the area of 580 Jefferson Avenue to disperse a group which was loitering. Mr. Benny Warr, who is known to Officer Ferrigno as an associate of the Chalk'em South gang, refused the officers' order to leave the location. Mr. Warr became irate towards the officers and began shouting "**fuck you motherfuckers**" at them. Mr. Warr was again told to leave by the Officer Ferrigno. At this time, Mr. Warr screamed "**man, suck my dick**" multiple times, which caused a large group of onlookers to gather and become irate towards the officers.

Mr. Warr was then informed that he was under arrest, and when the officers attempted to take him into custody, he resisted arrest by swinging his fists and struck Officer Ferrigno. After a brief altercation between Mr. Warr and the officers, Mr. Warr was taken into custody. Mr. Warr was taken to the hospital, and was issued an Appearance Ticket.

The ECD print out indicates that one person was taken into custody by Officers Ferrigno and Liberatore at 8:16 p.m.

The following police reports were completed for this incident: Crime Report (CR#13-115259) and a Prisoner Data Report (PDR) were completed by Officer Ferrigno. Subject Resistance Reports (SRR), were also completed by Officers Ferrigno, Liberatore, and Sergeant Mitchell Stewart.

The reports indicate that Mr. Warr was charged with the following: New York State Penal Law (NYSPL) Disorderly Conduct, Section(s) 240.20(2), (3), and (6), and NYSPL Resisting Arrest, Section 205.30.

SPECIFIC ALLEGATIONS:

ALLEGATION #1:

The Investigation of Procedure: R.P.D. Policy Allegation: Officers arrested the complainant in violation of General Order 585. **Complainant Allegation:** Mr. Benny Warr alleged that Officers Joseph Ferrigno and Anthony Liberatore unlawfully arrested him.

ALLEGATION #2:

The Investigation of Force: RPD Policy Allegation: Officers used excessive force on the complainant in violation of General Order 335. **Complainant Allegation:** Mr. Benny Warr alleged that Officers Ferrigno and Liberatore used unnecessary and excessive force on him during his arrest.

ALLEGATION #3:

The Investigation of Courtesy: R.P.D. Policy Allegation: An officer was discourteous toward the complainant in violation of Department Rules and Regulations 4.2. **Complainant Allegation:** Mr. Benny Warr alleged that an officer told him to "fucking move."

ALLEGATION #1:

Investigation of Procedure:

INFORMATION TENDING TO SUPPORT ALLEGATION #1:

- The Rochester Police Department – Stenographic Statement of Mr. Benny Warr, dated June 25, 2013.
- The Rochester Police Department – Media Statement of Mr. Benny Warr, dated April 10, 2013.
- Ms. Shakur Muhammad – Cell phone video posted on Youtube.com, dated May 4, 2013.

INFORMATION TENDING TO REFUTE ALLEGATION #1:

- The Rochester Police Department – Stenographic Statement of Officer Anthony Liberatore, dated June 10, 2013.
- The Rochester, Police Department – Stenographic Statement of Officer Joseph Ferrigno, dated June 13, 2013.
- The Court of Appeals of the State of New York – People v Baker, dated February 7, 2013.

RECOMMENDED FINDING FOR ALLEGATION #1:

The Investigation of Procedure: R.P.D. Policy Allegation: Officers arrested the complainant in violation of General Order 585. **Complainant Allegation:** Mr. Benny Warr alleged that Officers Joseph Ferrigno and Anthony Liberatore unlawfully arrested him.

The focus of this allegation is to determine whether the officers had probable cause to arrest Mr. Warr under the New York State Penal Law (NYSPL) Disorderly Conduct statute. The subsequent charge of Resisting Arrest will not be addressed in this summary as Mr. Warr does not have the right to resist arrest, whether or not he perceived the arrest by the officers to be illegal.

In his statement, Mr. Warr stated that as he was waiting for the bus at the bus stop, located at the northwest corner of Jefferson Avenue and Bartlett Street, and that he had four (4) quarters

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in his hand. As he was waiting for the bus with two other people, officers walked up to the bus stop and asked Mr. Warr and the others to move. Mr. Warr informed the officers that he was waiting for the bus. In reply, the officers told him again to move. In response Mr. Warr stated **"sir, I'm catching a bus. I'm at a bus stop."** Mr. Warr stated he did not know that he was being arrested and did not know where the officers came from.

Upon questioning Mr. Warr regarding his whereabouts prior to being at the bus stop, he stated that he was sitting in his wheelchair in front of 584 Jefferson Avenue, when officers started dispersing the kids from in front of 580 Jefferson Avenue. Mr. Warr stated that there was a young kid sitting next to him at the time the officers started dispersing the area in front of and around 580 Jefferson Avenue. Mr. Warr added that he was not specifically addressed by the officers to move, but he overheard the officers' request, so at that time he took it upon himself to cross the street, and go to the bus stop to **"catch the bus."** Mr. Warr stated that his intent was to get on the number six bus to take a ride to the southern end of Jefferson Avenue at the intersection of South Plymouth Avenue, which is located just under a half of a mile from Jefferson Ave. and Bartlett St.

In his statement to the media, Mr. Warr stated that he did not move when the officers requested because he was catching the bus, and it was his right to catch the bus. He wanted to get out of the area. Mr. Warr denied resisting arrest and stated that he cooperates with the law.

A video of this incident was posted on YouTube shortly after the incident. The video was captured on a citizen's cellular telephone. The video did not capture the entire interaction between the officers and Mr. Warr; only part of the use of force by the officers.

In his statement, Officer Ferrigno stated the following: as he and Officer Liberatore pulled up to the area of 580 Jefferson Avenue, they observed a large group shooting dice, playing chess, and drinking. The officers started to disperse the group, including Mr. Warr, by asking them move along. When Officer Ferrigno told Mr. Warr to move, Mr. Warr replied **"fuck you, mother fucker. Suck my dick."**

According to Officer Ferrigno, he and his partner, Officer Liberatore, initially just pulled up in their car to the side of the street to verbally address the group, in order to disperse it. The interaction between them and Mr. Warr took place on the east side of Jefferson Avenue. Mr. Warr refused repeated commands to move and kept yelling obscenities at the officers. Mr. Warr's verbal replies and actions were loud enough to be noticed by bystanders, and they started to linger around to observe the exchange between the officers and Mr. Warr.

Officer Ferrigno stated that he then exited the patrol vehicle and told Mr. Warr again to move and was again told by Mr. Warr, **"Fuck you mother fucker."** Officer Ferrigno then told Mr. Warr that he was going to jail and that he was under arrest. At this time Mr. Warr took off in his wheelchair westbound across Jefferson Avenue, to the area of 595 Jefferson Avenue. As he was crossing the street he was still swearing and yelling obscenities at the officers.

Officer Ferrigno reported that while at 595 Jefferson Avenue, Mr. Warr continued to loudly swear obscenities while two female bystanders stood near him. Officer Ferrigno said he also observed that other civilians were starting to take notice of Mr. Warr's behavior and were gathering in the area to observe the interaction between Mr. Warr and the officers. Officer Ferrigno said some of the civilians who observed the interaction between the officers and Mr.

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Warr and Officer Ferrigno overheard them saying **"you can't talk to him like that. He needs to go to jail!"**

Officer Ferrigno stated that he approached Mr. Warr and again informed him that he was under arrest and once again Mr. Warr swore at the officers and said, **"Fuck you, you better call an ambulance."** As Mr. Warr continued swearing and yelling obscenities, Officer Ferrigno noticed that more and more people started to gather and watch the incident. Officer Ferrigno then told Mr. Warr to put his hands behind his back and that Mr. Warr was going to jail and attempted to take Mr. Warr into custody.

In his statement, Officer Liberatore stated the following: He and Officer Ferrigno were working as two-badge car and went to the area of 580 Jefferson Avenue. They began to disperse about ten to twelve individuals who were congregating in front of the establishment, with Mr. Warr being one of those individuals. During their dispersal everyone began to disperse, except for Mr. Warr. As the officers asked Mr. Warr to disperse, he replied **"fuck you."** The officers once again asked Mr. Warr to move and he told the officers to suck his dick. The officers then told Mr. Warr that he was under arrest. Officer Liberatore said that Mr. Warr's replies were loud and aggressive enough that people in the overheard his comments and some of them even commented to the officers **"are you going to let him talk to you guys like that?"**

After the officers told Mr. Warr that he was under arrest, he proceeded to travel westbound across Jefferson Avenue to 595 Jefferson Avenue. Once the officers concluded the dispersal in front of 580 Jefferson Avenue, they went across the street to affect the arrest of Mr. Warr for Disorderly Conduct. Officer Liberatore stated that they waited to arrest Mr. Warr because they did not want to cause a **"big spectacle"** in chasing after a man in a wheelchair. The officers also wanted make sure that they completed their task in dispersing the other individuals from the area.

The New York State Penal Law defines the Disorderly Conduct 240.20 statute as: A person is guilty of disorderly conduct when, with intent to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof:

1. He engages in fighting or in violent, tumultuous or threatening behavior; or
2. He makes unreasonable noise; or
3. In a public place, he uses abusive or obscene language, or makes an obscene gesture; or
4. Without lawful authority, he disturbs any lawful assembly or meeting of persons; or
5. He obstructs vehicular or pedestrian traffic; or
6. He congregates with other persons in a public place and refuses to comply with a lawful order of the police to disperse; or
7. He creates a hazardous or physically offensive condition by any act which serves no legitimate purpose.

The officers arrested Mr. Warr for subsections two, three, and six of this statute. In *People v Baker* 2013 NY Slip Op 00782 Decided on February 7, 2013, in their decision, the Court of Appeals wrote the following: Under Penal Law § 240.20(3), **"[a] person is guilty of disorderly conduct when, with intent to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof . . . [i]n a public place, he uses abusive or obscene language, or makes an obscene gesture."** The offense has existed in one form or another for more than a century and has spawned a significant body of case law. As

is clear from the precedent, critical to a charge of disorderly conduct is a finding that defendant's disruptive statements and behavior were of a public rather than an individual dimension. This requirement stems from the mens rea component, which requires proof of an intent to threaten public safety, peace or order (or the reckless creation of such a risk). Thus, "a person may be guilty of disorderly conduct only when the situation extends beyond the exchange between the individual disputants to a point where it becomes a potential or immediate public problem" (People v Weaver, 16 NY3d 123, 128 [2011][internal quotation marks and citation omitted]). The "public harm" element is what distinguishes the disorderly conduct statute from other offenses that contain similar requirements but encompass disputes of a more personal nature (see People v Tichenor, 89 NY2d 769, cert denied 522 US 918 [1997]).

The significance of the public harm element in disorderly conduct cases cannot be overstated. In virtually all of our prior decisions, the validity of disorderly conduct charges has turned on the presence or absence of adequate proof of public harm. To determine whether the record supports an inference that the requisite mens rea was present, we have employed a contextual analysis that turns on consideration of many factors, including "the time and place of the episode under scrutiny; the nature and character of the conduct; the number of other people in the vicinity; whether they are drawn to the disturbance and, if so, the nature and number of those attracted; and any other relevant circumstances" (Weaver, 16 NY3d at 128). We have clarified that the risk of public disorder does not have to be realized but the circumstances must be such that defendant's intent to create such a threat (or reckless disregard thereof) can be readily inferred (id.; People v Todaro, 26 NY2d 325, 329 [1970]).

In their testimony, the officers stated that their request to the group of people to disperse from the area of 580 Jefferson Avenue was obeyed by everyone except for Mr. Warr. Their requests and commands for Mr. Warr to disperse was met with hostility by Mr. Warr and he not only refused to move, but replied to them in a loud obscene manner which was noticed, and commented on by passersby. The alleged comments by the passersby indicated that Mr. Warr's behavior was unwelcome. Even as Mr. Warr reportedly crossed the street, he was still yelling obscenities in the course of his crossing and continued this behavior in the area of the bus stop where other civilians were standing and others started to gather around to observe the event.

The criminal case against Mr. Warr resulted in an agreement between the Monroe County District Attorney's Office and Mr. Warr on August 9, 2013, for Mr. Warr to accept an Adjournment in Contemplation of Dismissal (ACD). It should be noted that an ACD is neither an admission of guilt nor a proof of innocence. The ACD is in effect for a period of six months, usually with the attached condition that the defendant does not get into any legal trouble for the duration of the six months.

Based upon careful review of the investigation, which included conflicting testimonial evidence, the review of the New York State Penal Law, the Court of Appeals ruling of People v. Baker, and the lack of independent witnesses, I respectfully recommend a finding of **Unprovable** for Officers Joseph Ferrigno and Anthony Liberatore in regards to the allegation of unlawful arrest.

ALLEGATION #2:
Investigation of Force:

INFORMATION TENDING TO SUPPORT ALLEGATION #2:

- The Rochester Police Department – Media Statement of Mr. Benny Warr, dated April 10, 2013.
- The Rochester Police Department – Stenographic Statement of Mr. Benny Warr, dated June 25, 2013.
- The Rochester Police Department – Stenographic Statement of Mrs. Mary Adams, dated June 10, 2013.
- The Rochester Police Department – Stenographic Statement of Ms. Amandra Flowers, dated May 15, 2013.

INFORMATION TENDING TO REFUTE ALLEGATION #2:

- The Rochester Police Department – Subject Resistance Report of Officer Anthony Liberatore, dated May 1, 2013.
- The Rochester Police Department – Subject Resistance Report of Officer Joseph Ferrigno, dated May 1, 2013.
- The Rochester Police Department – Subject Resistance Report of Sergeant Mitchell Stewart, dated May 1, 2013.
- Ms. Shakur Muhammad – Cell phone video posted on Youtube.com, dated May 4, 2013.
- The Rochester Police Department – Blue Light camera recording of POD 142, dated May 1, 2013.
- The Rochester Police Department – Stenographic Statement of Officer Anthony Liberatore, dated June 10, 2013.
- The Rochester Police Department – Stenographic Statement of Officer Joseph Ferrigno, dated June 13, 2013.
- The Rochester Police Department – Stenographic Statement of Sergeant Mitchell Stewart, dated June 20, 2013.
- The Rochester Police Department – Inter – Departmental E-mail from Sergeant Andrew McPherson, dated May 13, 2013.

RECOMMENDED FINDING FOR ALLEGATION #2:

The Investigation of Force: RPD Policy Allegation: Officers used excessive force on the complainant in violation of General Order 335. **Complainant Allegation:** Mr. Benny Warr alleged that Officers Ferrigno and Liberatore used unnecessary and excessive force on him during his arrest.

In his statement, Mr. Warr stated the following: As he was waiting at the bus stop, the officers walked up to him and asked him and two other people who were at the bus stop to move. Mr. Warr told the officers “**sir, I’m catching the bus.**” According to Mr. Warr the officer then said “**I said fucking move,**” to which Mr. Warr replied “**sir, I’m catching a bus. I’m at a bus stop.**” The officer then turned and sprayed Mr. Warr with what he described as mace. Mr. Warr described Officer Ferrigno as the officer who sprayed him. After being sprayed with O.C., Mr. Warr reacted by bringing his hands up to his face and then Officer Liberatore pushed the wheelchair over causing Mr. Warr to fall onto the ground.

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Mr. Warr stated that as the wheelchair was pushed over by Officer Liberatore, Mr. Warr landed on his left side and was punched and kicked by the officers all over his body. He was eventually rolled over onto his right side by the officers. When asked directly where on his body he was struck by the officers, Mr. Warr could not specifically state where he was struck. Mr. Warr had to be told and shown by his attorney, Mr. Charles Burkitt Esq., of the area he was punched, which Mr. Burkitt indicated by pointing to the area of his torso, located between the hip and shoulders. Mr. Warr then stated that he was struck in the stomach, ribs, head, and neck, **"It was like my stomach, my ribs, my head, and neck and, you know, it was just all over."**

In her statement, Mrs. Mary Adams said that she was driving to her home on Arnett Boulevard with her husband and two children. As she was driving westbound on Bartlett Street towards Jefferson Avenue, she observed two officers standing across the street on Jefferson Avenue as she stopped for the traffic light. Initially it appeared to Ms. Adams that the officers were standing on either side of a garbage can. As she got closer to the intersection, she realized that there was a man sitting in a motorized wheelchair behind the garbage can. Ms. Adams stated that it looked like the officers were maybe talking to each other or just standing there, not doing anything.

Ms. Adams stated that she then observed the officers dump the man in the wheelchair over **"hard onto the sidewalk."** Ms. Adams said she became **"shocked"** at what she observed, so she pulled into the parking lot of Warren's Pharmacy, which is located on the northwest corner of the intersection, got out of her vehicle, and walked within maybe four or five feet to where the officers were engaged with Mr. Warr. Ms. Adams stated that she saw both officers **"kicking, hitting, pushing, shoving"** Mr. Warr, and saw one of the officers kick Mr. Warr **"particularly hard"** in his head. She stated that the kick was not in response to anything that was going on and it appeared to her that this kick **"was as if it was just like an emotional hatred, violent kick for no other reason than hatred towards this man."** Ms. Adams stated that the officer gained momentum for this kick by walking a few steps and bringing the kick in hard with his foot.

Ms. Adams also stated that she did not observe any kind of resistance on the behalf of Mr. Warr during the arrest. She described Mr. Warr as having a large frame. Ms. Adams also stated that she made a comment to the arriving police personnel of how they were treating the crowd.

Ms. Adams said that when she pulled up to the intersection, she initially had an obstructed view of the officers and Mr. Warr due to the garbage can. As she pulled into the parking lot to park her car, she lost view of the officers and Mr. Warr for a few seconds. She said that there were only a few bystanders in the area but did not observe a crowd of people at that time. Ms. Adams said that nobody was as close as she was to the scene of the arrest, yet she was not able to observe when the officers applied the handcuffs to Mr. Warr or how many officers it took to get Mr. Warr under control.

Ms. Adams reported that she assumed that the officers were **"pushing, pulling, and struggling"** with Mr. Warr to place handcuffs on him. She stated that as Mr. Warr was placed into custody, a group of people gathered around the area, and that they were upset at what the officers did to Mr. Warr.

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In her statement, Ms. Amanda Flowers stated that she observed the officers talking with Mr. Warr, who she knows as "Hop," at the bus stop. She stated that it looked like one of the officers may have grabbed Mr. Warr by his neck and the other grabbed him around his waist and they **"snatched"** Mr. Warr out of his wheelchair onto the ground. Ms. Flowers also stated that she saw one of the officers trying to grab Mr. Warr's arm as Mr. Warr pulled his arm away from the officer. Ms. Flowers said that after Mr. Warr was handcuffed, a pretty big crowd gathered around them.

In his statement, Sergeant Mitchell Stewart stated that he responded as a back-up officer to 595 Jefferson Avenue as Officers Ferrigno and Liberatore stepped out with a male. While he was en-route to the location, he heard the officers calling out for the back-up officer to **"step it up."** As he arrived on scene, he reported that he observed Mr. Warr on his stomach, while Officers Liberatore and Ferrigno were trying to gain control of Mr. Warr's right and left arm respectively. Sergeant Stewart stated that he heard the officers tell Mr. Warr to stop resisting and observed Mr. Warr being noncompliant with the officers' commands.

Sergeant Stewart described Mr. Warr as a heavyset male and said that the officers were having a hard time gaining control of Mr. Warr. He also stated that Mr. Warr kept tensing his left arm as he was trying to pull it inward. He also stated that he also gave commands to Mr. Warr to put his hands behind his back, and to stop resisting. In order to handcuff Mr. Warr, two pairs of handcuffs had to be used to successfully handcuff him. After Mr. Warr was handcuffed, a large crowd had already formed around the officers and Mr. Warr. Sergeant Stewart stated that while he was assisting the officers with the arrest of Mr. Warr, he did not see any of the officers kick Mr. Warr in the head.

In his statement, Officer Liberatore stated the following: when he and Officer Ferrigno told Mr. Warr that he was under arrest, Mr. Warr told them that the only way he was going was in an ambulance. Officer Ferrigno then tried to grab one of Mr. Warr's arms, at which point Mr. Warr started to swing both of his arms wildly to avoid Officer Ferrigno's grasp. Officer Liberatore believes that in doing so, Mr. Warr hit Officer Ferrigno with his arms.

Officer Liberatore said that Officer Ferrigno then sprayed Mr. Warr with his Oleoresin Capsicum (OC), which appeared to have no effect on Mr. Warr. Officer Liberatore then moved to Mr. Warr's right side and as he tried to grab Mr. Warr's right arm, Mr. Warr **"flailed"** arms away from him and told Officer Liberatore that he wasn't going. Officer Liberatore realized that his and Officer Ferrigno's efforts to control Mr. Warr while he was still seated in his wheelchair were not working. He decided to push the wheelchair over to get Mr. Warr out of it and onto the ground, thereby gaining the opportunity to get Mr. Warr under control and affect his arrest.

Officer Liberatore further stated that as a result of being pushed over, Mr. Warr landed on the ground and was initially lying on his back. While in this position, the officers tried to turn Mr. Warr onto his stomach and get his arms into position for handcuffing; all the while issuing verbal commands to Mr. Warr to stop resisting. Mr. Warr was not being compliant with the officers and he was trying to pull his arms under his body. Due to Mr. Warr's physical build, which was described by the officers as being **"large and strong"** and his weight being around three hundred pounds, the officers had a difficult time in trying to roll Mr. Warr onto his stomach. As the officers were struggling with Mr. Warr, Officer Liberatore observed several individuals approaching them.

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Officer Liberatore reported that due to officer safety reasons, which were based on the Officer Liberatore's experience, and on the resistance level of Mr. Warr, Officer Liberatore delivered an elbow strike to Mr. Warr's face in hopes of ending the situation as fast possible. After delivering this strike, Mr. Warr still continued to fight, and it was with the additional assistance of Sergeant Mitchell that the officers were able to get Mr. Warr under control, and able to apply handcuffs onto him. Officer Liberatore said that he never kicked Mr. Warr in the head during the incident.

In his statement, Officer Ferrigno stated the following: as he and Officer Liberatore approached Mr. Warr in the area of 595 Jefferson Avenue, Officer Ferrigno told Mr. Warr that he was under arrest. Mr. Warr replied **"fuck you, you better call an ambulance."** Officer Ferrigno ordered Mr. Warr to put his hands behind his back, which Mr. Warr refused to do. As Officer Ferrigno went to grab Mr. Warr's wrist, Mr. Warr threw a punch at Officer Ferrigno and hit him in the groin. Officer Ferrigno then sprayed Mr. Warr with his O.C. to change Mr. Warr's **"channel,"** after which, Officer Ferrigno again attempted to grab Mr. Warr's arm. Due to Mr. Warr swinging his fists, Officer Ferrigno was not able to grab Mr. Warr's arms.

Officer Ferrigno said that both he and Officer Liberatore realized that they could not control Mr. Warr while he was seated in his wheelchair, so a decision was made to get Mr. Warr onto the ground by pushing the wheelchair over. While on the ground, Mr. Warr continued to resist by trying to hit the officers with his fists. Unable to get Mr. Warr under control and onto his stomach, Officer Ferrigno gave two to three knee strikes Mr. Warr's abdominal area which Officer Ferrigno described in his Subject Resistance Report as not being effective. With the assistance of Sergeant Stewart, Officers Ferrigno and Liberatore were able to gain control of Mr. Warr, roll him onto his stomach, and handcuff him.

In their statements, both Officers Ferrigno and Liberatore stated that when Mr. Warr was told that he was under arrest, Mr. Warr informed them that they better call an ambulance. Based on prior intelligence on Mr. Warr regarding his association with gang members, possibly being involved in drug sale and accessibility to weapons, the officers took Mr. Warr's statement as a threat. The officers indicated that in order to control Mr. Warr and take him into custody, their escalation of force in response to Mr. Warr's resistance included verbal commands, attempts at joint manipulation, utilizing O.C., to hard reactionary techniques.

The video posted on YouTube, as well as the video footage from the blue light camera, indicate that Mr. Warr resisted arrest by pulling his arms away from the officers while he was seated in the wheelchair as well as pulling his arms away from the officers when they were on the ground with him. The video also shows the elbow strike by Officer Liberatore, the knee strikes by Officer Ferrigno, as well as their difficulty in trying to roll Mr. Warr onto his stomach and get his arms into a position where he could be handcuffed. At no time is it visible that any of the officers kicked Mr. Warr in the head as stated by Ms. Adams. The citizen, who recorded the video, provides the comment in the video that one of the officers is mad because Mr. Warr punched him.

The video also shows the reaction of the crowd, and the number of people who began to approach the officers during the incident. Ms. Adams is seen pulling into the lot next to the officers at a high rate of speed. These are factors which the officers quickly have to process and make decision of how to react in order to maintain their safety as well as that of Mr. Warr's.

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Both the YouTube and blue light camera videos, along with the officers SRRs were reviewed by Sergeant Andy McPherson, who is the Department's Defensive Tactics Coordinator, as well as the head instructor for the Public Safety Training Facility's recruit training for the Rochester Police Department. He also met with Officer Liberatore and discussed the incident with him. After a careful review of the incident, based on the totality of the circumstances, Sergeant McPherson found that the use of force on Mr. Warr was reasonable and appropriate. The investigation revealed that Mr. Warr's non-compliance, verbal and physical resistance to the officers' verbal commands and physical attempts to place him under arrest while seated in a wheelchair, presented a tactical dilemma in regards to the number of options that were available to the officers. The RPD's General Order 335 Section I.A. defines appropriate force and as: **The reasonable force, based upon the totality of the circumstances known by the member, to affect an arrest, overcome resistance, control an individual or situation, defend self or others, or to prevent a subject's escape.** Force is defined as: **Any intentional physical strength or energy exerted or brought to bear upon or against a person for the purpose of compulsion, constraint, or restraint.**

Furthermore the policy states that: **Members may use only that level of physical force necessary in the performance of their duties within the limits established by Article 35 of the New York State Penal Law, and consistent with the training and policies of the Rochester Police Department. The appropriateness of force used is dependent on the "totality of the circumstances" at the moment the force is used.** In referencing the RPD's Defensive Tactics Manual, Officers Ferrigno and Liberatore were justified in using to what amounted to as level three techniques on the use of force matrix. The RPD's use of force policy allows the use of equal or higher level of force than that of the force being used against an officer. The level of force used on a subject depends on the perception of the officer who is actively engaged in the incident.

Based upon careful review of the investigation, which included testimonial evidence, the review of the officers' Subject Resistance Reports, videos of the incident, the review of the incident by Sergeant McPherson, I respectfully recommend a finding of **Exonerated** for Officers Joseph Ferrigno and Anthony Liberatore in regards to the allegation of unnecessary/excessive force.

ALLEGATION #3:**Investigation of Courtesy:****INFORMATION TENDING TO SUPPORT ALLEGATION #3:**

- The Rochester Police Department – Stenographic Statement of Mr. Benny Warr, dated June 25, 2013.
- The Rochester Police Department – Inter-Departmental Correspondence (IDC) of Officer Anthony Liberatore, dated August 28, 2013.

INFORMATION TENDING TO REFUTE ALLEGATION #3:

- The Rochester Police Department – Inter-Departmental Correspondence of Officer Joseph Ferrigno, dated August 28, 2013.
- The Rochester Police Department – Stenographic Statement of Mrs. Mary Adams, dated June 10, 2013.

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RECOMMENDED FINDING FOR ALLEGATION #3:

The Investigation of Courtesy: R.P.D. Policy Allegation: An officer was discourteous toward the complainant in violation of Department Rules and Regulations 4.2. **Complainant Allegation:** Mr. Benny Warr alleged that an officer told him to "fucking move." In his statement, Mr. Warr stated that when the officers asked him to move, and he refused, one of the officers told him to "fucking move."

In her statement, Ms. Adams did not indicate that she heard the officers use discourteous remarks during the arrest, however she was not near the officers when the initial interaction took place.

In his IDC, Officer Ferrigno indicated that he did not direct discourteous remarks at Mr. Warr, nor did they use discourteous language during the incident.

In Officer Liberatore's IDC, he indicated that he did not tell Mr. Warr to "fucking move," however, Officer Liberatore did state the following: in order to gain compliance from Mr. Warr while trying to place him into custody and to avoid any further resistance, I stated "are you ready to get your ass kicked?" Officer Liberatore further stated that: it was not his intention to be discourteous, but to use language that is best understood and complied with on the street.

Based upon careful review of the investigation, which included conflicting testimonial evidence, the Rochester Police Department's Rules and Regulations Section 4.2, Courtesy, and the lack of independent witnesses, I respectfully recommend a finding of **Unprovable** for Officer Joseph Ferrigno, and a finding of **Sustained** for Officer Anthony Liberatore in regards to the allegation of discourtesy.

NEIGHBORHOOD CHECK:

The results of the neighborhood check are contained in a case note attached to the case file.

MEDICAL:

Mr. Warr was transported to the University of Rochester's Strong Memorial Hospital Emergency Department by Rural Metro Ambulance on May 1, 2013 and was seen at approximately 9:12 p.m. He was treated for head and knee pain, and was diagnosed with three rib fractures, which the medical staff was unable to determine as to the date of occurrence. Mr. Warr was treated and released on May 2, 2013. Please refer to Mr. Warr's medical treatment summary for further.