VERMONT HUMAN RIGHTS COMMISSION

COMPLAINANT: OBADIAH JACOBS

RESPONDENT: TOWN OF CHESTER

VHRC CASE NO.: PA19-0018

TOWN OF CHESTER'S RESPONSE TO INVESTIGATIVE REPORT

Town of Chester ("Chester"), by and through its attorneys, Carroll, Boe, Pell & Kite, P.C., hereby files its response to the Investigative Report prepared by Melissa Horwitz, HRC Attorney Investigator, dated May 4, 2021.

I. INTRODUCTION

Chester has a municipal police department comprised of five full-time officers, including Sergeant William Frank and Chief Richard Cloud, and three part-time officers. Chester is committed to the principle that all persons, regardless of race, creed, color, national origin, marital status, sex, sexual orientation or gender identity be treated equally and fairly in the conduct of its affairs. Chester supports the work of the Vermont Human Rights Commission ("HRC") and its staff and appreciates the diligence and the extent of the Investigation Report issued on May 4, 2021 ("Report"). Chester freely acknowledges that it can and will improve the practice and procedures of its municipal police department and is currently undertaking a comprehensive review of its internal policies. It is also actively considering the implementation of a Citizens Oversight Committee to help guide the Chester Police Department ("CPD") and Chester in improving accessibility, communications, accountability, public awareness, transparency and best practices.

In that spirit, Chester hereby provides its response to the Report for the purposes of clarifying its understanding of the pertinent facts of record and the circumstances involving this

particular situation. Insofar as Chester's assessment differs, it does so with all due respect to the Investigative Attorney.

Chester also extends its apologies to Mr. Jacobs for the 18 minutes and 27 seconds he was detained on May 10, 2019, including the 48 seconds for which he was subject to a high-risk stop. Given the facts of record, however, Chester maintains that there were nondiscriminatory reasons for the stop having nothing to do with an effort to discriminate or deprive Mr. Jacobs an accommodation based on Mr. Jacob's race and color as alleged. Accordingly, Chester asks that the HRC find that there are no reasonable grounds to believe that unlawful discrimination occurred.

II. DOCUMENTS, RECORDINGS, VIDEO AND INTERVIEWS CONSIDERED AS PART OF THE RECORD

Chester hereby adopts by reference those documents, recordings, video and interview recordings as noted in the Report which, for the purposes of this response, constitute the record information from which the facts, as presented, are derived.

III. FACTUAL BACKGROUND

This is a claim made by Complainant Obadiah Jacobs ("Complainant" or "Mr. Jacobs") against Respondent Town of Chester ("Respondent" or "Chester") premised on the Vermont Fair Housing and Accommodations Act (VFHPAA or "the Act") codified at 9 V.S.A. §4502(a). Specifically, Mr. Jacobs alleges "I believe that the officer, Sgt. William Frank, pulled me over and subjected me to a traumatizing encounter involving a firearm because he profiled me on the basis of my race and skin color." Jacobs Complaint at Para. 9 (PA 19-0018).

The facts which are material to these allegations, are almost entirely encompassed within the timeframe of two events, both of which are well documented in audio and video recordings. Those two events are: (1) Chester Police Sergeant Frank's receipt of a "be on the lookout"

("BOLO" or "BOL") from the Bellows Falls Police Department ("BFPD") Dispatch on May 7, 2019 regarding a road rage incident involving a firearm, and (2) Sergeant Frank's stop of Mr. Jacobs on May 10, 2019 in the drive-up area of the Abenaque Car Wash in Chester, Vermont.[1] What follows will be a brief recounting of what appears in the cruiser video and what can be heard on the recordings as well as a response to some of the comments and arguments made in the Report concerning these facts.

1. On May 10th, 2019, a man, described in the Report as the "Bellows Falls Witness" was stopped at an intersection in Bellows Falls, Vermont. The Bellows Falls Witness was coming from New Hampshire, across the New Arch Bridge. Bellows Falls Call Information Narrative (5/7/19). After stopping, he proceeded into the intersection and "out of nowhere" a car appeared forcing him to slam on his brakes. The next thing he recalled is a gun being pointed directly at him from an approaching vehicle. Bellows Falls Witness Statement at 1:30-1:43. "He took off, it was one of those small cars with a white strip over the hood with an out-of-state plate." Bellows Falls Witness Statement at 2:28-2:35. "He took off north past the police station towards the interstate and that's all I can say." Bellows Falls Witness Statement at 2:50-2:58. He reported that the driver was black with dreadlocks. Bellows Falls Witness Statement at 7:40.

2. The incident was reported to the BFPD via 911 prompting Bellows Falls Officers Michael Keefe and Noah Rheaume to be dispatched to the caller's location at or about 11:54:13. *See* Rockingham Initial Call Information Sheet. The BFPD Officers responded to the Senior Center and met with the Complainant who reported that a black male with dreadlocks waved a

[1] Given that these recordings capture the entirety of the information provided to Sergeant Frank as well as the entire 19 minutes of the stop, which is at the heart of this investigation, Chester urges the Commission to consider hearing and viewing these recordings for themselves before making its decision.

gun at him, driving a small red/maroon car, possibly a Mini Cooper. The vehicle was last seen heading north towards the interstate and Chester.

3. According to the Bellows Falls Witness, the incident "scared the livin' **** out of me." Bellows Falls Witness Statement at 6:33.

4. On May 7, 2019, Officers Rheaume and Keefe investigated and verified a complaint made by a "Bellow's Falls Witness" and reported as follows:

> On May 7th, 2019 I responded to the Senior Center located off Hyde Street in Bellows Falls to meet with complainant [Bellows Falls Witness] who wanted to report a road rage incident that took place on Rockingham Street at the New Arch Bridge in Bellows Falls.
>
> Upon arrival I met with [Bellows Falls Witness] who advised that when he was at the intersection of the bridge small vehicle, possibly a Mini-Cooper drove by him on Rockingham Street headed North. He stated that the operator was a black male with dreadlocks. He stated that the male waived what he thought was a gun at him while passing by. Wayne stated that he did not know the vehicle or operator.
>
> I had dispatcher Beam put out a BOL for the vehicle to area law enforcement to stop and ID the vehicle and operator. Officer Rheaume and I searched the area for the vehicle but did not locate it.

Initial Call Information Sheet, Incident Number: 19BF001883.

5. On March 7, 2019, Sergeant Frank was informed by BFPD Dispatch, at the request of Bellows Falls Police Officer Noah Rheaume, to "be on the lookout" for "possible Mini-Cooper, red/maroon, one of those cars, possible stripe on it, black male with dreadlocks, waved a gun at an elderly gentleman when they were coming over the [New Arch] Bridge, went north on 5, out of state plates." 5/7/19 Telephone Recording; Bellows Falls Dispatch to Chester P.D.

6. In an interview given as part of this Investigation, the Bellows Falls Witness verified that the road rage incident occurred, that it involved "a silver handgun being pointed out of the window towards me", that it involved a small maroon car with a "white stripe over the hood", that the car had out of state plates, that the driver was black with dreadlocks and beads in his hair and that the encounter "scared the livin' **** out of me." Bellows Falls Recorded statement at 1:40, 2:05, 2:26, 3:15, 6:33 and 7:18.

7. On Friday, May 10, 2019 at approximately 1437 hours, CPD Sergeant William Frank was processing a motor vehicle stop involving a third party in the Jiffy Mart parking lot, located at the corner of Rt. 103 and Rt. 11 in Chester.

8. While conducting and processing the motor vehicle stop, Sergeant Frank observed a black male with dreadlocks exit the Jiffy Mart and then leave the parking lot in a small maroon vehicle that resembled a Mini-Cooper with a white stripe along the roof line and out-of-state plates. Based on the multiple matches in descriptors, Sergeant Frank suspected this to be the vehicle and driver for which the BFPD had issued a BOL based on the road rage complaint involving a firearm. After concluding his traffic stop at the Jiffy Mart at approximately 1451 hours, Sergeant Frank proceeded south on Rt. 103 to the parking lot of Jacques Diner where he took up a stationary position to monitor traffic.

9. At approximately 1453 hours, Sergeant Frank again observed the previously identified maroon vehicle pass by his stationary position proceeding south on Rt. 103 towards Bellows Falls. Sergeant Frank initially intended to follow the vehicle and make contact with the BFPD but the vehicle almost immediately turned off Rt. 103 and pulled into the Abenaque Car Wash. Cruiser Video at 00:10.

10. Sergeant Frank pulled into the car wash behind the maroon vehicle, activated his overhead lights and video camera (after Mr. Jacobs had come to a stop), exited his vehicle, drew his firearm and ordered the driver to "shut the car off-let me see your hands." He then ordered the driver to exit the vehicle and place and keep his hands on the roof. He then approached the driver and, being alone, conducted a brief pat down search of the operator for weapons with his firearm at the low ready. Finding no weapons during the limited pat down search, lasting no more than 7 seconds, Sergeant Frank then holstered his firearm. Sergeant Frank's firearm was out of its holster during the entire encounter for no more than 48 seconds from the initiation of the vehicle stop. Cruiser Video at 00:10-01:37.

11. Immediately following the pat down search, Sergeant Frank explained to the operator the reason for the stop including the BOL issued by BFPD, the reported road rage incident involving a firearm, and that the description of the vehicle and the driver reported to be involved in the road rage incident matched that of the operator and his vehicle. Mr. Jacobs denied his involvement. Cruiser Video at 01:37-02:18.

12. Following Sergeant Frank's explanation for the stop, he verbally asked for and received Mr. Jacobs' identity. Sergeant Frank then made contact with BFPD to receive further instructions concerning the status of the BOL and he advised Mr. Jacobs that he was awaiting those instructions. Mr. Jacobs then indicated a need to call someone to make child care arrangements and began to walk towards his vehicle at which point Sergeant Frank stated "before you do that, I need to make sure you don't have any guns in there, ok, is that cool with you?" Mr. Jacobs replied, "ok, yeh sure that's cool." Mr. Jacobs then said "big mistake, sir" to which Sergeant Frank replied "well, you know what, I absolutely hope it is a mistake, I really do." Sergeant Frank then made a consensual weapons search of the vehicle which lasted 1:27

minutes after which he said “ok, thank you, now if you want to make a call or whatever you gotta’ do go ahead.” Mr. Jacobs then re-entered his vehicle and proceeded to make telephone calls and, at the request of Sergeant Frank, Mr. Jacobs also provided his license. After receiving instructions from BFPD, Sergeant Frank then returned Mr. Jacobs’ license and requested that Mr. Jacobs stop in at the BFPD and speak with either Corporal Mike Keefe or Officer Noah Rheaume. Mr. Jacobs then left. The entire encounter lasted approximately 19:00 minutes. Cruiser Video at 02:18-18:59.

13. Although Mr. Jacobs recalls lights being activated while he was on Rt 103 before pulling into the carwash, *see* Jacobs Complaint and Jacobs Recorded Interview at 8:45, it is visually clear from the cruiser video that Sergeant Frank’s lights were not activated until Mr. Jacobs had entered the Abenaque Car Wash drive-in area and was pulling to a stop.

14. The stop was initially conducted as a high risk stop. As explained by Sergeant Frank, the underlying offense for which the BOL was issued involved a road rage incident with a “waved” firearm. During the initial phase of the stop, Sergeant Frank can be heard and observed providing specific instructions as to what to do (“put your hands on the car”), confirming with Mr. Jacobs that the instructions were clear (“do you understand”), approaching with his firearm at the low ready, and then conducting a six (6) second pat down search while responding “I will tell you in a minute” to Mr. Jacobs question “why did you pull me over sir”. Cruiser Video at 00:53-01:38. The lapsed time between when Mr. Jacobs was ordered from his car until Sergeant Frank holstered his firearm was 44 seconds.

15. Immediately thereafter, Sergeant Frank explained the origins of the BOL. Sergeant Frank explained that it involved a “tiny maroon car with a white stripe, that they thought may or may not be a Mini-Cooper and there was a black fellow with dreadlocks” before

going on to explain his observation that "this could not match that description any better." Cruiser Video at 2:07. Sergeant Frank then asks "what is your name?" Mr. Jacobs responds "Obadiah Jacobs" at which point Sergeant Frank responds "[o]h, Obadiah Jacobs, I remember you now." Cruiser Video 03:25.

16. Sergeant Frank then returned to his cruiser and took immediate steps to contact the BFPD to receive instructions and speak with the investigating officers. He then explained to Mr. Jacobs that he was awaiting a return call from BFPD whereupon Mr. Jacobs indicated that he needed to "pick up his daughter, so I have to call my kid's mom" as he began to move towards his vehicle. Cruiser Video 06:30. The following exchange then occurred:

> Sgt. Frank: Ok, no whoa, whoa, whoa before you do that, I need to make sure you don't have any guns in there, ok?
> Mr. Jacobs: ok.
> Sgt Frank: Is that cool with you?
> Mr. Jacobs: Yea sure it's cool.
> Sgt Frank: Ok, can you just stand right back here? Right by the car, just stay right there ok?
> Mr. Jacobs: Big mistake sir.
> Sgt. Frank: Well you know what, I absolutely hope it's a mistake I really do.

Cruiser Video 06:30-06:49.

17. Sergeant Frank then conducts a brief weapons search of the inside of the vehicle lasting 104 seconds (20 seconds of which is taken reiterating to Mr. Jacobs, who had moved in the direction of Sergeant Frank while his back was turned, that he should remain by the cruiser). Once completed, Sergeant Frank said "ok thank you. Now if you want to make a call or whatever you gotta' do go right ahead." Cruiser Video at 06:49-08:33. Mr. Jacobs then returns to his car, locates his phone, provides an ID to Sergeant Frank at his request and gets back into his vehicle.

18. Mr. Jacobs and Sergeant Frank then remain in their respective vehicles for approximately seven (7) minutes while Sergeant Frank awaits a return call with instructions from BFPD. Sergeant Frank can then be observed approaching Mr. Jacobs car and making inquiries as to whether Mr. Jacobs is leasing the car "which comes back to Toyota" and Mr. Jacobs confirms that it is a rental car, Cruiser Video at 16:35, as well as his current address. Cruiser Video at 16:56. Sergeant Frank then returns Mr. Jacobs' license and asks him to visit with Corporal Mike Keefe or Officer Noah Rheaume of the BFPD the following week about the May 7, 2019 incident. Cruiser Video at 17:14.

19. A Vermont State Trooper ("Trooper") can be seen arriving on the scene at approximately 17:58 of the Cruiser Video. There are no interactions between the Trooper and Mr. Jacobs. The investigatory stop concludes with Sergeant Frank providing Mr. Jacobs his name, and Mr. Jacobs saying "have a good day sir" and Sergeant Frank responding "take care." Cruiser Video at 18:20.

20. Mr. Jacobs departs in his vehicle at approximately 19:00 of the Cruiser Video.

21. Chief Cloud can be heard arriving on scene at Cruiser Video at 19:27. Sergeant Frank states that "by the way he's going to file a complaint" to which the State Trooper responds "whatever". Sergeant Frank then states that it is a "perfect match for the description" and enquires if the Trooper had ever dealt with Obadiah Jacobs before who responds "no". Cruiser Video at 19:55. Sergeant Frank goes on to state that "he used to sling some dope and he always wore like two or three sets of spandex pants and I am sure that they used to keep them in between the layers." He is then asked by the Trooper "did he have anything on him today or no?" Cruiser Video at 20:10. Sergeant Frank responds "I just patted him for weapons I didn't

get into his pockets or anything but I did go through the car and he didn't have a gun in the car that I could find." Cruiser Video at 20:16.

22. The following conversation then ensues:

> Trooper: Obadiah, I was thinking Amish (unintelligible)
> Chief Cloud: He didn't have a beard or anything?
> Trooper: (unintelligible) Stopping a horse and buggy
> Sgt. Frank: Jamaican
> Trooper: I guess that would work too.
> Sgt. Frank: I guess.
> Trooper: Alright guys.
> Sgt. Frank: Yea, sorry, see ya.
> Sgt. Frank: so anyway, I pulled him out at gunpoint of course he's a black man being treated this way is f***n bullshit, whatever.
> Chief Cloud: He didn't get his car washed.
> Sgt. Frank: No
> Chief Cloud: I thought that's why he pulled in here.
> Sgt. Frank: Yea, he pulled in hear just because I got behind him. . . . Yea, so the guy said he thought it kinda looked like a Mini-Cooper and it was maroon with possibly a white stripe, black guy with dreadlocks. Id never seen that model of a Toyota before but it does look like a Cooper.

Cruiser Video at 20:16-21:18. There are no further conversations involving the investigatory stop.

IV. DISCUSSION

A. The Investigative Stop of Mr. Jacobs was Based on Reasonable Suspicion

The initial and foundational benchmark of the entire legal analysis contained in the Report is premised on a negative answer to the question of whether "Sergeant Frank had reasonable suspicion to make an investigatory stop of Mr. Jacobs." Report at p. 15. If reasonable suspicion, objectively viewed, exists, there is no basis upon which a claim under the Act can be reasonably made as the "place", "facility" or "service" allegedly in question is always subject to police investigatory detention premised on reasonable suspicion regardless of race or color.

It is undisputed that this investigatory stop occurred subsequent to the issuance of a BOL issued by BFPD, a local law enforcement agency. Specifically, BFPD dispatch contacted the Chester Police Department directly with the BOL information at the specific request of BFPD Corporal Michael Keefe. It is normal and customary for police agencies to exchange BOL information concerning criminal activity that is reported to have occurred within their respective jurisdictions.

Because responses to BOL's inherently contain a wide variety of fact-specific information, not easily reduced or categorized in a policy, it is not unusual that the CPD does not have a specific written policy which dictates specific responses to BOL's received from other law enforcement. In fact, it would be unusual for CPD to have such a policy. A review of the comprehensive list of standard titles in the CALEA Law Enforcement Standing Manual, 6th Ed., demonstrates that the CALEA Law Enforcement Accreditation Program itself does not have or include a policy specific to BOLOs. *See* CALEA.org/node/11406. No such policy exists in the model policies provided to members of law enforcement departments by the Vermont League of Cities and Towns.

As described in the Report at pages 10-11, the manner of transmission, sources, recipients and substantive information in a BOL often requires, as here, an on-the-spot evaluation of a police officer to determine, often within seconds, an assessment of the officer's observations against the particularized BOL information to determine if an investigative stop is reasonable premised on the totality of circumstances. In the case of a BOL seeking area law enforcement to "stop and ID the vehicle and operator", *see* Bellows Falls' Initial Call Information at Bates C0085, "it is imperative that any stop based on that information be judged against an objective standard: would the facts available to the officer at the moment of seizure or the search 'warrant

a man of reasonable caution and belief' that the action taken was appropriate?" *Terry v. Ohio*, 392 U.S. 1, 21-22 (1968). "The law enforcement interests promoted by allowing one department to make investigatory stops based upon another department's bulletins or flyers are considerable, while the intrusion on personal security is minimal. The same interests that weigh in favor of permitting police to make a Terry stop to investigate a past crime, support permitting police in other jurisdictions to rely on flyers or bulletins in making stops to investigate past crimes." *United States v. Hensley*, 469 U.S. 221, 232, 105 S.Ct. 675, 682 (1985). "[E]ffective law enforcement cannot be conducted unless police officers can act on directions and information transmitted by one officer to another and that officers, who must often act swiftly, cannot be expected to cross-examine their fellow officers about the foundations of the transmitted information." *United States v. Robinson*, 536 F.2d 1298, 1300 (1976).

"In *Terry*, and subsequent cases, this court has held that, consistent with the Fourth Amendment, police may stop persons in the absence of probable cause under limited circumstances. In particular, the court has noted that law enforcement agents may briefly stop a moving automobile to investigate a reasonable suspicion that its occupants are involved in criminal activity." *United States v. Hensley*, 469 U.S. 221, 226, 105 S.Ct. 675 (1985) (citing, *Terry v. Ohio*, 392 U.S. 1 (1968)).

As noted by the Vermont Supreme Court in *State v. Siergiey*, 155 Vt. 78, 80-81, 582 A.2d 119, 121 (1990), "the test 'in evaluating the validity of an investigatory seizure . . . is 'whether, based upon the whole picture, [the officer's] . . . could reasonably surmise that the particular vehicle they stopped was engaged in criminal activity.'" *Id.* at 81.[2]

[2] It is well settled in Vermont that the Fourth Amendment's reasonableness standards to investigatory stops also applies to the court's analysis under Article 11 of the Vermont Constitution. *Zullo v. State*, 2019 VT 1, ¶58, 2019 Vt. 1, 2009 VT 298, 335. A "lesser standard of reasonable suspicion of either criminal activity or even a minor traffic violation can form the basis of a valid temporary stop." *Id.*, 2019 VT 1 at ¶59.

> Investigatory stops are permitted where 'specific and articulable facts which, together with the rational inferences taken therefrom, reasonably warrant the intrusion.' The requisite 'level of suspicion is considerably less than proof of wrongdoing by a preponderance of the evidence.' The Defendant offers no reason to adapt different principles under the Vermont Constitution. *Id.* (internal citations omitted).

Id.

The Report cites *State v. Boyea*, 101 VT 401, 765 A.2d 862 (2000) as providing the courts, and by extension, police officers, three factors to consider in assessing the reliability of the information received from an anonymous informant: "the nature and specificity of the information conveyed; the extent of corroboration by the officer; and the urgency of effectuating a stop under the circumstances." *Boyea*, 101 Vt. at 404. *Boyea* found reasonable suspicion where a Vermont State Trooper received a radio dispatch of an erratically driven blue/purple Volkswagen Jetta with New York plates travelling south on I-89 in between exits 10 and 11. *Boyea*, at 403. In this situation, the descriptors of the vehicle in question (red/maroon Mini-Cooper with possible stripes and out-of-state plates heading north towards I-89 and Chester) are notably similar to those in *Boyea*. While the temporal connection in *Boyea* was more immediate, this case involves added descriptors of the vehicle *and* the individual driving (skin color and dreadlocks), the car and waving a gun with the added factor of a known and credible witness informant. Taken together, there are five independent pieces of particularized information from which a reasonable suspicion can be drawn. That the matching vehicle and driver together were spotted three days later in Chester, the direction to which the vehicle was headed, does not eliminate a reasonable particularized basis upon which to be suspicious, for the purposes of a

investigatory stop, that this vehicle and its driver are, in fact, the subject of the BOL dispatched by BFPD.[3]

"The level of suspicion required for a lawful investigatory stop is considerably less than a preponderance of the evidence, but it must be more than inchoate, an unparticularized suspicion or hunch." *State v. Thompson*, 175 Vt. 470, 471, 816 A.2d 550, 552 (2002) (mem.) (quotation omitted). "In determining whether an officer had reasonable suspicion to effectuate a seizure or extend an investigative detention, we look at the totality of the circumstances." *Manning*, 2015 VT 124, ¶14. *See, also, State v. Rutter*, 2011 VT 13, ¶16, 189 Vt. 574 (mem.) ("we conclude that the protections of Article 11 do not extend to prohibiting law enforcement officers from stopping motor vehicles where there is an objectively reasonable suspicion that a motor vehicle violation has occurred, even if in a particular situation these infractions may appear 'trivial' or the officer's motivation is suspect."). "In determining the legality of a stop, courts do not attempt to divine the arresting officer's actual subjective motivation for making the stop; rather, they consider from an objective standpoint whether, given all of the circumstances, the officer had a reasonable and articulable suspicion of wrongdoing." *State v. Lussier*, 71 Vt. 19, 23-24, 757 A.2d 1017, 1020 (2000). "The totality-of-the-circumstances standard and reasonable suspicion determinations 'allows officers to draw on their own experience and specialized training to make inferences from and deductions about the cumulative information available to them that 'might well elude an untrained person''". *State v. Davis*, 2007 VT 71, ¶7, 182 Vt. 573, 574.

Given the other matches between the lookout description and the stopped car, a slight discrepancy involving a detail of make and model and the stripping of the vehicle given the white roof displayed on Mr. Jacobs' vehicle is entirely reasonable. "[R]easonable suspicion can survive in the face of

[3] Here, the Report places weight on the fact that Mr. Jacobs with dreadlocks appear, in part, in the video to be red, a fact missing from the identity descriptor in the BOL. The video, however, also clearly depicts that Mr. Jacobs' hair is black and red. Sergeant Frank was not supplied with a description of hair color as part of the BOL. Under these circumstances, there is no basis upon which to fault for failing to identify information that he was not provided and could not reasonably observe until other than the stop. It is also clear from the telephonic BOL delivered to Sergeant Frank, that the information came directly from an eyewitness who was the subject of the road rage incident within minutes of its occurrence as investigated by officers of the BFPD.

discrepancies between the vehicle described and the vehicle stopped." *See, United States v. Abdus-Price*, 518 F.3d 926, 931 (Dist. Col. Circuit 2008) (color discrepancy between dark blue and white car for a black and tan car reasonable) and *United States v. Hearst*, 228 F.3d 751, 756-57 (6th Cir. 2000) (finding reasonable suspicion supported stop of dark Mercury Cougar where report described dark colored Ford Thunderbird); *Youmanzor v. United States*, 803 A.2d 983, 993 (D.C. 2002) (finding reasonable suspicion supported stop of a blue Honda, where a lookout described a gray Honda). "Investigating officers must be allowed to take account of the possibility that some of the descriptive factors supplied by victims or witnesses may be in error." 4 Wayne R. Lafave, Search and Seizure: A Treatise on the Fourth Amendment §9.5(g) at 557 (4th Ed. 2004)). When one considers all of the information and circumstances of this situation, as presented to Sergeant Frank, they presented a particularized basis for an investigatory stop. It should also be noted that there was urgency in effectuating the stop for investigatory purposes given the manner in which a firearm was reportedly used by a reliable informant. The gravity implicit in the road rage incident involving a deadly weapon was certainly another factor to be considered by Sergeant Frank in determining the reasonableness of a brief investigatory stop.

B. <u>High-Risk Stop</u>

Sergeant Frank's decision to initiate a high-risk stop is also reasonable under the circumstances. He was alone at the time of the stop. The BOL involved the threatening use of a firearm with particularized information as observed by him, that it occurred from the very vehicle being stopped. It is universally recognized that traffic stops are "especially fraught with danger to police officers." *Michigan v. Long*, 463 U.S. 1032, 1047, 103 S. Ct. 3469 (1983). "'The risk of harm to both the police and the occupants [of a stopped vehicle] is minimized, "'if the officers routinely exercise unquestioned command of the situation.'" *Arizona v. Johnson*, 555 U.S. 323, 330, 129 S. Ct. 781 (2009)(internal citations omitted). Once stopped, officers can order the driver to exit the vehicle and conduct a search for weapons to assure scene safety where there is a reasonable suspicion of danger to the officer. *Id.* As stated by Judge Posner: "Where

the officer merely points a gun at a suspect in the course of arresting him, the suspect would have no basis for claiming that he had been seized with excessive force in violation of the Constitution." *Witkins v. May,* 872 F.2d 190, 194 (7th Cir. 1989).

As demonstrated by the video of the encounter, this is exactly how Sergeant Frank proceeded. His firearm was out of its holster for no more than 48 seconds, he proceeded towards the vehicle holding his firearm at the "low ready" position, the pat down search for weapons took 7 seconds and the vehicle search, requested and consented to only after Mr. Jacobs sought to re-enter the vehicle, took only 1.27 minutes. These actions were limited to the investigatory purposes of the temporary detention and were all calculated at assuring the safety of those involved in an encounter that took a total of 19 minutes to complete without incident.

"Police officers have the authority to briefly stop someone if they have a reasonable and articulable suspicion that the individual is involved in criminal conduct that the police are investigating and if the crime involved a potential threat to public safety, the law enforcement interests at stake weigh even more heavily in favor of permitting the stop." *United States v. Edwards*, 2017 U.S. Dist. LEXIS 150204 at p. 3 (W.D.N.Y. 2017).

> [W]here police have been unable to locate a person suspected of involvement in a past crime, the ability to briefly stop that person, ask questions, or check identification in the absence of probable cause, promotes the strong government interest in solving crimes, and bringing offenders to justice. Restraining police action until after probable cause is obtained will not only hinder the investigation, but might also enable a suspect to flee in the interim and to remain at large. Particularly in the context of felonies or crimes involving a threat to public safety, it is in the public interest that the crime be solved and the suspect detained as promptly as possible. The law enforcement interest at stake in these circumstances outweigh the individual's interest to be free of a stop and detention that is no more extensive than permissible in the investigation of imminent or ongoing crimes.

United States v. Hensley, 469 U.S. 221, 229, 105 S.Ct. 675, 680 (1985).

The crime under investigation involved conduct that could lead to charges of reckless endangerment (13 V.S.A. §1025) or the felony of aggravated assault (13 V.S.A. §1024(5)). "That a protective frisk takes precedence over such investigation of criminal activity is encapsulated in Justice Harlan's memorable phrase: 'There is no reason why an officer, rightfully but forcibly, confronting the person suspected of a serious crime, should have to ask one question and take the risk that the answer might be a bullet.'" *United States v. Abdus-Price*, 518 F.3d 926, 933 (2008). Once an officer has "lawfully engaged a person for investigative purposes, 'the policeman making a reasonable investigatory stop should not be denied the opportunity to protect himself from an attack by a hostile suspect.'" *Adams v. Williams*, 407 U.S. 143, 146, 92 S.Ct. 921 (1972). "He may compel a stopped motorist to step out of the car to prevent their surreptitious retrieval of weapons [and] [h]e may then conduct a protective frisk for weapons if he has reasonable suspicion that the stopped individuals are armed and dangerous. His reasonable suspicion may be based on reliable reports from others." *Id.* at 931-932.

In this case, there was reasonable suspicion to believe that the occupant of the vehicle, based on the totality of the descriptor matches of both the vehicle and driver, possessed a firearm and that it was capable of being brandished in an aggressive and threatening manner. Under these circumstances, it was entirely appropriate for Sergeant Frank to conduct the initial 48 seconds of the stop as high-risk and to ask Mr. Jacobs to step out of the car, place his hands on the hood of the car and conduct a brief 5 second pat down to be sure he had no weapons.

Further, when Mr. Jacobs indicated a need to contact family members via his phone located in the car, Sergeant Frank rightfully restricted him from reentering the car until such time as a brief weapons search of the interior of the car was conducted to which Mr. Jacobs then verbally consented. After the search, Mr. Jacobs was then able to reenter the vehicle and place

his telephone call. In *United States v. Howell*, 2018 U.S. Dist. LEXIS 138468 (Dist. Ct. 2018) officers initiated a vehicle stop and drew their weapons before making any observations of Mr. Howell. Pursuant to the tip of a confidential informant, the officers had been informed that the occupant possessed a firearm. "Because police officers may 'take such steps as are reasonably necessary to protect their personal safety and maintain the status quo during the course of [a] stop', the . . . officers' decision to draw their weapons before approaching [the driver's vehicle] was reasonable under the circumstances, and therefore probable cause is not an issue here."[4] *Id.* at *6.

C. The Claim Under the VFHPAA

The HRC's jurisdiction under 9 V.S.A. §4552(b)(1) is limited. It is "to investigate and enforce complaints of unlawful discrimination, violation of Chapter 139 of this Title, discrimination in public accommodations and rental sale of real estate." *Id.* Section 4502 of Title 9 reads:

> (a) an owner of operator of a place of public accommodation or an agent or employee of such owner or operator shall not, because of the race, creed, color, national origin, marital status, sex, sexual orientation, or gender identity of any person, refuse, withhold from or deny to that person any accommodations, advantages, facilities, privileges of a place of public accommodations.

Id. Assuming the application of the *McDonald-Douglas* framework as the proper basis for establishing an allocation of the respective burdens of production and persuasion and the order of

[4] The Report makes passing reference to Sergeant Frank's employment history as a police officer in the State of Vermont. The Report notes that Sergeant Frank has been a police officer for the Springfield, Bellows Falls and Chester Police Departments for 19 years, and is currently a Sergeant with the Chester Police Department. As indicated in the Report, Sergeant Frank has no prior history, of complaints, lawsuits or discipline relating to discrimination on the basis of race or color. Of the three past legal claims which have been filed against Sergeant Frank, the latest being 2007, none of them involve claims brought while he was a member of the CPD, none of them involve persons of color and none of them have resulted in any legal determination of wrongdoing or liability. It should also be noted that Chester does have Fair and Impartial policing policies for which CPD officers have received training, and that CPD officers do have annual use of force training.

proof, *see, Robertson v. Mylan Laboratories, Inc.*, 176 Vt. 356, 367 (2004) (Title VII case), the Complainant needs to establish that:

> (1) he is a member of a protected class; (2) that respondent is an owner or operator of a place of public accommodation; (3) that claimant was denied accommodations, advantages, facilities and privileges of a place of public accommodation; and (4) that the denial of the accommodation, advantages and privileges of the place of public accommodation was because of the race or color of the complainant.

See 9 V.S.A. §4502(a).

"The specific elements of a prima facia case may vary depending upon the claim and the particular facts of the case." *Robertson v. Mylan Laboratories, Inc.*, 176 Vt. 356, 367 (2004) (interpreting the elements of a prima facie case under FEPA). The Report also references that a discrimination claim under VFHPAA can be proven with "direct evidence." In doing so, the Report cites *Griffith v. City of Des Moines*, 387 F.3d 733, 736 (8th Cir. 2004) for the proposition that the Claimant may establish his case "in one of two ways". The first is by proof of "direct evidence" of discrimination. The second is by demonstrating discrimination based on circumstantial evidence.

"Direct evidence in this context is not the converse of circumstantial evidence, as many seem to assume. Rather, direct evidence is evidence 'showing a specific link between the alleged discriminatory animus and the challenged decision, sufficient to support a finding by a reasonable factfinder that an illegitimate criteria actually motivated' the adverse employment action." *Id.* "Thus, 'direct' refers to the causal strength of the proof, not whether it is circumstantial' evidence." *Id.*

> A Plaintiff with strong (direct) evidence that illegal discrimination motivated the employer's adverse action does not need the 3-part *McDonald-Douglas* analysis to get to the jury, regardless of whether his strong evidence is circumstantial. But if the plaintiff

> lacks evidence that *clearly points to the presence of an illegal motive, he must avoid summary judgment by creating the requisite inference of unlawful discrimination through the McDonald-Douglas analysis, including sufficient evidence pretext."*

Id. (emphasis added). *See, also, Robertson v. Mylan Laboratories, Inc.*, 176 Vt. 356, 367 (2004) (setting forth the *McDonald-Douglas* framework in considering of FEPA claim on motion for summary judgment).

The initial analysis in the Report addresses whether the record provides direct evidence that racial or ethnic discrimination motivated a deprivation of public accommodation by respondent.[5]

In this case, there is no evidence that Sergeant Frank or Chief Cloud ever engaged in making a direct derogatory slur or comment involving Mr. Jacobs' race or color. The only comment that can be heard directly attributable to Chief Cloud was a reference to Mr. Jacobs not getting his "car washed" and asking if he had a beard. Sergeant Frank's comment that he expected Mr. Jacobs to file a "bullshit" complaint, while a possible expression of frustration in connection with a potential claim being filed, it is not a derogatory comment, which has any causal relation to Sergeant Frank's decision to initiate the investigatory stop, the decision to employ a high-risk protections and the subsequent decision to seek consent from Mr. Jacobs prior to searching his vehicle for weapons. Specifically, the casual link between these statements and any lack of accommodation involving the decision to effectuate the stop is too attenuated to provide any direct correlation or evidence of an intent to discriminate. While Sergeant Frank's comment is certainly hostile toward the prospect of a claim being filed against him premised on

[5] "Such facts could include 'allegations of overtly racially-motivated misconduct, such as use of racial slurs, . . . that other members of a protected class suffered similar mistreatment, [or] treat[ment] less favorable [than similarly situated [persons] who are not members of the protected class. *Jianjun Zxie v. Oakland Unified School Dist.*, 2013 U.S. Dist. LEXIS 29898, *4 (N.D.Cal. 2013).

discrimination "[h]ostile conduct may support an inference of discrimination, but is not alone sufficient." *Bishop v. Toys "R" Us-NY, LLC*, 2009 U.S. Dist. LEXIS 17377, *6 (S.D.N.Y. 2009). There must be a nexus to the discriminatory conduct; a nexus which is lacking here.

D. Place of Public Accommodation

It is conceded that Chester, as a governmental entity, is subject to the Act. *See, Dept. of Corrections v. Human Rights Comm'n.*, 917 A.2d 451 (2006). It is, however, still to be determined by the Vermont Supreme Court that a public highway is a "facility" under the Act as defined and used in 9 V.S.A. §4501(1) and whether Chester is an owner or operator of the location where the stop occurred.

VFHPPA, the statute underlying this claim, "creates a private right of action for certain discrimination claims." *Washington v. Pierce*, 2005 VT 125 ¶ 13, 179 Vt. 318, 323 (2005). The public accommodations statute forbids owners or operators of places of public accommodation from discriminating on the basis of specified criteria. *Department of Corrections v. Human Rights Commission,* 2006 VT 134 ¶ 8, 181 Vt. 225, 228 (2006) ("*DOC*") (citing 9 V.S.A. § 4502). "'Public accommodation' is defined as 'an individual, organization, governmental or other entity that owns, leases, leases to or operates a place of public accommodation.'" *Id.* (quoting 9 V.S.A. § 4501(8)). "'Place of public accommodation,' in turn, is defined as 'any school, restaurant, store, establishment or other facility at which services, facilities, goods, privileges, advantages, benefits or accommodations are offered to the general public.'" *Id.* (quoting 9 V.S.A. § 4501(1)).

Typically, claims pursuant to VFHPPA and analogous federal statutes—such as the Americans with Disabilities Act ("ADA") and the Rehabilitation Act—"may all be treated together." *Abdo v. University of Vermont,* 263 F. Supp. 2d 772, 777 (D. Vt. 2003); *see Hainze v.*

Richards, 207 F.3d 795, 799 (5th Cir.) ("Jurisprudence interpreting either section is applicable to both."), *cert. denied*, 531 U.S. 959 (2000); *Doe v. Pfrommer*, 148 F.3d 73, 82 (2d Cir. 1998) (requirements of both federal statutes are "nearly identical"); *Taylor v. Schaffer*, 2015 WL 541058, *6 (D. Vt. 2015) ("same analysis applies" to claims under both federal statutes); *Ryan v. Vermont State Police*, 667 F. Supp. 2d 378, 385-86 (D. Vt. 2009) (claims under both federal statutes share common essential elements and should be analyzed "in tandem"); 9 V.S.A. § 4500(a) (VFHPPA sections governing "places of public accommodation" are "intended to implement and to be construed so as to be consistent with [the ADA] and rules adopted thereunder, and are not intended to impose additional or higher standards, duties, or requirements than that act."); 9 V.S.A. § 4500(b) (Sections 4502(b)-(c) governing disability discrimination "shall not be construed to create or impose on governmental entities additional or higher standards, duties, or requirements than that imposed by Title II" of the ADA); *Bhatt v. University of Vermont*, 2008 VT 76 ¶ 14, 184 Vt. 195, 200 (2008) (VFHPAA's disability-discrimination provision includes "identical language" as that appearing in Title III of the ADA); *DOC*, 2006 VT 134 ¶ 9, 181 Vt. at 228-29 (quoting 9 V.S.A. §§ 4500(a)-(b)).

U.S. Department of Justice ("DOJ") regulations list examples of facilities satisfying the ADA's definition of a "place of public accommodation." 28 C.F.R. § 36.104. These include a "[p]lace of lodging," a "restaurant, bar, or other establishment serving food or drink," a "motion picture house, theater, concert hall, stadium, or other place of exhibition or entertainment," a "auditorium, convention center, lecture hall, or other place of public gathering," a "bakery, grocery store, clothing store, hardware store, shopping center, or other sales or rental establishment," a "laundromat, dry-cleaner, bank, barber shop, beauty shop, travel service, shoe repair service, funeral parlor, gas station, office of an accountant or lawyer, pharmacy, insurance

office, professional office of a health care provider, hospital, or other service establishment," a "terminal, depot, or other station used for specified public transportation," a "museum, library, gallery, or other place of public display or collection," a "park, zoo, amusement park, or other place of recreation," a "nursery, elementary, secondary, undergraduate, or post-graduate private school, or other place of education," a "day care center, senior citizen center, homeless shelter, food bank, adoption agency, or other social service center establishment," and a "gymnasium, health spa, bowling alley, golf course, or other place of exercise or recreation." *Id.*; *see* 42 U.S.C. § 12181(7)(A)-(L) (similar list); *National Federation of the Blind v. Scribd, Inc.*, 97 F. Supp. 3d 565, 574 (D. Vt. 2015) (Sessions, J.) ("*NFB*") ("The categories in the [DOJ] regulation are essentially the same as those in the statute," namely Title III of the ADA).

The Vermont Supreme Court effectively expanded this list by ruling that VFHPAA "applies to state correctional facilities" regardless of whether or not prisons are open to the general public. *DOC*, 2006 VT 134 ¶ 1, 181 Vt. at 226. And this Court expanded the ADA's reach (and, presumably, VFHPPA's reach as well) into the realm of cyberspace by ruling that a "place of public accommodation" includes services offered over the Internet that are analogous to one or more of the ADA-listed categories. *NFB*, 97 F. Supp. 3d at 575-76. Chester, however, is unaware of any Vermont Supreme Court decision which has interpreted VFHPPA to apply during roadside encounters with law enforcement officers. Until decided, Chester reserves the right to contest the HRC's jurisdiction to investigate such claims.

E. Complainant was not Denied a Public Accommodation Because of his Race or Color.

As direct evidence, the Report points to statements made during a conversation among Sergeant Frank, Chief Cloud and a Vermont State Trooper which occurred subsequent to the investigatory stop in question and the specific actions which are claimed to have deprived Mr.

Jacobs of a public accommodation based on race and color. "Direct evidence must be 'evidence of conduct or statements that both reflect directly the alleged discriminatory attitude and that bear directly on the contested employment decision.'" *Warch v. Ohio Cas. Ins. Co.*, 435 F.3d 510, 519 (4th Cir. 2006) (citing, *Taylor v. Virginia Univ.*, 193 F.3d 219, 232 (4th Cir. 1999) (un banc) "What is required as evidence of conduct or statements that both reflect directly the alleged discriminatory attitude *and* that bear directly on the contested employment decision." *Brinkley v. Harbor Rec. Club*, 180 F.3d 598, 607 (4th Cir. 1999) (citing, *Fuller v. Phipps*, 67 3rd 1137, 1142 (4th Cir. 1995) (superintendent statement that he would have difficulty working for a woman not sufficiently probative to indicate discriminatory attitude and illustrate nexus between that negative attitude and the employment action)). "Direct evidence is 'evidence that proves the existence of a fact without requiring any inferences,' whereas indirect evidence requires the drawing of an inference." *Messer v. Ohio*, 2013 U.S. Dist. LEXIS 129718, *27 (S.D. Ohio, W.D. 2013).

As stated by the United States Supreme Court in the context of a title 7 employment claim, "the ordinary tribulations of the workplace, such as the sporadic use of abusive language, gender-related jokes, and occasional teasing are legally insufficient to obtain relief under Title 7." *Faragar v. City of Boca Raton*, 524 U.S. 775, 788, 118 S.Ct. 2275 (1998) (addressing hostile environment employment claims). "Courts in discrimination cases often hold that stray remarks made outside the context of the challenged decision are minimally probative of discrimination." *Lewis-Smith v. W. Ky. Univ.*, 85 F.Supp. 3rd, 885, 900, Dist. Ct. W.D. Ky. (2015). *See also, Phelps v. Yale Sec., Inc.*, 986 F.2d 1020, 1025-1026 (6th Cir. 1993) (age discrimination case based on comments that plaintiff too old to be secretary and that she would still be the plant

manager secretary if she were younger not sufficient to provide a nexus as direct evidence in age discrimination case).

As previously addressed, here the communications relied upon concerning the origins of Mr. Jacobs' name as being "Amish" were, in fact, made by a Vermont State Trooper not associated with the Town of Chester. Further, Sergeant Frank's reference to the expectation that Mr. Jacobs may be filing a complaint with reference to his treatment as "a black man" as being "f***ing bullshit" is, his personal assessment of the legitimacy of a such a claim and cannot be fairly inferred to represent a general or "implicit" bias against persons of color. It is also important to note that the statements were made, not in the context of the actual high-risk stop, detention and consent search of the vehicle, but subsequent to the stop itself and the context of a recitation of the events.

Finally, there is no demonstrative statement or action by Sergeant Frank in the cruiser video or suggested in the Report itself that indicates he acted in a "markedly hostile" way or aggressive manner. Once it was determined, after a period of 45 seconds, that no firearms were present on Mr. Jacobs' person pursuant to a 7 second pat down search, Sergeant Frank's demeanor and statements are fairly characterized as being civil and communicative. The Report's assessment that Mr. Jacobs received "marketably hostile services from the Chester police" is entirely dependent upon the Report's assessment that the investigatory stop itself lacked reasonable suspicion, a position already addressed in this response.

In considering this Complaint, it is hoped that the HRC will recognize that Sergeant Frank's assessment of the somewhat abstract concept of reasonable suspicion was his foremost concern in conducting the investigatory stop, and not a discriminatory reaction to his race or color.

IV. CONCLUSION

In conclusion, Chester respectfully requests that the Human Rights Commission find that there are no reasonable grounds to believe that Chester, via its Police Department, discriminated against Obadiah Jacobs based on his color and race in violation of the Vermont Fair Housing and Public Accommodations Act.

Respectfully submitted this 18th day of May, 2021.

TOWN OF CHESTER, VERMONT

BY:/s/ James F. Carroll
James F. Carroll, Esquire
Carroll, Boe, Pell & Kite, P.C.
Its Attorney