



DENVER
THE MILE HIGH CITY

Office of the Independent Monitor

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December 22, 2008

Mr. Taylor Pendergrass
Staff Attorney, ACLU of Colorado
400 Corona Street
Denver, CO 80218-3915

Case No. P200811001

Dear Mr. Pendergrass:

This office is in receipt of your complaints, received on October 30, 2008, November 6, 2008 and November 10, 2008, making allegations against the Denver Police Department (DPD) regarding a mass arrest situation that took place on August 25, 2008 on 15th Street near the intersection of Court Place.

You made the following allegations:

1. That DPD officers "departed from the truth" when they made sworn statements that a dispersal order had been given and disobeyed;
2. That the Denver Police Department's "spontaneous event" policy was violated by the failure to give a dispersal order and the opportunity to disperse;
3. That the Denver Police Department improperly withheld 15 minutes of audio dispatch tape that was arguably exculpatory from the criminal defendants who were arrested in the above-noted incident;
4. That an undercover officer improperly inflamed a tense situation by resisting arrest;
5. That your client, Cecil Bethea, was not permitted to voluntarily leave the location and was subjected to unnecessary force, inappropriate handcuffing and an inappropriate "pat-down frisk;" and;
6. That Division Chief Mary Beth Klee failed to initiate an investigation into a complaint made by Ronald Hurd on behalf of Mr. Bethea.

I have reviewed your complaint letters, listened to testimony provided by DPD Command Staff at a criminal trial conducted on November 17 and 18, 2007, watched video relating to the incident, and discussed your concerns with DPD Command Staff and the lead attorney of the City Attorney's Office Prosecution Unit. Based on the information I have reviewed, I do not believe your complaints state any provable misconduct on the part of any DPD officers or command staff and will, therefore, take no further action at this time.

Specifically, as to each allegation:

1. Although you point out that a number of officers (only one identified as an officer employed by the City of Denver and within the jurisdiction of this Office & DPD Internal Affairs) provided inaccurate information in their probable cause statements by stating that dispersal orders were given, when, in fact, no formal dispersal order was given using any amplified sound device, there

is no reason to believe that these officers made these statements with the knowledge that the information being provided was incorrect or false. Specifically, none of these officers had any motivation to lie under these circumstances. Instead, it is clear that this was a situation involving multiple officers and multiple agencies and that any inaccuracies or mistakes would be attributable to errors or omissions in communication between those officers who initially confronted the protestors and those officers who eventually made the arrests. As such, I find no reasonable possibility that there was any intentional misconduct on the part of these officers and no further internal affairs inquiry would be necessary or appropriate on this allegation.

In one case, an out-of-county deputy stated that he heard the dispersal orders being given "by speaker." The City Attorney's Office Prosecution Unit is aware of that statement and will be referring the case to the Denver Police Department for further review and possible investigation. Given that case does not involve a Denver police officer or Sheriff's deputy, it is not within the jurisdiction of the Monitor's Office or the Internal Affairs Bureau.

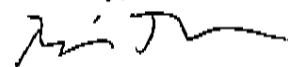
2. In your letter, you quote DPD Operations & Procedure Manual Section 108.08(6)(a)(3) which states: "When possible, clear instructions shall be communicated to the crowd. Unless there is an immediate risk to public safety, or significant property damage is occurring, sufficient time will be allowed for a crowd to comply with police commands before action is taken." In this case, the DPD command had a reasonable belief that the crowd that was leaving Civic Center Park and heading toward the 16th Street Mall was doing so with the intent to attack people and property on the 16th Street Mall. The crowd had already ignored police orders to remain in the Civic Center Park. Members of the crowd were seen obtaining feces and urine from toilets in the Civic Center Park area. Members of the crowd were also observed putting bandanas over their faces, in an apparent attempt to avoid being identified and to protect themselves from the use of gas or pepper spray. The DPD command staff's decision to stop the crowd from obtaining access to the 16th Street Mall and to protect the lives and property of innocent persons using the Mall for lawful purposes was a reasonable one. The decision not to order or allow the crowd to disperse was also reasonable. As there was an "immediate risk to public safety," simply ordering the crowd to disperse, without taking enforcement actions would have allowed those within the crowd with criminal intent to simply find another way to egress the 16th Street Mall and commit criminal acts without further police intervention. In accordance with their policies, the DPD allowed those protestors who were detained on the sidewalk to leave the area. Only those protestors who were detained on the street (where they were not permitted by law to be) were taken into custody. This decision shows that the DPD command staff was acting in a reasonable manner in identifying those persons who had committed criminal violations and separating out those for whom there was insufficient proof of criminal intent. As such, I find that there was no policy violation as asserted in your complaint.
3. Your allegation that the DPD failed to provide exculpatory evidence in discovery is outside the jurisdiction of this office or Internal Affairs. However, I have been informed by the City Attorney's Office Prosecution Unit that defense counsel raised this issue in at least one trial and the court ruled the evidence was not exculpatory and found no discovery violation on the part of the City.
4. You assert, based on a report received in discovery, that an undercover officer may have unnecessarily inflamed the situation by resisting arrest and struggling with DPD Commander Kris Kroncke. I have spoken with Commander Kroncke about the incident. I have been informed that the undercover officer acted in accordance with the Commander's expectations. The report indicated that the undercover officer "put up a struggle with Commander Kroncke." In actuality, the resistance was minimal – there was no screaming, fighting or any other attempt to incite the

crowd or the police. The officer who deployed the pepper spray in this case perceived that the undercover officer was struggling with Commander Kroncke. In fact, the "struggle" consisted of nothing more than the mere act of pulling away slightly. Given all the circumstances, it would be reasonable to expect the undercover officer to put up at least a small struggle in order to avoid his identity being disclosed to the protestors watching his arrest. The undercover officer, certainly, had no reason to want to be pepper sprayed or otherwise harmed by the officers covering Commander Kroncke. Therefore, your conclusion that the officer may have exacerbated an already tense situation is not supported by the evidence.

5. Your client, Cecil Bethea asserts that he was an innocent person caught up in the mass arrest. Based on all the circumstances, however, there is no reason to believe that he should have been given an opportunity to voluntarily leave the location until officers were able to determine that he was not involved in criminal activity. Once officers were able to hear and verify his story that he was not involved in the protest he was released. Your assertion that he should not have been handcuffed and subject to a "pat down" search ignores that until officers had the opportunity to talk to him, he had been detained and was in the process of being arrested. During the arrest processing, and based on their discussions with him, Mr. Bethea was released as soon as it was determined that he was the only person in the detained crowd who had not been involved in the protest activities that had been identified as unlawful. As to Mr. Bethea's assertion that two officers used unnecessary force in pulling him up from the ground, there appears to be no way to identify the officers involved. Unless you can provide additional information in this regard, no further investigation can take place.
6. Finally, you question why an internal affairs investigation was not initiated into Mr. Bethea's circumstances when Mr. Ronald Hurd sent a letter of complaint on August 27, 2008. Mr. Hurd's "complaint" letter was written as the result of his seeing a picture in the "Rocky Mountain News" of Mr. Bethea being detained by Denver Police Officers. He was not a percipient witness as to the event. As per normal DPD protocol, complaint investigations are generally not initiated based on third-party complaints made by persons who were not personally involved or who did not personally witness an incident. If DPD command staff becomes concerned by officer behavior depicted in the media, they can self-initiate an investigation. Initiating a complaint based on concerns expressed by persons who have simply seen a news report, without objective proof of misconduct, is not prudent or in accord with any best practices in complaint handling.

I hope this letter sufficiently explains to you the reasoning I have used in reviewing and responding to your concerns. Based on these observations and conclusions, no further action will be taken on your complaints at this time.

Sincerely,



Richard A. Rosenthal
Independent Monitor