



## CLOSED CASE SUMMARY

ISSUED DATE: FEBRUARY 21, 2019

CASE NUMBER: 2018OPA-0690

### Allegations of Misconduct & Director’s Findings

**Named Employee #1**

Allegation(s):		Director’s Findings
# 1	5.001 - Standards and Duties 2. Employees Must Adhere to Laws, City Policy and Department Policy	Allegation Removed
# 2	6.180 - Searches-General 2. There are Specific Exceptions to the Search Warrant Requirement	Not Sustained (Lawful and Proper)

**Named Employee #2**

Allegation(s):		Director’s Findings
# 1	5.001 - Standards and Duties 2. Employees Must Adhere to Laws, City Policy and Department Policy	Allegation Removed
# 2	6.180 - Searches-General 2. There are Specific Exceptions to the Search Warrant Requirement	Not Sustained (Training Referral)

**Named Employee #3**

Allegation(s):		Director’s Findings
# 1	5.001 - Standards and Duties 2. Employees Must Adhere to Laws, City Policy and Department Policy	Allegation Removed
# 2	6.180 - Searches-General 2. There are Specific Exceptions to the Search Warrant Requirement	Not Sustained (Training Referral)

***This Closed Case Summary (CCS) represents the opinion of the OPA Director regarding the misconduct alleged and therefore sections are written in the first person.***

### **EXECUTIVE SUMMARY:**

It was alleged that the Named Employees cited an invalid basis for making a warrantless entry into a community member’s apartment and that the entry, itself, may have been in violation of law and SPD policy.

### **SUMMARY OF INVESTIGATION:**

Officers, including the Named Employees, responded to a call concerning the violation of a no contact order. When the officers arrived, they learned that the Subject and his girlfriend, who was the protected person, were inside of the girlfriend’s apartment. Named Employee #2 (NE#2) knocked on the door and the girlfriend answered. They identified her and asked her whether the Subject was inside the apartment. At first, she appeared reluctant to answer. NE#2 asked her directly where the Subject was, referring to him by his first name. The girlfriend, again reluctantly and with her voice at a low volume, stated that he was inside. Named Employee #3 (NE#3) asked the girlfriend if she would step outside of the apartment and she did so. NE#3 stepped into the threshold of the apartment and twice asked the girlfriend where the Subject was. She responded that he was inside and appeared to



---

point to a location within the apartment. NE#2 and NE#4 entered into the apartment. They were eventually following inside by Named Employee #1 (NE#1). Shortly after entry, the officers observed the Subject. The Subject, who was sitting down, was armed with a knife. He stood up and began cutting himself. At that point, NE#3 used force to take the Complainant into custody. The force, which was consistent with policy, is not at issue here.

In NE#3's use of force report, he contended that the warrantless entry into the apartment was justified by "implied consent." NE#3 told OPA that he initially wrote that he had simple "consent" in his first draft of his use of force report; however, he explained that his Lieutenant directed him to change "consent" to "implied consent." He did not recall his Lieutenant's justification for that change. All of the Named Employees informed OPA that they did not receive express consent from the Subject to enter her apartment. Moreover, they all recognized that there were no exigent circumstances present that would have allowed for entry therein.

The force used by NE#3 was later reviewed by the Department's Force Review Board (FRB). During its analysis, the FRB identified that there was no "implied consent" exception to the search warrant requirement. Accordingly, the FRB found that the Named Employees did not properly document the legal basis for their entry into the girlfriend's apartment. FRB referred that issue to OPA, as well as the question of whether the entry, itself, was justified. This investigation ensued.

As part of its investigation, OPA interviewed the Named Employees. Named Employee #1 (NE#1) told OPA that he arrived at the apartment after NE#2 and NE#3 had already made the decision to enter. When asked what his basis was for going inside of the apartment, NE#1 referenced officer safety, given that he was providing backup for NE#2 and NE#3. NE#1 did not believe that there were any exigent circumstances at the time. When asked what he had learned from the incident, NE#1 stated that he now knew that he could not rely on "implied consent" as a basis for conducting a warrantless entry. He further told OPA that he learned that he, as a backing officer, needed to make sure that the primary officers were acting consistent with policy.

At the time of the incident, NE#2 was a probationary officer and NE#3 was his Field Training Officer. NE#2 stated that he was with NE#3 when initial contact with the girlfriend was made. He stated that she appeared to be fearful and was talking quietly. NE#2 stated that NE#3 made the decision to enter. He told OPA that the girlfriend did not give oral consent for the officers to enter her apartment. He further stated that, to the best of his knowledge, there was no exigency permitting entry.

NE#3, like NE#2, acknowledged that oral consent to enter was not given by the girlfriend. However, he stated that she pointed out where the Subject was in her apartment and then moved out of the way to let the officers walk by her and inside. NE#3 also confirmed that there was no exigency present to justify entry. NE#3 told OPA that he did not have an explanation for why his Lieutenant told him to cite "implied consent" as the lawful authority that permitted their entry into the apartment and then their presence therein when he used force. NE#3 cited a number of cases as supporting his warrantless entry into the apartment. One those cases – *State v. Raines*, 559 Wn. App. 459 (1989) – is, in OPA's opinion, conclusive legal authority establishing that the entry was appropriate. However, this case does not support the proposition that the legal basis for the warrantless entry was "implied consent." This is, instead, a term of art, most often utilized in the context of tests to determine impaired driving, to which consent is implied based on the obtaining of a state-issued driver's license. I note that another case cited by NE#3 - *State v. Jacobs*, 101 Wn. App. 80 (2000) – is relevant to the extent that it holds that the Subject, who was violating a no-contact order – had no standing to contest the validity of the entry. However, the determinative question here is



---

whether the search would stand up to scrutiny if challenged by the girlfriend, not the Subject.

**ANALYSIS AND CONCLUSIONS:**

**Named Employee #1 - Allegation #1**

***5.001 - Standards and Duties 2. Employees Must Adhere to Laws, City Policy and Department Policy***

SPD Policy 5.001-POL-2 requires that employees adhere to laws, City policy, and Department policy. As discussed more fully herein, it was alleged that the Named Employees acted contrary to Department policy and potentially the law when they made entry into the girlfriend's apartment. Given that this issue is addressed in the context of SPD Policy 6.180-POL-2, below, I find that this allegation is duplicative and I recommend that it be removed.

Recommended Finding: **Allegation Removed**

**Named Employee #1 - Allegation #2**

***6.180 - Searches-General 2. There are Specific Exceptions to the Search Warrant Requirement***

As discussed above, NE#1 entered the apartment after NE#2 and NE#3 had already done so. Based on a review of the BWV, he did not take part in or influence the decision to make entry. Moreover, he did not document in his report that the search was justified by "implied consent."

NE#1 explained to OPA that he entered the apartment to provide back-up to NE#2 and NE#3 and, in that respect, acted to ensure officer safety. I find that this decision was both reasonable and consistent with policy.

As such, I recommend that this allegation be Not Sustained – Lawful and Proper as against him.

Recommended Finding: **Not Sustained (Lawful and Proper)**

**Named Employee #2 - Allegation #1**

***5.001 - Standards and Duties 2. Employees Must Adhere to Laws, City Policy and Department Policy***

For the same reasons as stated above (see Named Employee #1, Allegation #1), I recommend that this allegation be removed.

Recommended Finding: **Allegation Removed**

**Named Employee #2 - Allegation #2**

***6.180 - Searches-General 2. There are Specific Exceptions to the Search Warrant Requirement***

SPD Policy 6.180-POL-2 concerns searches and seizures, including entries into residences. It specifically references the various exceptions to the search warrant requirement. Among the exceptions discussed therein are consent and exigent circumstances. The policy does not include "implied consent" as an exception and, indeed, OPA knows of no legal authority providing that such an exception exists to the warrant requirement. The chain of command's force review noted that both NE#2 and NE#3 reported that the search was justified by "implied consent." This was



incorrect. Moreover, NE#3's Lieutenant was in error when she, according to NE#3's account, told NE#3 to include this language in his report. It is unclear from NE#3's OPA interview what the basis for the Lieutenant's direction was.

While the officers proffered the incorrect basis for the entry in their reporting, the warrantless entry was still justified as a matter of law. I agree with NE#3 that *State v. Raines* supports the finding that the girlfriend pointing out the Subject's location inside the apartment and then moving to the side when the officers entered, would be construed as legal consent, even if not provided orally. However, even if this did constitute consent, SPD policy still compelled the officers to have the girlfriend execute a consent to search Form. This was the case even though such a form was likely not legally required. See, e.g., *State v. Dancer*, 174 Wn. App. 666, 300 P.3d 475 (2013), review denied, 179 Wn.2d 1014 (2014) (the officer's failure to provide Ferrier warnings did not render consent invalid where the officers had independent corroborating evidence, a K-9 track, that the person could actually be found in the home). In this respect, the policy is more restrictive than the law. I note that this result seems counterintuitive given that it would be illogical to obtain non-verbal consent and then follow-up with a request that the resident sign a form; however, this is how the policy is currently written.

Given the failure to have the girlfriend execute a consent to search form and given that at least two of the involved officers provided the incorrect justification for entering the apartment, OPA concludes that a Training Referral is the appropriate result. In making this recommendation, OPA notes that the officers' Captain already reminded all South Precinct supervisors that "implied consent" is not an exception to the search warrant requirement. It may be helpful to provide a broader reminder to all South Precinct officers at a roll call briefing.

- **Training Referral:** The Named Employees should be retrained on SPD Policy 6.180 and, specifically, the requirement that when they obtain consent to enter a residence, they have the resident execute a Consent to Search Form. The Named Employees should also be reminded that "implied consent" is not an exception to the search warrant requirement, even if consent does not necessarily need to be verbal and express to be valid. Lastly, the Precinct Captain should provide this same reminder to the Lieutenant who ordered NE#3 to include "implied consent" in his use of force report. This retraining and counseling should be documented and this documentation should be maintained in an appropriate database.

Recommended Finding: **Not Sustained (Training Referral)**

**Named Employee #3 - Allegation #1**

***5.001 - Standards and Duties 2. Employees Must Adhere to Laws, City Policy and Department Policy***

For the same reasons as stated above (see Named Employee #1, Allegation #1), I recommend that this allegation be removed.

Recommended Finding: **Allegation Removed**

**Named Employee #3 - Allegation #2**

***6.180 - Searches-General 2. There are Specific Exceptions to the Search Warrant Requirement***

I recommend that this allegation be Not Sustained and refer to the above Training Referral. (See Named Employee #2, Allegation #2.)



**Seattle**  
Office of Police  
Accountability

## ***CLOSE CASE SUMMARY***

OPA CASE NUMBER: 2018OPA-0690

---

Recommended Finding: **Not Sustained (Training Referral)**