



CLOSED CASE SUMMARY

ISSUED DATE: MARCH 5, 2019

CASE NUMBER: 2018OPA-0750

Allegations of Misconduct & Director’s Findings

Named Employee #1

Allegation(s):		Director’s Findings
# 1	6.220 - Voluntary Contacts, Terry Stops & Detentions 1. Terry Stops are Seizures and Must Be Based on Reasonable Suspicion in Order to be Lawful	Not Sustained (Lawful and Proper)

Named Employee #2

Allegation(s):		Director’s Findings
# 1	6.220 - Voluntary Contacts, Terry Stops & Detentions 1. Terry Stops are Seizures and Must Be Based on Reasonable Suspicion in Order to be Lawful	Not Sustained (Lawful and Proper)

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 detained the Complainant without reasonable suspicion to do so.

ADMINISTRATIVE NOTE:

After its review, the Office of Inspector General (OIG) certified this matter as objective, but declined to certify the case as either timely or thorough. With regard to timeliness, the OIG cited to a 30-day rule imposed by the former OPA Auditor, in which he required that cases be provided to him at least 30 days in advance of the 180-day timeline. If they were not, they were deemed untimely. This same rule has not been formally or informally imposed by the OIG and, thus, it is unclear why it is being applied to this case. OPA believes that this rule is arbitrary and notes that it is not found in any legal or statutory authority, including the Accountability Ordinance, the Consent Decree, or the OPA Manual.

With regard to thoroughness, the OIG listed a number of concerns. OPA addresses them in full below. First, the OIG referenced its belief that the *Terry* Template, which was completed by a witness officer, was inconsistent with the evidence and was incomplete. OPA fails to see how that is relevant to this case or material to a finding of thoroughness. The existence of a *Terry* Template and the quality of that documentation are not at issue in this case. Moreover, the *Terry* Template was completed by Witness Officer #1 (WO#1), not the Named Employees. As such, any issues with the accuracy of the *Terry* Template, are the responsibility of WO#1. Lastly, aside from the errant statement in the *Terry* Template that there was not a frisk during the detention (which may have been the result of WO#1 writing that he, himself, did not perform a frisk) it was otherwise predominantly accurate. The basis for the stop was, as the *Terry* Template indicated, that the Complainant: “was in the area and had a similar description and location as the



suspect.” Contrary to the OIG’s interpretation in its memo, this is consistent with the reasoning provided by Named Employee #2 (NE#2) at his OPA interview.

Second, the OIG raised OPA’s failure to ask NE#2 why he continued with the detention after he perceived that the Complainant was not an African-American man. While perhaps it would have been optimal to ask this question, NE#2 was clear at his interview that he believed it possible that the victim had provided an inaccurate description given the intensity of the situation and, given similarities between the Complainant’s description and that of the perpetrator and his closeness in time and location to where the perpetrator was described being, the Complainant still could have been the right person. Moreover, while the Complainant was not African-American, his racial identity was unclear from a review of the video. He later self-identified as Native American/Alaskan Native. Given the totality of the evidence, OPA does not believe that the failure to ask this specific question warrants a determination that the investigation was not thorough.

Third, OIG faults OPA for not questioning NE#2 concerning the following areas: the basis for the frisk for weapons; why he did not complete a *Terry* Template; and the “reason for additional detaining actions during the detention.” The OIG further deemed OPA’s questioning of NE#2 to not be thorough because OPA did not explore the purported “discrepancies” between the *Terry* Template and NE#2’s reasoning for the detention. All of the issue areas identified by the OIG are simply irrelevant to whether there was reasonable suspicion to stop the Complainant, which was the only allegation classified for investigation. Moreover, given that only SPD Policy 6.220-POL-2(1) was classified, and not SPD Policies 6.220-POL-2(2) (limiting the detention to a reasonable scope), 6.220-POL-2(6) (frisks of detained subjects), and 6.220-POL-4 (*Terry* Templates), OPA could potentially have violated the Collective Bargaining Agreement had it explored these issues at the Named Employees’ interviews.

Fourth, the OIG appears to take issue with the fact that the witness officer, not NE#2, generated the *Terry* Template. Again, this is absolutely irrelevant to the issues in this case. Also, there is no requirement that the officer that effectuates the stop generate the documentation, even if this would be preferred for logical reasons.

Fifth, the OIG raises that OPA did not review the Body Worn Video (BWV) for any officers other than the Named Employees. Based on the limited nature of the allegations in this case and the fact that the Named Employees’ video captured the entirety of the incident, it is unclear why this would have been needed at all, let alone why it caused the investigation to not be thorough. The OIG opined that the BWV for other officers may have captured other moments not recorded by the Named Employees’ BWV; however, that is pure speculation and, in fact, is a conclusion contrary to the available video evidence. Moreover, it is important to note that OPA’s resources are limited. It would make no sense to review BWV of little relevance when that time could be better spent on other necessary investigative tasks.

Sixth, the OIG appears to believe that OPA should have interviewed WO#1. Again, why? What relevance would it have had in this case? NE#2, not WO#1, made the decision to detain the Complainant. The only questions that WO#1 could have answered concerned why he wrote what he did in the *Terry* Template and his independent knowledge of the Complainant’s identity. Neither areas of information pertained to whether the initial detention was legally justified.

Seventh, and last, the OIG appeared to suggest that OPA’s failure to interview the Complainant contributed to the purported lack of thoroughness of this investigation. However, the OIG entirely fails to mention that OPA made multiple attempts to do so and was unable, even after best efforts, to locate and interview the Complainant.



For the reasons stated above, and while respecting the OIG's role in the review of OPA's investigations, OPA disagrees with virtually all of the conclusions reached by the OIG in its memo and its decision not to certify this case as thorough or timely. OPA does not believe that it should be held to a standard of perfection, particularly one that is undefined. The question on certification should be whether the investigation adduced sufficient evidence to make a determination on the allegation. Here, OPA believes that it did and that the case should have been fully certified.

ANALYSIS AND CONCLUSIONS:

Named Employee #1 - Allegations #1

6.220 - Voluntary Contacts, Terry Stops & Detentions 1. Terry Stops are Seizures and Must Be Based on Reasonable Suspicion in Order to be Lawful

NE#2 responded to a report of an armed robbery at a 7-11 store. The following description was provided of the perpetrator: "Black Male, 25-30 years of, wearing a black hat, red shirt, black pants, black and blue backpack." As NE#2 arrived at the scene, an update came over the radio indicating that the perpetrator may be walking across the street towards a gas station. NE#2's BWV recorded his subsequent law enforcement action.

NE#2's BWV showed an individual walking across the street towards the gas station. At that time, which was virtually simultaneous to when the update came over the radio, he was the only individual doing so. The individual was wearing a red hat, black jacket with a sweatshirt underneath, and black pants. NE#2 honked his horn in order to get the individual's attention; however, the individual did not turn around and continued into the gas station. NE#2 walked towards the gas station and the individual, who was later identified as the Complainant, walked out and back into the parking lot. This was the first time the Complainant's face was visible to NE#2. From a review of the BWV, the Complainant did not appear to be African-American but was also not clearly Caucasian. Indeed, the Complainant self-identified as Native American/Alaskan Native. NE#2 told him to move towards a patrol vehicle that was parked in front of the gas station and the Complainant did do. NE#2 instructed him to put his hands on the patrol vehicle and then patted him down for weapons. NE#2 asked the Complainant for his name and the Complainant gave a name that was later determined to be false.

Just under two and a half minutes after the stop was initiated, Named Employee #1 (NE#1) and WO#1 arrived. NE#1 and WO#1 both recognized the Complainant and were aware that his name was not what he previously provided to NE#2. NE#1 told OPA that he also knew that the Complainant had an open felony warrant. The Complainant was then placed under arrest. The officers later located the actual perpetrator, who was seen exiting a business that shared the same parking lot. The perpetrator was wearing a black and white hat, a black jacket, and black pants. As such, the perpetrator also did not exactly match the description provided. The perpetrator was positively identified by a victim, who also confirmed that the Complainant was not involved in the robbery.

It was later alleged that the Complainant was detained by the Named Employees without reasonable suspicion. This investigation ensued.

SPD Policy 6.220-POL-1 governs *Terry* stops and stands for the proposition that *Terry* stops are seizures of an individual and, as such, must be based on reasonable suspicion in order to be lawful. SPD Policy defines a *Terry* stop as: "A brief, minimally invasive seizure of a suspect based upon articulable reasonable suspicion in order to investigate possible criminal activity." (SPD Policy 6.220-POL-2(b).) SPD Policy further defines reasonable suspicion



as: “Specific, objective, articulable facts, which, taken together with rational inferences, would create a well-founded suspicion that there is a substantial possibility that a subject has engaged, is engaging or is about to engage in criminal conduct.” (*Id.*) Whether a *Terry* stop is reasonable is determined by looking at “the totality of the circumstances, the officer’s training and experience, and what the officer knew before the stop.” (*Id.*) While “[i]nformation learned during the stop can lead to additional reasonable suspicion or probable cause that a crime has occurred, it “cannot provide the justification for the original stop.” (*Id.*)

It is undisputed that the Complainant was not the perpetrator of the robbery. It is also undisputed that the Complainant did not exactly match the description of the perpetrator in a number of respects. NE#2 explained at his OPA interview that he first observed the Complainant within a minute of the robbery and only a block from the scene of the crime. NE#2 further stated the following: He was wearing a red hat and a black jacket and dark green pants. Which was kinda – I figured, you know, this is in the realm of somebody just got robbed and they do get their details mixed up. I do give leeway to that.” NE#2 also told OPA that he had been involved in other cases in which a detained individual did not match the exact description of the suspect but ultimately was determined to be the perpetrator. NE#2 further contended that the Complainant “looked pretty dark enough from behind that he could’ve been mistaken as a black person.”

NE#2 also based the detention on the Complainant’s behavior. NE#2 said that, when coupled with the closeness of the description, it provided him a further reason to believe that the Complainant was the perpetrator. Specifically, NE#2 pointed to the following: “I was responding with my lights and sirens, and of course he would’ve seen that police was there, and me honking the horn and calling out to him, and not even turned around once, that speaks to me like, ‘oh shoot, I’m not going to be stopped by this guy.’”

Based on OPA’s review of the record, I find that NE#2 had reasonable suspicion to detain the Complainant in order to determine whether he was a robbery suspect. I base this decision on several facts articulated by NE#2. First, while the Complainant did not match the exact description, it was plausible that the victim, who was relaying a description immediately after a traumatic incident, could have been mistaken. For example, the victim easily could have confused a red hat with a red shirt. This is particularly compelling given that the actual perpetrator also did not exactly match the description provided. Similarly, I agree with NE#2 that it was unclear that the Complainant was not African-American at the time of the initial contact. Even after the detention occurred, NE#1’s racial identity was unclear and, as discussed above, he later identified as Native American/Alaskan Native.

Second, the Complainant was crossing the street towards a gas station approximately one minute after the incident. Moreover, this was consistent with where the perpetrator was described being. Notably, he was the only individual in plain view of NE#2 who was doing so at the time.

Third, I agree that the Complainant’s behavior, namely walking away from a patrol vehicle with its emergency lights and siren activated that was honking at him, was suspicious and provided further support for the stop. I find that it was abnormal for the Complainant to not have looked towards the source of the noise. While the Complainant almost certainly did not do so because of his open warrant, NE#2 reasonably could have believed that he was continuing to walk away because he was the perpetrator of the robbery.



I find that it was permissible to detain the Complainant for a period of time, here just over two minutes, to determine whether he was connected to the robbery. Moreover, I find that it was permissible to frisk him for officer safety given that he was a possible suspect in a crime of violence and was believed to be armed with a knife.

Lastly, I note that this allegation was also classified for investigation against NE#1; however, NE#1 did not make the initial decision to detain the Complainant, but only the later decision to arrest him based on the open warrant.

For the above reasons, I recommend that this allegation be Not Sustained – Lawful and Proper as against both Named Employees.

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

Named Employee #2 - Allegations #1

6.220 - Voluntary Contacts, Terry Stops & Detentions 1. Terry Stops are Seizures and Must Be Based on Reasonable Suspicion in Order to be Lawful

For the same reasons as stated above (see Named Employee #1, Allegation #1), I recommend that this allegation be Not Sustained – Lawful and Proper.

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