



## ***CLOSED CASE SUMMARY***

ISSUED DATE: FEBRUARY 2, 2021

FROM: DIRECTOR ANDREW MYERBERG  
OFFICE OF POLICE ACCOUNTABILITY

CASE NUMBER: 2020OPA-0313

### **Allegations of Misconduct & Director's Findings**

#### **Named Employee #1**

Allegation(s):		Director's Findings
# 1	5.001 - Standards and Duties 10. Employees Shall Strive to be Professional	Not Sustained (Lawful and Proper)
# 2	16.230 - Issuing Tickets and Traffic Contact Reports 3. Officers Document All Traffic Stops	Not Sustained (Training Referral)
# 3	6.220-POL-2 - Conducting a Terry Stop 6. Officers May Conduct a Frisk or Pat-Down of Stopped Subject(s) Only if [...]	Not Sustained (Lawful and Proper)
# 4	8.200 - Using Force 1. Use of Force: When Authorized	Not Sustained (Unfounded)
# 5	6.220-POL-2 - Conducting a Terry Stop 7. Under State Law, Traffic Violations Will Not Be Used as a Pretext [...]	Not Sustained (Unfounded)

#### **Named Employee #2**

Allegation(s):		Director's Findings
# 1	5.001 - Standards and Duties 10. Employees Shall Strive to be Professional	Not Sustained (Unfounded)

***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, who was subjected to a traffic stop, alleged that Named Employee #1 stopped him without cause, used excessive force when removing him from his vehicle, and acted aggressively and unprofessionally. He further alleged that a supervisor, Named Employee #2, was dismissive and unprofessional when he made a complaint.

### **SUMMARY OF INVESTIGATION:**

Early in the morning on May 25, 2020, Named Employee #1 (NE#1) was patrolling around the 700 block of Rainier Avenue. While on patrol, NE#1 observed a vehicle traveling toward the intersection of Rainier and Dearborn Street. He performed a routine license plate check of the vehicle that indicated that the vehicle was registered to the Complainant. The check also indicated that the Complainant's license was suspended.

NE#1 performed a traffic stop of the vehicle and requested backup. He activated his emergency equipment near the intersection of 10th Avenue and Dearborn Street. The vehicle continued to travel at a low speed for several blocks before pulling into an alleyway near the intersection of 7th Avenue and Dearborn. NE#1 stopped his patrol vehicle



and contacted the Complainant, who was the driver of that vehicle. There was another individual in the passenger's seat of the car, Witness #1. The entire contact was captured on Body Worn Video (BWV).

The Complainant asked NE#1 what was going on, and NE#1 told him that he was being stopped because the registered owner of the vehicle had a suspended license. In response to a question, NE#1 clarified that there were two registered owners, and that the male owner's license was suspended. The Complainant asked NE#1 if he knew who was driving the vehicle at the time of the stop. NE#1 explained that under Washington law, an officer may stop a vehicle upon learning that one of the owners has a suspended license to investigate whether that individual is driving. *See* RCW 46.20.349. NE#1 then asked if the Complainant had a valid license, and the Complainant gave NE#1 his license while replying that, to the best of his knowledge, it was valid. NE#1 told the Complainant that he was the owner who was identified as not having a valid license. The Complainant replied that he did not know why that was. NE#1 asked, "do you have any weapons on you tonight, sir?" The Complainant replied: "absolutely not." BWV showed that NE#1 appeared to chuckle and said that he did not know why the Complainant answered that way since they had never had any prior contact. The Complainant asked why NE#1 asked about weapons, and NE#1 stated that he asks every person he stops. NE#1 returned to his patrol vehicle and ran the Complainant's license. This showed the Complainant had prior convictions for gang-related activity and was prohibited from possessing a firearm.

During this time, a backup officer, Witness Officer #1 (WO#1), arrived on the scene. As NE#1 was conducting the records check, the Complainant began rolling up his windows and NE#1 remarked to WO#1: "why is he rolling his windows up?" WO#1 then approached the vehicle's passenger side. He shined his flashlight into the passenger side window and observed heavily tinted glass. While WO#1 was doing so, NE#1 asked the Complainant why he was rolling his window up. The Complainant responded that he was doing so because he saw WO#1 looking into the interior of his car. NE#1 asked him what he was concerned about WO#1 seeing in his car, and the Complainant said he was not worried.

NE#1 directed the Complainant to exit his car. The Complainant replied that NE#1 had no cause to tell him to exit his car and that, consequently, he could not order him to do so. The Complainant and NE#1 went back and forth; however, neither became visibly escalated. NE#1 then said: "I'm literally going to smash the window and drag you out of the car." The Complainant continued to assert that NE#1 needed cause to order him to exit. He stepped out of the vehicle and said that he wanted to speak to a supervisor.

As the Complainant exited the vehicle, NE#1 and WO#1 secured the Complainant's arms and walked him toward NE#1's patrol vehicle. They stood him against the front bumper and conducted a pat down search. OPA's review of BWV indicated that neither NE#1 nor WO#1 used force greater than de minimis in securing the Complainant or conducting the search. The Complainant was not placed in handcuffs.

A Sergeant, Named Employee #2 (NE#2), arrived while NE#1 was still talking to the Complainant. NE#1 continued to try to interview the Complainant regarding his DOC supervision. When the Complainant saw NE#2, he stated that he was "done" talking to NE#1 and wanted to talk to the sergeant. He also stated that he felt disrespected and objected again to being ordered out of his vehicle. NE#1 then went to his patrol vehicle where he briefed NE#2. NE#1 stated that when WO#1 went to inspect the Complainant's vehicle, he rolled up the windows and, when asked why, became argumentative. NE#1 told NE#2 that he was concerned the Complainant was trying to conceal something in the car.



NE#2 went to speak to the Complainant. The Complainant explained that he had just broken up with his ex-girlfriend, who paid for car insurance on the vehicle. Because the Complainant had a restricted license, he was required to carry insurance and he theorized that his ex-girlfriend had canceled the insurance, causing his license to be suspended. The Complainant said that he had been pulled over before. He stated that he felt disrespected because he did not believe there was a reason for the officers to order him out of his car.

NE#2 attempted to explain the situation to get the Complainant to see “both sides.” He noted the heavy tint on the Complainant’s windows and the fact that the Complainant drove down a dark alley before stopping. NE#2 suggested that it would be concerning to an officer if a person rolled up his windows when the officer got close to his vehicle. The Complainant disagreed, saying that in his view, if a person drove down an alley with no exit, he could not be trying to run from police. Secondly, he stated that a person rolling up his windows indicated a desire for privacy rather than a desire to conceal something.

NE#2 stated that he had been a police officer for 20 years, and had the Complainant acted in the manner he did, NE#2 would have placed him “in handcuffs on the front of the car.” He said that the Complainant should “thank this officer for not putting you in the metal bracelets.” The Complainant stated that: “human to human, you wouldn’t slam somebody, you wouldn’t think that’s okay.” NE#2 said: “nobody slammed you, my man.” NE#2 concluded by saying that he was going to let NE#1 finish the contact.

While NE#2 and the Complainant were talking, NE#1 talked to Witness #1, who was in the passenger seat of the Complainant’s vehicle. He asked her if she had a valid license and would be willing to drive the car. Witness #1 provided her license to NE#1 and he verified it as valid. After the Complainant and NE#2 finished talking, NE#1 asked the Complainant if he was still involved in gang activity as indicated by his record. The Complainant denied that he was and stated that he ran a nonprofit. He asked if he would be cited, and NE#2 said that he would not since Witness #1 could drive the vehicle. NE#1 noted that the Complainant’s license had been suspended numerous times, including most recently in March. NE#1 ended the contact without further incident.

Several hours later the same day, the Complainant filed this complaint with OPA. When contacted, the Complainant alleged that NE#1 asked a lot of questions unrelated to the alleged purpose of the stop, and alleged that the stop was pretextual. He also alleged that NE#1 used physical force when he exited the vehicle. He said that while he understood that his prior history would result in some questions when contacted by police, he felt that NE#1 was unprofessional in how he approached the situation. When interviewed, Witness #1 largely corroborated the Complainant’s account and alleged that NE#1 was escalated and aggressive during the encounter. This OPA investigation ensued.

OPA examined SPD’s records and determined that NE#1 did not file a field contact report as required by policy for more than 50 days after the contact. It did not appear that NE#1 followed up with DOC or took any other action besides eventually filing the field contact report in July.

OPA also interviewed the involved employees. NE#1 stated that, when he performed the initial records check of the Complainant’s license, he determined that the Complainant had felony convictions and a history of gang activity and possession of weapons. He stated that the tint of the windows made it impossible for him or WO#1 to see inside the vehicle, even using their flashlights. He said that based on his experience contacting people in vehicles who are on probation, non-cooperative conduct can be part of an attempt to conceal violations. Coupled with the Complainant’s prior history, NE#1 stated that he was concerned the Complainant was trying to hide contraband or a weapon.



With respect to his statement that he would smash the window and remove the Complainant from the vehicle, NE#1 stated that he phrased it that way to convey seriousness and to alert the Complainant about the outcome of continuing refusal to exit the vehicle. NE#1 stated that, when the Complainant exited the vehicle, he was confrontational, and NE#1 observed his fists balled, which he described as a “pre-attack indicator.” NE#1 based his decision to conduct a frisk on the Complainant’s demeanor as well as his prior convictions and weapon possession.

NE#1 stated that he did not issue a ticket and instead issued a warning because he wanted to give the Complainant a “break,” and because he knew it was unlikely that prosecutors would bring charges for that crime alone. NE#1 believed that, consequently, writing a ticket would upset the Complainant further to no purpose.

Finally, NE#1 admitted to failing to write a field contact report at the end of his shift. He stated that he intended to complete one but that, in the days immediately following this incident, all of SPD went to Blue/Gold staffing to respond to the George Floyd demonstrations. NE#1 stated that given the amount of hours he worked demonstration management duty, he ultimately forgot to complete the field contact report and was reminded when he received notice of this complaint at which point he did so.

OPA also interviewed the supervisor, NE#2. NE#2 stated that when he arrived, he observed the Complainant in an animated discussion with NE#1. NE#2 described his own conversation with the Complainant as purposed to provide the Complainant with context for NE#1’s actions. He stated that he has had similar conversations with numerous individuals throughout his career and wanted to explain police procedures, as well as the officer safety concerns that NE#2 identified as the motivating factor for NE#1’s conduct.

NE#2 denied that his comments to the effect that he would have handcuffed the complainant and placed him against the front of a vehicle were purposed to intimidate or demean. He stated that he was trying to provide the Complainant with perspective as to how the situation could have appeared threatening to NE#1. NE#2 stated that he did not order the Complainant to “thank” NE#1 but instead meant it as a figure of speech.

Finally, OPA interviewed WO#1, the backing officer. WO#1 stated that when he approached the passenger side of the vehicle, he saw all the windows roll up. He said that the heavy tint of the windows prevented him from seeing inside. He tried to shine his light into the windows, but the tint prevented him from seeing whether anyone inside was reaching for a weapon or other object. He explained that his attempt to see into the vehicle was intended to locate any weapons that were in open view.

WO#1 further stated that the Complainant was ordered out of the vehicle for officer safety. WO#1 explained that during his career with SPD, he had before found firearms and other weapons within the grab range of drivers and passengers, including in the glovebox, center console, and elsewhere. He believed it would have been an officer safety issue to allow the Complainant to remain inside the vehicle when it was not possible to see inside.

#### **ANALYSIS AND CONCLUSIONS:**

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

##### ***5.001 - Standards and Duties 10. Employees Shall Strive to be Professional***



SPD Policy 5.001-POL-10 requires that SPD employees “strive to be professional.” The policy further instructs that “employees may not engage in behavior that undermines public trust in the Department, the officer, or other officers” whether on or off duty. (SPD Policy 5.001-POL-10.) The policy further states the following: “Any time employees represent the Department or identify themselves as police officers or Department employees, they will not use profanity directed as an insult or any language that is derogatory, contemptuous, or disrespectful toward any person.” (*Id.*) Lastly, the policy instructs Department employees to “avoid unnecessary escalation of events even if those events do not end in reportable uses of force.” (*Id.*)

OPA finds that NE#1 did not violate the professionalism policy in his interactions with the Complainant. OPA’s analysis of BWV indicates that NE#1 did not become noticeably escalated during the interaction. He did not use profanity or otherwise use language purposed to demean the Complainant or any other person.

OPA noted that NE#1’s statement that he would smash the Complainant’s window appeared to increase and not decrease the Complainant’s level of frustration and concern. However, OPA does not find that this statement, in and of itself, was the sole reason for the negative interaction. Instead, it appeared that the Complainant was frustrated at the situation generally, including the fact that he had been stopped at all, as well as his belief that NE#1 was not permitted to have him exit the vehicle or take other steps that were premised on ensuring officer safety like the attempted open-view inspection of the vehicle’s interior. To the extent that the Complainant’s contention is that these officer safety steps were prohibited by this policy or SPD’s de-escalation policy, OPA does not agree.

Ultimately, while NE#1 might have phrased his requests differently, they were not unprofessional and were not, in OPA’s perspective, purposed to demean. For these reasons, OPA recommends that this allegation be Not Sustained – Lawful and Proper.

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

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

### ***16.230 - Issuing Tickets and Traffic Contact Reports 3. Officers Document All Traffic Stops***

SPD Policy 16.230-POL-3 details the documentation that can be generated as a result of a traffic stop. Included is a TCR. A TCR is “used to provide a written warning for traffic infractions.” A TCR is not appropriate, however, “for Terry stops on a vehicle.” SPD Policy 16.230-TSK-1 instructs officers on what steps to take when issuing an infraction or TCR. Notably, the policy instructs officers to serve a copy of the TCR on the driver. SPD Policy 16.230-POL-11 provides two exceptions from when service on the driver is not required: first, when a criminal citation is referred to the Law Department for review; and, second, when a notice of infraction is sent to the Court for mailing to the violator.

OPA finds that by failing promptly to document the traffic stop, NE#1 violated the letter of this policy. However, given the surrounding circumstances, OPA declines to issue a Sustained finding here. Rather, OPA finds that, while NE#1 appeared to delay his reporting for one or two days, mass, sustained demonstration activity then prevented him from doing so later. Ultimately, given the length of the demonstrations and associated Blue/Gold staffing requirements, NE#1 simply forgot to file this report. While that is not optimal, it is understandable given the strain that NE#1 and the entire Department experienced during this time. Accordingly, in place of a Sustained finding, OPA recommends the below Training Referral:



- **Training Referral:** NE#1's chain of command should review with him the importance of filing timely, accurate reports of all traffic stops, as well as other reportable interactions including Terry stops. This training should be documented, and that documentation retained in an appropriate database.

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

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

***6.220-POL-2 - Conducting a Terry Stop 6. Officers May Conduct a Frisk or Pat-Down of Stopped Subject(s) Only if [...]***

SPD Policy 6.220-POL-2(6) 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-2(6).) The policy provides a non-exclusive list of factors supporting such a search. (*See id.*)

OPA finds that NE#1's decision to conduct a pat-down frisk of the Complainant did not violate this policy.

As a threshold matter, OPA finds that NE#1 had adequate cause to order the Complainant to exit his vehicle. Under Washington law, a driver may be ordered to exit his vehicle during a traffic stop for officer safety reasons, so long as the officer can articulate an "objective reason" for doing so. *State v. Lee*, 7 Wn.App.2d 692, 703 (Wn.Ct.App. 2019). Ample case law also supports an officer's pat-down frisk for weapons provided the officer has reasonable, articulable suspicion that the individual frisked may be armed.

NE#1 met both standards here, and the same facts support both decisions. NE#1 had reason to suspect a safety threat based on: the Complainant's prior history including possession of firearms; the fact that it was impossible to see into the vehicle because of the tinted windows and thus, impossible to verify that no weapons were present; and the fact that the traffic stop was taking place in a dark alley. While the Complainant knew he intended no harm, there was no way for NE#1 or any other officer to know the same, and the law permitted NE#1 to take the actions necessary to make the scene safe including ordering the Complainant out of his car and conducting a limited pat-down.

For these reasons, OPA recommends that this allegation be Not Sustained – Lawful and Proper.

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

**Named Employee #1 - Allegation #4**

***8.200 - Using Force 1. Use of Force: When Authorized***

SPD Policy 8.200(1) requires that force used by officers be reasonable, necessary and proportional. Officers shall only use "objectively reasonable force, proportional to the threat or urgency of the situation, when necessary, to achieve a law-enforcement objective." Whether force is reasonable depends "on the totality of the circumstances" known to the officers at the time of the force and must be balanced against "the rights of the subject, in light of the circumstances surrounding the event." (SPD Policy 8.050.) The policy lists a number of factors that should be weighed when evaluating reasonableness. (*See id.*) Force is necessary where "no reasonably effective alternative to





the use of force appeared to exist” and “the amount of force used was reasonable to effect the lawful purpose intended.” (*Id.*) Lastly, the force used must be proportional to the threat posed to the officer. (*Id.*)

OPA finds, based on BWV of the incident, that NE#1 used no more than de minimis force when guiding the Complainant from his vehicle to NE#1’s patrol vehicle prior to the pat-down search. SPD Policy defines de minimis force as “[p]hysical interaction meant to separate, guide, and/or control without the use of control techniques that are intended to or are reasonably likely to cause any pain or injury.” See SPD Policy 8.050. OPA notes that at no time did the Complainant state he was in pain or any form of discomfort from the contact, or give any vocal or physical signs that would cause a reasonable person to infer he was in pain.

The de minimis force NE#1 and WO#1 did use was reasonable, necessary, and proportional under the circumstances. It was reasonable given that they needed to momentarily secure the Complainant in order to conduct a pat-down search. It was necessary to do so to ensure safety. Finally, the very minimal force used was proportional to the Complainant’s non-resisting behavior.

For these reasons, OPA recommends that this allegation be Not Sustained – Unfounded.

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

**Named Employee #1 - Allegation #5**

***6.220-POL-2 - Conducting a Terry Stop 7. Under State Law, Traffic Violations Will Not Be Used as a Pretext to Investigate Unrelated Crimes***

SPD Policy 6.220-POL-2(7) precludes the use of a traffic violation to investigate unrelated crimes. The policy defines “pretext” as where an officer stops “a suspect for an infraction to investigate criminal activity for which the officer has neither reasonable suspicion nor probable cause.” (SPD Policy 6.220-POL-9.) The policy explains that pretext stops are prohibited by law. (*Id.*) It further explains that: “Officers must actually, consciously, and independently determine that a traffic stop is reasonably necessary in order to address a suspected traffic infraction.” (*Id.*)

OPA does not identify a basis to believe that NE#1 stopped the Complainant’s vehicle based on a pretext to investigate other crimes for which he had no reason to be suspicious. Rather the evidence indicated that NE#1, while engaged in proactive enforcement, identified a reason to believe that the vehicle’s owner had a suspended license. The subsequent investigation by NE#1 and WO#1—namely, the attempt to determine whether individuals in the car may be armed—was premised on NE#1’s identification of the Complainant as an individual who had been seen with weapons before, as well as the concerns that arose when the Complainant attempted to prevent officers from seeing inside his vehicle described above.

For these reasons, OPA recommends that this allegation be Not Sustained – Unfounded.

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

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

***5.001 - Standards and Duties 10. Employees Shall Strive to be Professional***



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When evaluating the totality of the circumstances, OPA does not find that NE#2 was unprofessional during his interaction with the Complainant. This is not to say that OPA finds each of NE#2's statements to have been optimal or that it believes that NE#2's chosen method of explaining NE#1's conduct was ideal. OPA notes that explaining how the situation could have been more invasive and unpleasant for the Complainant without violating the law did not seem to get across the idea NE#2 intended it to—namely that NE#1 had reasonable safety concerns which prompted him to act in the way he did.

However, the professionalism policy does not require that every interaction be perfect or that employees always perform to an ideal standard. Rather, SPD employees are expected to behave as a reasonably professional officer would. Here, NE#2's comments in context were intended to explain why the contact occurred as it did, not to demean the Complainant or suggest to him that he was at the mercy of police. NE#2 was not escalated and did not use profanity. While he could have chosen different words, NE#2 did not violate this policy.

For these reasons, OPA recommends that this allegation be Not Sustained – Unfounded.

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