



CLOSED CASE SUMMARY

ISSUED DATE: OCTOBER 21, 2018

CASE NUMBER: 2018OPA-0311

Allegations of Misconduct & Director's Findings

Named Employee #1

Allegation(s):		Director's Findings
# 1	5.140 - Bias-Free Policing 2. Officers Will Not Engage in Bias-Based Policing	Not Sustained (Unfounded)

Named Employee #2

Allegation(s):		Director's Findings
# 1	5.140 - Bias-Free Policing 2. Officers Will Not Engage in Bias-Based Policing	Not Sustained (Unfounded)
# 2	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)
# 3	6.220 - Voluntary Contacts, Terry Stops & Detentions 8. Officers May Conduct a Frisk or Pat-Down of Stopped Subject(s) Only if [...]	Not Sustained (Training Referral)
# 4	15.180 - Primary Investigations 5. Officers Shall Document all Primary Investigations on a General Offense Report	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:

The Complainant alleged that he was subjected to biased policing by the Named Employees. It was further alleged that Named Employee #2 may not have had reasonable suspicion for the stop of the Complainant, that the search of the Complainant's jacket may have been impermissible, and that Named Employee #2's General Offense Report may have been deficient.

ANALYSIS AND CONCLUSIONS:

Named Employee #1 - Allegations #1

5.140 - Bias-Free Policing 2. Officers Will Not Engage in Bias-Based Policing

SPD policy prohibits biased policing, which it defines as "the different treatment of any person by officers motivated by any characteristic of protected classes under state, federal, and local laws as well other discernible personal characteristics of an individual." (SPD Policy 5.140.) This includes different treatment based on the race of the subject. (*See id.*)



As discussed more fully below, I find that the officers had reasonable suspicion to effectuate the stop and detention of the Complainant. I conclude that they took this law enforcement activity because they believed that illegal activity was potentially underfoot, not based on any impermissible reason. I find no evidence in the record establishing that the stop was based on bias due to the Complainant's race or his membership in any other protected class.

For these reasons, I recommend that this allegation be Not Sustained – Unfounded as against both Named Employees.

Recommended Finding: **Not Sustained (Unfounded)**

Named Employee #2 - Allegations #1

5.140 - Bias-Free Policing 2. Officers Will Not Engage in Bias-Based Policing

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

Recommended Finding: **Not Sustained (Unfounded)**

Named Employee #2 - Allegation #2

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 made the decision to effectuate the detention. NE#2 asserted that he believed the stop was lawful as it was supported by reasonable suspicion.

The officers were dispatched to a call concerning individuals allegedly dealing narcotics. The call came from a business owner who reported that the narcotics activity was occurring outside of his store. The caller described a Black male who had a black backpack. The caller further stated that multiple individuals were coming and going from the scene.

When the Named Employees arrived, the Complainant was sitting next to another individual in the location identified by the caller. Both the Complainant and the other individual were eating donuts. The Complainant is Black; however, his clothing did not match the description of the suspect, nor did he have a black bag. Instead, there was an orange bag by his feet. In addition, as discussed below, his black jacket was on the ground behind where he was sitting.

When asked why he stopped the Complainant given that the Complainant did not match the description of the suspect, NE#2 stated that he was aware of the following: that it was a high drug activity location; that there was information that a number of people had been involved in the narcotics transactions; there were clothes around the Complainant; when he arrived at the scene, there were people around the Complainant and, when he approached the Complainant, the people left; and the Complainant appeared to possibly be high at the time. NE#2 also explained that the 911 caller had seen the drug activity while watching security video, which could have skewed the caller's perception of the color of the suspect's clothes. NE#2 also noted that there was a candle lighter at the Complainant's feet, which, in NE#2's training and experience, suggested narcotics activity.



NE#2 asserted that the totality of these circumstances caused him to believe that the Complainant was engaged in narcotics activity and, as such, supported reasonable suspicion for the stop and detention.

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.*)

Based on my review of the record, whether there was reasonable suspicion for the stop is, in OPA’s opinion, a close question. However, where it is this close, and given that NE#2’s interpretation of the evidence and the inferences he drew therefrom do not appear to have been unreasonable, OPA deems it appropriate to defer to what NE#2 perceived in the moment. As such, I conclude, as he did, that there a sufficient legal basis to effectuate the stop and detention of the Complainant. I thus recommend that this allegation be Not Sustained – Lawful and Proper.

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

Named Employee #2 - Allegation #3

6.220 - Voluntary Contacts, Terry Stops & Detentions 8. Officers May Conduct a Frisk or Pat-Down of Stopped Subject(s) Only if [...]

SPD Policy 6.220-POL-8 states that: “Officers may conduct a frisk or a pat-down of a stopped subject only if they reasonably suspect that the subject may be armed and presently dangerous.” The policy explains that: “The decision to conduct a frisk or pat-down is based upon the totality of the circumstances and the reasonable conclusions drawn from the officer’s training and experience.” (SPD Policy 6.220-POL-8.) The policy provides a non-exclusive list of factors supporting such a search. (*See id.*)

NE#2 performed a pat frisk on the Complainant’s jacket. He asserted that it appeared, from his vantage point, that the jacket, which was on the ground behind the Complainant, had bulging pockets. As discussed below, this was not evident from the BWV. NE#2 also asserted that the jacket was within the Complainant’s lunge area, which also does not appear to be the case from the video.

NE#2 claimed that the search was justified because he believed the Complainant to be potentially armed and dangerous. He stated that this was the case because: he felt the Complainant was potentially high; he knew that the Complainant was in a high drug activity location; in his experience, those dealing narcotics were often armed; and drug-related calls could, at times, involve weapons.



As with the Terry stop, OPA believes that whether the pat frisk was permissible at all was a close call. OPA did not perceive anything on the BWV that suggested that the Complainant was armed and dangerous; however, as with Allegation #2 above, OPA defers to NE#2's judgment during the incident and finds that he frisk was appropriate.

That being said, OPA finds that the frisk went beyond a lawful scope. Such frisks are limited to searches for weapons. They are not, as NE#2 recognized at his OPA interview, permitted to be used to gather evidence. OPA concludes that, at the time NE#2 located the square object in the Complainant's jacket pocket, he knew or should have known that it was not a weapon. This is consistent with both the video and audio of the BWV. As such, NE#2 violated this policy and the law when he went inside the pocket of the jacket and pulled out the narcotics.

While OPA concludes that the search was contrary to policy in this instance, OPA does not believe that NE#2 did not do so knowingly and intentionally. Instead, OPA finds that NE#2 made a mistake that is better corrected by retraining rather than a Sustained finding. As such, OPA issues NE#2 the following Training Referral.

- **Training Referral:** NE#2 should receive additional training concerning SPD Policy 6.220-POL-8 and, specifically concerning when a pat frisk of a subject's clothing may be performed and what the permissible scope of that search is. NE#2 should perform research into the law governing searches like the one that occurred here either with his chain of command or his fellow officers. They should determine whether the law permitted such a search and, if not, what NE#2 could have done in this instance that would have been legally justifiable. NE#2's chain of command should plan to have NE#2 and his squad mates discuss this issue at a roll call to ensure that they are all understand the issues that arose in this case and how it could have been better handled. OPA will plan to attend this roll call to hear the discussion and to address any questions. Lastly, NE#2's chain of command should counsel him concerning this incident and ensure that he tries to more closely comply with this policy moving forward. This retraining and associated counseling should be documented and this documentation should be maintained in an appropriate database.

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

Named Employee #2 - Allegations #4

15.180 - Primary Investigations 5. Officers Shall Document all Primary Investigations on a General Offense Report

SPD Policy 15.180-POL-5 requires officers to document all primary investigation on a General Offense Report. Such reports must be "complete, thorough, and accurate." (SPD Policy 15.180-POL-5.)

When comparing NE#2's General Offense Report to the BWV, while thorough, it does not appear to be complete or accurate in several respects.

First, NE#2 failed to note in the report that the individual who he contacted did not match the description of the suspect identified in the CAD Call Report. NE#2 explained to OPA that, while this was the case, the CAD referenced multiple people coming and going from the location in question and that the Complainant could have ditched or changed his clothes. However, NE#2 should have included this information in his report.



Second, there is no evidence from OPA's review of the video that the pockets of the Complainant's jacket were appreciably bulging at the time NE#2 picked it up to pat it down. OPA recognizes that NE#2's perception may have been different than the video, but the report appears to be inaccurate in this respect.

Third, from OPA's review of the video, it does not appear that the Complainant was trying to secret away his jacket or hide it. It was lying right behind the rock he was sitting on.

Fourth, the report characterized the Complainant as standing up and looking for avenues of escape. In OPA's opinion, this is also not reflected by the video. NE#2 asked the Complainant what he was lighting with his lighter and the Complainant said his cigarettes. NE#2 asked where the cigarettes were and the Complainant stood up in an apparent attempt to withdraw them from his pocket. As such, it is inaccurate to suggest that the Complainant stood up in an attempt to flee. Moreover, once standing up, the Complainant did not appear to make any movements consistent with seeking to escape from the scene.

Fifth and last, NE#2 failed to accurately and completely describe the search of the jacket. NE#2 stated that, when the search was completed, the jacket was in the Complainant's "lunge area." However, at that time, the Complainant was standing up several feet away and the jacket was not in hands-reach of him. Moreover, NE#2 wrote in his report that when he frisked the jacket pocket he "felt several hard, heavy objects that could be used as a weapon" and "looked into the pockets to determine if there was a weapon(s)." However, this description does not appear to be borne out by the BWV. At the time he conducted the frisk, NE#2 appeared to feel what appeared on the video to be a square object. Given NE#2's experience, it seems likely that he knew, at that moment, that what he felt was not a weapon. Indeed, NE#2's calm statements ("what is this?") suggested that he was aware that what he was recovering was narcotics. As discussed above, I do not believe that this was a valid search and I find that NE#2's description of this search in his report was deficient.

While I find that there were multiple issues with NE#2's report, I do not feel that it was so deficient as to warrant a Sustained finding. Instead, I recommend that NE#2 receive a Training Referral.

- **Training Referral:** NE#1 should be reminded by his chain of command concerning the requirements that his General Offense Reports be complete, thorough, and accurate. His chain of command should discuss the report he generated in this case with him and go over OPA's findings concerning that report. NE#2's chain of command should discuss ways in which he could have more completely and accurately described the law enforcement activity that he took. This retraining and associated counseling should be documented and this documentation should be maintained in an appropriate database.

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