

Case: July 21, 2023

Case: 20105

Investigator: Jessalyn Goodman

Complaint Received: June 16, 2020

Complainant: Katherine Latham and Frank Latham

CCA completed an investigation of CCA Complaint No. 20105 by Katherine Latham. This report is intended to convey the conclusions reached as a consequence of the investigation, and the basis for those conclusions. This report does not purport to summarize all evidence uncovered during the course of the investigation, nor is it intended to summarize the entirety of CCA's file on this matter.

Complaint Summary:

Date: June 9, 2020

Time: 4:30pm

Location: [REDACTED]

On June 9, 2020, CPD officers responded to the area to investigate a recent shooting in the area; Witness A reported her concerns in person to District 5 personnel. The officers questioned individuals at nearby residences, but not Ms. Latham's residence. Later, Ms. Latham was on the porch of her residence, holding a six-month old baby, when SWAT officers approached with their firearms pointed at her. Ms. Latham's brother, Mr. Frank Latham, was detained with "zip-ties" and placed in police cruisers along with other house residents. Officers instructed Ms. Latham to put her hands up, but she refused because she held the baby.

The officers stated that they were investigating the recent shooting and believed the shot came from the upstairs window of Ms. Latham's residence. A lieutenant showed Ms. Latham the search warrant on his phone. Officers proceeded inside her residence and searched it, locating a shotgun and small amount of marijuana.

Allegations:

Improper Pointing of a Firearm, Improper Procedure, Improper Search, Dishonesty

Persons Involved:

Lieutenant Michael Fern, #L0048, M/W/51 (CPD, Involved Officer, Attempted)
Lieutenant Brian Bender, #L0318, M/W/43 (CPD, Involved Officer)
Sergeant Daniel Cavanaugh, #S0007, M/W/44 (CPD, Involved Officer)
Sergeant Daniel Downing, #S0383, M/W/36 (CPD, Involved Officer)
Sergeant Donald Elsaesser, #S0030, M/W/52 (CPD, Involved Officer)
Sergeant John Dotson, #S0132, M/W/46 (CPD, Involved Officer)
Sergeant Ronald Hale, #S067, M/W/51 (CPD, Involved Officer)
Officer Joshua Condon, #P0329, M/W/35 (CPD, Involved Officer)

Officer Jason Lindle, #P0584, M/W/36 (CPD, Involved Officer)
Officer Tracy Jones, #P0585, M/B/55 (CPD, Involved Officer)
Officer Matthew Crosswell, #P0022, M/W/37 (CPD, Involved Officer)
Officer Miykael Freeman, #P0398, M/B/23 (CPD, Witness Officer)
Officer Brian Kneller, #P0161, M/W/42 (CPD, Witness Officer)
Officer Carol Walker, #P0203, F/B/65 (CPD, Witness Officer)
Officer Sean Farris, #P0101, M/B/29 (CPD, Witness Officer)
Witness A, F/W/59 (Citizen, Witness, Attempted)
Witness B, M/B/52 (Citizen, Witness)
Witness C, M/B/29 (Citizen, Witness)
Witness D, F/B/32 (Citizen, Witness)
Witness E, F/B/27 (Citizen, Witness)
Witness F, M/B/19 (Citizen, Witness)
Katherine Latham, F/B/49 (Citizen, Complainant)

Evidence Reviewed:

Hamilton County Clerk of Courts
CPD Records Management System (RMS)
CPD Internal Investigation Section (IIS) Report
CPD Computer Aided Dispatch (CAD)
Affidavit for Search Warrant
Search Warrant Inventory Sheet
CPD Reports

- Incident Report
- Property Supplement Report
- Investigative Notes General
- Incident Closure Report

Body-Worn Cameras (BWC) Officers Antwine, Crosswell, Davis, Dula, Farris, Freeman, Kneller, Shack, Stewart, and Walker.

Statements by officers, complainant, and relevant witnesses

Significant Discrepancies or Clarifications:

1. Names of the officers were not provided at the time of the complaint. CPD records included the IIS Report and a list of SWAT officers who were dispatched to Ms. Latham's residence; interviews with officers present clarified which officers were substantively involved in the encounter at Ms. Latham's residence. CCA determined Lieutenant Fern showed Ms. Latham the search warrant on his cell phone and Officers Jones, Condon, and Lindle conducted the search of Ms. Latham's residence. As SWAT personnel were not required to wear BWCs at that time, BWC footage of the actual incident was not available and CCA was unable to determine which specific SWAT officers may have pointed their firearms at Ms. Latham or other house residents.
2. Lieutenant Fern retired in September 2020. CCA attempted to contact Lieutenant Fern by mail without success. To date, Lieutenant Fern has not contacted CCA.
3. CCA attempted to contact Witness A by phone and by mail without success. To date, Witness A has not contacted CCA.

4. At the time of the incident, CPD Procedure Section 12.540 Body Worn Camera System did not require SWAT officers to wear BWCs. As of April 2021, the procedure has been updated to require SWAT personnel to utilize their BWCs in “high risk activities (i.e. search warrants, arrest warrants, crowd control) in accordance with their documented SOPs.”
5. IIS completed a report of the incident (#2020-119). The allegations of Improper Pointing of Firearms, Improper Search, and Procedure (Handcuffing) were Exonerated. IIS added an allegation of Procedure (Failing to Provide a Copy of the Search Warrant Inventory) as “Not Sustained” for Officer Jones.

Additionally, IIS stated Officer Jones violated CPD Manual of Rules and Regulations Rule 2.03 (A). IIS found Officer Jones “erroneously identified himself, the affiant, as having seen the muzzle-flash from the window” in the affidavit but stated “the transfer error had no bearing on the foundation or basis for the affidavit.”

Authorities:

CPD Procedure Section 12.550 Discharging to Firearms by Police Personnel (Revised: 06/22/2017)

CPD Procedure Section 12.600 Prisoners: Securing, Handling, and Transporting (Revised 05/30/2019)

CPD Procedure Section 12.700 Search Warrants/Consent to Search (Revised: 05/30/2019)

CPD Manual of Rules and Regulations – Section Two – Neglect of Duty

CPD Investigations Manual (Revised: 03/06/2020)

Analysis:

Allegation: Improper Pointing of a Firearm

Ms. Latham alleged that SWAT officers approached her residence and pointed their firearms at her while she held an infant. Witness statements and police documents establish that on June 9, 2020, SWAT officers did enter Ms. Latham’s residence with firearms displayed while assisting with the execution of a search warrant.

As per CPD Procedure § 12.700, SWAT assists with the execution of all high-risk warrants. According to § 12.700, “A high-risk search warrant is one where the officers expect: 1) Fortified locations. 2) Armed subject. 3) Subject has an outstanding warrant for Homicide, Rape, Felonious Assault, Aggravated Robbery, or Aggravated Assault. 4) Any other situation where the potential for violence is great (No Knock search warrants).”

SWAT is authorized by CPD policy to carry weapons that may not be holstered. See CPD Procedure §§ 12.205 and 12.545. Furthermore, with respect to building searches, CPD officers are trained that while “[n]ot all searches will be conducted with a weapon out it is a much quicker transition to a sight picture on a suspected threat with your weapon already out rather than drawing from your holster.” See Peace Officer Basic Training, Building Searches. In addition, while CPD Procedure Section 12.550, Discharging of Firearms by Police Personnel, states that an officer has the authority to display a firearm when “a police officer perceives what he interprets to be a threat of loss of life or serious physical harm to himself or others at the hands of another,” Section 12.550 does not define “perceive” so as to require that an officer observe an imminent threat before displaying a firearm. An officer’s understanding or awareness of facts that the officer “interprets” to mean that a threat exists will permit the display of a firearm under the plain meaning

of Section 12.550's text. Collectively, the clear implication from these provisions is that CPD policy and training permits the withdrawing and/or display of firearms during execution of high-risk warrants, without the need for any additional showing.

However, CPD's Tactical Patrol Guide (2020) instructs that when conducting building searches, "officers who have their weapons out of the holster **must** maintain muzzle discipline by keeping their finger off the trigger and holding the gun in a tactical **low ready** position" (emphasis added). In addition, Section 12.550 requires that an officer who displays a firearm must do so with "finger outside the trigger guard". According to Section 12.550, the finger is only to be placed on the trigger when on target and ready to engage a threat."

In Ms. Latham's case, witnesses present recalled the officers had their firearms drawn. At the time of the incident, SWAT officers were not required to wear BWCs; there is only limited BWC footage from uniformed officers during the incident, which shows SWAT officers with their firearms in a low ready position and does not show any officers pointing at Ms. Latham or any other resident. In their statements to CCA, SWAT officers indicated it was likely their firearms were drawn and possible their firearms were pointed at individuals until the situation was considered safe and under control.

Although the basis for SWAT's involvement concerned a building search and execution of a high-risk warrant that was related to the discharge of a firearm, and although some of the relevant SWAT officers explained that their display of firearms was related to their need to maintain safety, key questions remain in this case. Ultimately, CCA lacks comprehensive BWC footage showing how SWAT handled their firearms with respect to Ms. Latham upon approaching her, and CCA is unable to identify all relevant SWAT personnel from that day who assisted in the execution of the warrant. Thus, the evidence provides an insufficient basis upon which to decide the allegation by a preponderance.

Allegation: Improper Procedure

Ms. Latham alleged that Mr. Latham was detained using "zip-ties." CPD Tactical Patrol Guide instructs officers conducting building searches to "secure all occupants first. Once all persons are safely in custody, a search for evidence may be conducted." CPD officers are authorized to use handcuffs and flex-cuffs (which have the appearance of "zip-ties") to detain individuals. CPD Procedure Section 12.600 Prisoners: Securing, Handling, and Transporting states flex-cuffs are permitted during SWAT operations. Therefore, the SWAT officers' use of flex-cuffs during this encounter was consistent with CPD's policy, procedure, and training.

Allegation: Improper Search

Ms. Latham alleged her residence was searched by CPD officers. In their statements to CCA, Officers Jones, Condon and Lindle confirmed they searched Ms. Latham's residence. Officers Condon and Lindle stated their entry occurred after a warrant to search Ms. Latham's residence had been signed by a judge and provided to on-site command staff. Entry into a residence granted by a search warrant is permitted by law. CCA confirmed the search warrant as signed by a judge on June 9, 2020.

As detailed below, Officer Jones authored the affidavit for the search warrant. CPD Procedure Section 12.700 Search Warrants/Consent to Search states that a search warrant is valid when the affidavit satisfies the legal requirements for such warrants, and must include the nature of the offense, a description of the place to be searched, specify the items sought, and probable cause.

It adds that the “probable cause for a search warrant are the facts and circumstances strong enough by themselves to cause a prudent officer to believe articles subject to seizure are being held on the property.” As the information Officer Jones listed in the affidavit was in error, and therefore misleading in the probable cause used to justify the validity of the search warrant, Officer Jones’s search of the residence was improper.

As Officers Condon and Lindle were unaware of Officer Jones’s additions to the affidavit, their actions were not unreasonable under the Fourth Amendment and were therefore consistent with CPD’s policy, procedure, and training.

Collateral Allegation:

Allegation: Improper Procedure

A review of the typed Affidavit for Search Warrant showed the affiant, Officer Jones, included a handwritten addendum: “Affiant saw the muzzle flash from the window.”

In his CCA interview, Officer Jones stated Lieutenant Fern assigned him to write an affidavit for a search warrant of Ms. Latham’s residence. Officer Jones explained he had not spoken to any witnesses, reviewed any statements, nor been involved in the initial investigation. After he presented the affidavit to be signed on or about June 9, 2020, Officer Jones stated he had a conversation with the reviewing judge about additional details of the incident. The judge “directed him to supplement the affidavit.” Officer Jones informed CCA that in response to the judge’s instruction that he supplement the affidavit with additional details, Officer Jones, the affiant, wrote the aforementioned on the affidavit (emphasis added), “**Affiant saw the muzzle flash from the window.**” However, Officer Jones acknowledged to CCA on April 24, 2023 that he **had not** seen the muzzle flash from the window. Officer Jones told CCA that Lt. Fern had informed him that a witness had seen the muzzle flash from the window, and that Officer Jones was relying on that information. He described the inaccuracy in the affidavit as a “clerical error” which occurred due to his “haste.” Initially, Officer Jones stated that the sentence should have read, “Affiant spoke to a witness, who saw the muzzle flash from the window,” but when confronted by CCA that he had *not* spoken to the witnesses, he corrected himself to say the sentence should have read, “Affiant spoke to a police officer, who had spoken to a witness who saw the muzzle flash from the window.”

The discrepancy between what Officer Jones wrote (that he saw the muzzle flash) and what he says actually happened (that someone else saw the muzzle flash) is concerning because of the lesser weight that a judge, who has to decide whether an affidavit establishes probable cause, is likely to give to uncorroborated hearsay from a citizen as compared to the weight that a judge is likely to give to an officer who attests to having seen a criminal offense unfold firsthand. Implicit credibility was likely given to police testimony of facts allegedly observed directly: in this circumstance, Officer Jones presented in a sworn affidavit that he observed the muzzle flash from the residence, lending credence to the allegations, rather than stating a witness provided the information, whose credibility had not been established.

It should also be noted that per CPD’s Investigative Notes, while Witness A alleged to CPD “an unknown suspect began firing shots from [address], from a front first floor window,” it did not reference a “muzzle flash.” CCA was unable to reach Witness A to confirm whether the detail was provided to CPD.

At a minimum, CPD Rules and Regulations Section Two – Neglect of Duty 2.03 prohibits “reports and/or forms submitted by members, as well as official statements (verbal, written, or electronic)

that...contain inaccurate, incomplete, or improper information due to officer negligence or inattention” or “as a result of intentional conduct by members designed to mislead.” Officer Jones included inaccurate information in his affidavit for the search warrant of Ms. Latham’s property, which gave rise to the probable cause to issue the search warrant, leading to the SWAT response by CPD, search of the residence, and detainment of its residents. At a minimum, his conduct was negligent or inattentive. Therefore, Officer Jones’s actions were not within CPD’s policy, procedure, and training.

Allegation: Dishonesty

During the course of CCA’s investigation, Investigators became aware of a false statement that Officer Jones made in his affidavit in support of a search warrant connected to this complaint (see above, discussing Officer Jones’s inaccurate assertion that he, the “affiant,” personally “saw the muzzle flash from the window”). Given our knowledge of that false statement, we must consider whether Officer Jones wrote such statement due to an oversight or negligence, or instead whether Officer Jones included that statement knowing that it was false. Relatedly, we must consider whether Officer Jones’s statement to CCA that he made the false assertion in the affidavit due to a “clerical error” was truthful, or whether that explanation was in turn a false statement on its own.

Section 5.01 of CPD’s Manual of Rules and Regulations states, “No member shall knowingly make a false verbal statement or knowingly state, enter, or cause to be entered on any official documents any false information during serious situations including but not limited to” interviews conducted during administrative investigations.

In addition, Article 28 of Cincinnati’s Administrative Code similarly instructs officers that “[a]s a condition of employment, all police officers and city employees are required to provide truthful and accurate information to the CCA.”

In assessing the credibility and truthfulness of any witness, including any police officer providing statements as evidence in an investigation, CCA considers the following factors, among others, consistent with standard investigative practice and application of legal principles for determining credibility:

- “Whether the witness makes a statement against self-interest, such as admitting to improper or illegal activity.”
- “Whether the witness has a motive to falsify.”
- “Whether the statement is consistent with the witness’ previous testimony or other evidence.”
- “Whether significant time has passed since the incident that could impact the completeness and accuracy of the witness’ testimony.”
- “Whether there is corroborating testimony or other evidence supporting the witness’ testimony.”
- “The amount of detail in the witness’ statement.”
- “The witness’ demeanor while providing a statement or manner of doing so.”
- “The reasonableness or plausibility of the what the witness is stating.”
- “The opportunity the witness had to see, hear, and know the things about which the witness is providing a statement.”
- “The witness’ accuracy of memory.”
- “The witness’ frankness or lack of it.”

- “The witness’ bias, if any.”

See CCA Investigator Manual (3/22/2022) (quoting *The Police Misconduct Complaint Investigations Manual*, 2d Edition, Barbara Attard and Kathryn Olson; also quoting Ohio Jury Instructions, 305 OJI CV 305.05).

As stated above, Officer Jones had a motive to inflate the evidentiary support for probable cause in the affidavit he submitted to the judge, given that a sworn firsthand observation from a police officer that the officer saw a muzzle flash from a window (i.e. the evidence that Officer Jones included in the warrant) is more credible than uncorroborated hearsay from a witness (i.e. the evidence that Officer Jones now says was the accurate information that should have been included in the warrant). An officer who wished to ease or expedite the approval of a search warrant might have decided that it was better for that officer’s investigation to overstate the evidence in the affidavit, and attest to having observed gunfire firsthand, rather than reference a hearsay statement from a witness that might be less likely to establish probable cause.

Despite this motive, however, when viewing Officer Jones’ explanation for including the false statement alongside the affidavit itself, his explanation – that he committed a clerical error by writing “affiant saw” rather than writing something to the effect of “affiant spoke to a police officer, who had spoken to a witness who saw” – appears plausible. In other portions of the affidavit that immediately follow his inaccurate statement “affiant saw,” Officer Jones repeatedly included hearsay statements from another witness, making it less likely that he wrote “affiant saw” in an effort to avoid including any hearsay in the affidavit. In addition, we are aware of no evidence that Officer Jones falsely claimed to have personally seen the muzzle flash on any other document, or in any other oral statement.

Nevertheless, given our inability to interview Lt. Fern for the purpose of corroborating (a) Officer Jones’ assertion that a citizen-witness informed Lt. Fern that the witness saw a muzzle flash from the property, and (b) that Lt. Fern in turn communicated that information to Officer Jones, we cannot properly assess what information Officer Jones possessed when he submitted the affidavit to the court. We also lack proof as to what Officer Jones orally communicated to the judge when he submitted the affidavit and have no record showing whether he orally informed the judge that he had seen the muzzle flash, consistent with what he wrote. Lacking such evidence, we have an insufficient basis upon which to decide whether Officer Jones was purposely misleading in submitting his affidavit and during his CCA interview when asked about that affidavit.

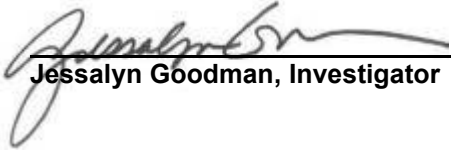
Findings:

Original Allegations

No.	Allegation	Subject Officer	Involved Citizen	Finding
1	Improper Pointing of a Firearm	Unidentified	Katherine Latham	Not Sustained
2	Improper Procedure	Unidentified	Frank Latham	Exonerated
3	Improper Search	Joshua Condon	Katherine Latham	Exonerated
4	Improper Search	Jason Lindle	Katherine Latham	Exonerated
5	Improper Search	Tracy Jones	Katherine Latham	Sustained

Collateral Allegation

6	Improper Procedure	Tracy Jones	Katherine Latham	Sustained
7	Dishonesty	Tracy Jones	Katherine Latham	Not Sustained



Jessalyn Goodman, Investigator



Gabriel Davis, Director

Previous Contacts and Commendations for Officers with Sustained Findings:

Officer Jones

Previous Contacts with CCA

Officer Jones had no previous contact with CCA in the past three years.

Previous Contacts for CCA Referrals

Officer Jones had no allegations that CCA referred to CPD for investigation in the past three years.

Previous Contacts with IIS

CCA is unaware of any additional previous contact by Officer Jones with IIS.

Commendations

Officer Jones received three commendations in the past three years.

Date	Source of Commendation Received
07/17/2017	CPD
07/17/2017	CPD
01/05/2020	CPD