



Homeland
Security

September 2, 2022

MEMORANDUM FOR: Chris Magnus
Commissioner
U.S. Customs and Border Protection

Scott K. Falk
Chief Counsel
U.S. Customs and Border Protection

FROM: Dana Salvano-Dunn (b) (6)
Director, Compliance Branch
Office for Civil Rights and Civil Liberties

Susan Mathias /s/
Assistant General Counsel, Legal Counsel Division
Office of the General Counsel

SUBJECT: CBP Office of Professional Responsibility
Complaint Nos. 000089-21-CBP

Purpose

This memorandum provides recommendations in connection with a Use of Force Report of Investigation (ROI) put forth by the U.S. Customs and Border Protection (CBP) Office of Professional Responsibility (OPR) for the above referenced complaint,¹ and in response to the established complaint process between the Office for Civil Rights and Civil Liberties (CRCL) and CBP OPR.²

Background

On May 11, 2021, the CBP Situation Room generated significant incident report (SIR) 21-WPBWPB-051221000002, identifiable with this death-in-custody. After the investigation was declined by the U.S. Department of Homeland Security (DHS), Office of Inspector General (OIG), CRCL undertook their investigation. Additionally, on May 13, 2021, the CBP OPR Special Agent in Charge Miami office (SAC Miami) was notified of the incident and began their use of force incident team (UFIT) investigation.

¹ Please note that we have omitted from this memorandum Personally Identifiable Information (PII) relating to the complainant. The name is included in an attached memo so this memorandum can be freely shared, without the attachment, with those who do not have a need to know the PII.

² DHS Instruction 046-01-002, *Office for Civil Rights and Civil Liberties, Compliance Branch*, dated 11/06/2013; MOA between CRCL and CBP, *The Coordination of CRCL Complaint Investigations*, dated 02/28/2017.

The initial incident occurred on May 11, 2021, when a CBP Marine Interceptor Vessel, Air and Marine Operations (AMO), West Palm Beach, Florida, located a Surface Target of Interest (STOI), described as a 20 to 30-foot white center console vessel with twin outboard engines.

The AMO agents observed the STOI operating with no navigation lights, idling into the surf zone with engines trimmed in the up position (because of the shallow water), and about to hit shore. The STOI powered up, and it appeared two individuals disembarked the vessel into shallow water and waded towards the beach. The STOI accelerated and turned away from shore.

The STOI, still without navigational lights, began to evade and increased speed. The CBP Interceptor vessel approached and activated its blue lights, navigational lights, and spotlight about 15 to 25 yards from the STOI. AMO agents witnessed numerous persons aboard the STOI. Approximately one mile from the initial sighting AMO agents deployed warning shots followed by disabling fire to the two outboard engines. It was later determined that twelve migrants remained onboard the STOI, because they were apprehended at the end of the encounter. A search of the area by numerous agencies located two of the migrants who had disembarked with no injuries; they were taken into custody by the Jupiter, Florida Police Department. A third migrant, identified as W.J., a male citizen of Haiti, was found deceased approximately six hours later. His body was found along the shoreline and had drifted significantly from the initial encounter. There were fifteen non-citizens total on the STOI, twelve onboard when the vessel was seized; two that fled into shallow water and were apprehended; and one that drowned.

The driver of the STOI was believed to be a smuggler. There were no personal flotation devices worn or onboard the STOI, which was overcapacity and operated recklessly. The STOI did not yield to marine warning shots and marine disabling fire was required on both outboard engines to safely stop the vessel, taking approximately 90 seconds.

On August 11, 2021, the Palm Beach County Medical Examiner, State of Florida, determined the cause of death for W.J. to be "drowning," manner of death was "accident," and how injury occurred was "decedent drowned." It is believed that W.J. disembarked the boat in close time proximity to the other two Haitians who were later apprehended on the beach. Because no one saw his disembark it is not clear what happened to W.J., including if he was struck by the boat when it departed. It was determined that the actions of AMO did not result to the death of W.J. as the use of disabling fire began after W.J. disembarked from the boat and it sped away from the shoreline.

On November 17, 2021, SAC Miami, Local Use of Force Review Board (LUFRRB) reviewed the incident "following use of warning shots and disabling fire in the Maritime Environment." The decision letter issued to the subject CBP employee stated:

The Miami LUFRRB unanimously agreed the application of less-lethal force by [Marine Interdiction Agent J.R.] complied with the CBP Use of Force Policy. This matter is considered closed by SAC Miami.

As you are aware, inquiries and reviews of this type are conducted for every less-lethal force incident which is not an allegation of excessive force, to determine whether the actions of CBP personnel were proper, appropriate, and in accordance with CBP policy.

Additionally, lessons learned, and experiences shared in analyzing these incidents provide valuable information to improve firearms, self-defense and tactical training with the principal objective of protecting the lives of our agents and officers.

Analysis

CRCL analyzed this incident from a civil rights perspective and to provide input to improve the UFIT, National Use of Force Review Board (NUFRB), and LUFRB process.

Created in 2015, the approximately 21 LUFRBs and one NUFRB are aimed at creating a process to review all use of force incidents in CBP. The more significant (and typically lethal) uses of force are reviewed by the NUFRB and the less significant (and typically less lethal) uses of force are delegated to one of the LUFRBs. According to CBP Directive No. 1420-012:³

The NUFRB is a committee established to review all significant use of force incidents - defined for purposes of this Directive as those that result in serious bodily injury or death and those that involve the discharge of a firearm - regardless of the outcome. The NUFRB is comprised of senior officials from across CBP as well as officials from the [DHS] and the Department of Justice (DOJ).

The NUFRB reviews each incident to determine if the use of force was consistent with CBP policy, if there are issues regarding potential misconduct or administrative violations warranting referral to the CBP [OPR] for further investigation, and to identify and assess any issues involving training, tactics, equipment, or policy.

According to CBP Directive No. 4510-038⁴ titled Response to Use of Force Incidents, section 6.5 states:

The NUFRB was created to review, in a timely manner, [use of force] incidents resulting in death or serious bodily injury, as well as the discharge of firearms with the following exceptions:

- Unintentional discharge
- Animal euthanasia
- Office of Air & Marine disabling fire
- Use of a firearm during authorized training

The NUFRB reviews each incident and makes observations and recommendations concerning the application of deadly force, training and tactics, policy issues and potential misconduct arising from the incident.

Section 6.6 of the same directive reads:

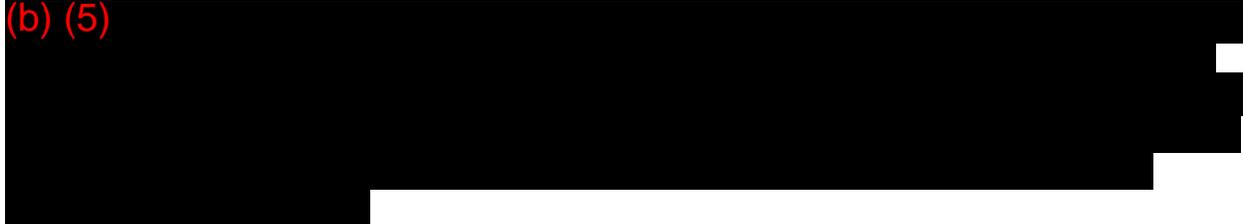
LUFRBs were created to review less-than-lethal force incidents that do not result in death or serious injury, as well as the discharge of a firearm in the following circumstances:

³ CBP Directive No. 1420-012, signed 12/16/2020.

⁴ CBP Directive No. 4510-038, signed 07/27/2015.

- Unintentional discharges
- Animal euthanasia
- Use of breaching rounds and/or less-lethal rounds
- Office of Air & Marine disabling fire

(b) (5)



(b) (5)



Section 5.3 of the same Directive states:

Consistent with this subsection (and absent serious physical injury or death) the use of warning shots and disabling fire by CBP [AMO] shall be reviewed by the appropriate LUFBR as a use of less-lethal force.

Accordingly, this matter did not warrant NUFBR review. The LUFBR reviewed the use of force, finding it within policy.

LUFBR concern: 000089-21-CBP

In this instance the LUFBR mistakenly reviewed the use of force, finding it within policy. The LUFBR letter sent to the CBP employee states, “[a]dditionally, lessons learned, and experiences shared in analyzing these incidents provide valuable information to improve firearms, self-defense and tactical training *with the principal objective of protecting the lives of our agents and officers.* (emphasis added)

Although this certainly is a goal of the LUFBR, it is not the “principal objective.” As noted in the directives, the LUFBR’s goal is to review less lethal use of force incidents that do not result in serious injury or death. Additionally, the LUFBR aims to ensure that agents and officers are not abusing their authority and are acting within CBP authority as they do their work. Finally, CBP agents and officers daily protect the lives of citizens and non-citizens, which is also a critical part of the LUFBR and NUFBR reviews.

⁵ CBP Directive No. 1420-012, signed 12/16/2020.

⁶ CBP Directive No. 4510-038, signed 07/27/2015.

Conclusion

AMO fired disabling shots, which are not typically reviewed by the NUFBR unless they result in serious bodily injury or death.⁷ Given the results of CBP's investigation, and the fact that M.J.'s death cannot be attributed to AMO's use of force, this matter was correctly reviewed by the LUFBR. However, the governing Directives and the Use of Force Incident Guide provide confusing, and at times, conflicting direction that should be addressed.

A second finding is that the LUFBR letter did not accurately represent the principal objective of the LUFBR to objectively review less than lethal uses of force.

Recommendations

- (1) Evaluate CBP Directive No. 4510-038, which was scheduled to be reviewed on July 27, 2018, to update it with current information, including, but not limited to CBP use of force policies, titles, responsibilities, procedures, board structure, and voting membership.
- (2) Ensure the language and guidance in CBP Directive Nos. 4510-038 and 1420-012 align.
- (3) Evaluate the Use of Force Incident Guide (March 2015) to ensure it aligns with current processes, practices, and procedures, including the correct review processes.

It is CRCL's statutory role to advise department leadership and personnel about civil rights and civil liberties issues, ensuring respect for civil rights and civil liberties in policy decisions and implementation of those decisions. We look forward to working with CBP to determine the best way to resolve these complaints. We request that CBP provide a response to CRCL 120 days whether it concurs or does not concur with these recommendations. If you concur, please include an action plan. Please send your response and any questions to (b) (6). CRCL will share your response with (b) (6), the Senior Policy Advisor who conducted this investigation.

Attachment

Copy to:

Stephen A. Boyer
Executive Assistant Commissioner
Air and Marine Operations
(b) (6), (b) (7)(C)

⁷ CBP Directive No. 1420-012, signed 12/16/2020.

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