



## ***CLOSED CASE SUMMARY***

ISSUED DATE: APRIL 28, 2022

FROM: INTERIM DIRECTOR GRÁINNE PERKINS  
OFFICE OF POLICE ACCOUNTABILITY

CASE NUMBER: 2021OPA-0306

### **Allegations of Misconduct and the Director's Findings**

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

Allegation(s):		Director's Findings
# 1	6.150 - Advising Persons of Right to Counsel and Miranda 12. Officers Shall Stop Questioning Once an Arrestee has Invoked the Right to a Lawyer	Not Sustained - Unfounded (Expedited)
# 2	6.180 - Searches-General 4. Open View and Plain View Doctrines	Allegation Removed

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

Allegation(s):		Director's Findings
# 1	6.150 - Advising Persons of Right to Counsel and Miranda 13. Should an Arrestee Clearly Invoke the Right to Remain Silent, Officers Must Read Miranda Again if They Later Re-Initiate Contact	Not Sustained - Unfounded
# 2	6.220 - POL – 2 Conducting a Terry Stop 2. During a Terry Stop, Officers Will Limit the Seizure to a Reasonable Scope	Not Sustained - Training Referral

#### **Named Employee #3**

Allegation(s):		Director's Findings
# 1	6.150 - Advising Persons of Right to Counsel and Miranda 13. Should an Arrestee Clearly Invoke the Right to Remain Silent, Officers Must Read Miranda Again if They Later Re-Initiate Contact	Not Sustained - Unfounded
# 2	6.220 - POL – 2 Conducting a Terry Stop 2. During a Terry Stop, Officers Will Limit the Seizure to a Reasonable Scope	Not Sustained - Training Referral

#### **Named Employee #4**

Allegation(s):		Director's Findings
# 1	6.150 - Advising Persons of Right to Counsel and Miranda 13. Should an Arrestee Clearly Invoke the Right to Remain Silent, Officers Must Read Miranda Again if They Later Re-Initiate Contact	Not Sustained - Unfounded
# 2	5.100 - Operations Bureau Individual Responsibilities III. Patrol Sergeant A. Responsibilities & B. Field Supervision	Not Sustained - Training Referral



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**EXECUTIVE SUMMARY:**

The Complainant alleged that his client's rights were violated when he was arrested and held without reason. The Complainant also alleged that his client's phone was seized illegally, and he was denied access to an attorney.

**ADMINISTRATIVE NOTE:**

During its intake investigation, OPA determined that there appeared to be some confusion amongst the officers, which, in part, manifested in issues surrounding the on-scene questioning of the Subject. Given this, OPA alleged that Named Employee #4, the on-scene supervisor, may not have met the mandates of 15.055-TSK-2 (Primary Patrol Sergeant's Responsibilities at a Death Investigation) to properly oversee the scene and the officers' handling of the incident. OPA determined that this did not rise to the level of misconduct and was better handled by training and counseling Named Employee #4 by the chain of command. This matter was returned to the chain of command to be handled via a Supervisor Action.

An allegation against NE#1, namely, SPD Policy 6.150 - Advising Persons of Right to Counsel and Miranda 12. Officers Shall Stop Questioning Once an Arrestee has Invoked the Right to a Lawyer, was processed as an Expedited Investigation. This means that OPA, with the Office of Inspector General's review and approval, believed that it could reach, and issue recommended findings based solely on its intake investigation and without interviewing the involved employees. As such, OPA did not interview the involved employee in relation to this specific allegation in this case.

NE#3, a Field Training Officer, was accompanied by a Student Officer. OPA determined that the Student Officer was being directed by the FTO throughout this incident. The student officer was not found to be in alleged violation of any policies. To facilitate the learning process he was designated as Witness Officer in the investigation of this case.

**SUMMARY OF INVESTIGATION:**

The Complainant submitted a written complaint on behalf of his client. It was alleged that his client, now referred to as Community Member #1 (CM#1), called a non-emergency line for ambulance support for his partner who had allegedly attempted to take her own life. SPD and Seattle Fire department responded to the call. The Complainant alleged that his client was arrested and unlawfully detained and that his phone was illegally seized by attending Named Employees. It was further alleged that when CM#1 was brought to the precinct he was denied access to an attorney.

On receipt of the complaint, OPA initiated an investigation. During its investigation, OPA reviewed the complaint, Computer Aided Dispatch (CAD) Call Report, Incident Report and Supplement, surveillance footage, and Body Worn Video (BWV). Neither the Complainant nor CM#1 responded to requests for interview. OPA interviewed the Named Employees.

CAD records showed that CM#1 called to report that he was "arguing with the subject last night she went into bathroom at 0230 and 0300, [CM#1] discovered her unresponsive at 0530." SFD advised that they had responded but were "standing by" until the scene was secured. BWV showed that Named Employee #2 (NE#2) was the first officer to respond to a call. NE#2's entire response to, and investigation of, this incident was recorded on his BWV, which was consistent subsequent reports made by NE#2. As such, these facts are not in credible dispute. Named Employee #3 (NE#3) and a student officer arrived at the apartment within minutes of NE#2. When NE#3 initially arrived at the apartment door he met CM#1 and asked, "Did you call?" CM#1 responded that "she's knocked out" in the apartment.



NE#3 and NE#2 handcuffed CM#1. During handcuffing NE#3 stated to CM#1, "you are not under arrest, you are detained right now." While handcuffing CM#1, NE#3 directed the student officer to go into the apartment check on the subject. NE#2 then immediately followed him into the apartment. At this juncture, Witness Officer (WO#1) arrived at the apartment accompanied by Named Employee #4 (NE#4). NE#4, a sergeant, was the supervisor on scene. Both WO#1 and NE#4 entered the apartment. WO#1 dealt with a barking dog, which was beside the subject. A second officer, Witness Officer #2 (WO#2), then arrived at the apartment.

SFD arrived and attended to the unresponsive subject. While in the apartment, NE#4 noticed a cell phone was propped up on the counter and that it appeared to be recording. NE#2 questioned why CM#1 phone was recording to which CM#1 responded that it was for his safety. While outside the apartment, the student officer read CM#1 his Miranda rights in the presence of NE#3.

NE#2 and NE#3 then questioned CM#1 about the events that transpired. CM#1 stated that he had found the subject in the bathroom where she was propped up against the door with a belt around her neck. CM#1 stated that he subsequently carried her from the bathroom to the sofa bed in the living room. NE#2 and NE#3's entire conversations with CM#1, both pre- and post-Miranda, were recorded on BWV. NE#3 told CM#1 that the subject had passed away and, in the presence of NE#2, inquired as to what happened. CM#1 responded, "No comment." NE#3 continued, "Did she use any drugs?" CM#1 responded again, "No comment." NE#2 asked, "Did you hurt [subject]?" CM#1 responded, "No comment." NE#2 persisted and asked, "Can you tell us anything about what happened, anything at all?" CM#1 replied that they had an argument and explained how the argument unfolded. CM#1 then explained how he found the subject in the bathroom and what he did thereafter. All this conversation is recorded on BWV and as such, these underlying facts are not in credible dispute.

At the apartment, BWV depicted WO#1 speaking on the phone with Named Employee #1 (NE#1), a homicide detective. NE#1 instructed WO#1 to seize anything that could be used as ligature, photograph the apartment, and seize the subject's purse. BWV depicts WO#2 searching the bathroom. NE#3 is heard stating "just look for anything in there at all."

CM#1 was transported to SPD headquarters to be interviewed by NE#1. Surveillance video confirms that NE#1 read CM#1 his Miranda rights. CM#1 was released from custody and his phone was retained for evidence.

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

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

##### ***6.150 - Advising Persons of Right to Counsel and Miranda 12. Officers Shall Stop Questioning Once an Arrestee has Invoked the Right to a Lawyer***

It was alleged that NE#1 failed to stop questioning CM#1 after CM#1 invoked his right to counsel.

SPD Policy 6.150-POL-12 directs that "[o]fficers shall stop questioning once an arrestee has invoked the right to a lawyer."

NE#1 was not present at the scene and questioned CM#1 after CM#1 was transported to SPD Headquarters. Video of NE#1's interview with CM#1 showed that NE#1 advised CM#1 of his *Miranda* rights, after which, CM#1 invoked his right to counsel. NE#1 stopped the interview and CM#1 was released.



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Accordingly, OPA recommends that this allegation be Not Sustained – Unfounded.

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

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

***6.180 - Searches-General 4. Open View and Plain View Doctrines***

It was alleged that NE#1 may have improperly seized CM#1's cell phone.

SPD Policy 6.180-POL-4 outlines the open view and plain view exceptions to the warrant requirement. Relevant to this case, plain view applies: "when the police inadvertently discover evidence after making a lawful intrusion into a constitutionally protected area, such as a residence. The evidence must be immediately recognizable as such and be in plain view." As indicated in the policy: "The key to the plain view doctrine is being in the protected place with consent or on legitimate police business." Once the inadvertent discovery is made, officers may have probable cause to seek a search warrant for a more thorough search.

Here, BWV showed that NE#1 was not involved in the seizure of CM#1's cell phone. When officers first entered the apartment, CM#1's cell phone was propped up and recording on the counter. BWV then showed that NE#4 recovered CM#1's cell phone and, at the direction of a Homicide supervisor, gave CM#1's cell phone to NE#2 to transport to SPD Headquarters with CM#1.

Accordingly, OPA recommends that this allegation be removed.

Recommended Finding: **Allegation Removed**

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

***6.150 - Advising Persons of Right to Counsel and Miranda 13. Should an Arrestee Clearly Invoke the Right to Remain Silent, Officers Must Read Miranda Again if They Later Re-Initiate Contact.***

It was alleged that NE#2 failed to honor CM#1 invocation of his right to remain silent.

SPD Policy 6.150-POL-13 directs that officers must re-read *Miranda* warnings before speaking to a subject that previously "clearly invoked the right to remain silent."

NE#2 was present when the Student Officer read CM#1 his *Miranda* rights. As indicated on BWV, NE#2 participated in the questioning of CM#1 post *Miranda*. During CM#1's detention, on a couple of occasions, NE#2 stepped back into the apartment, away from CM#1.

NE#2, accompanied by NE#3, continued to question CM#1 while he was detained outside the apartment. NE#2 specifically questioned CM#1 about a cell phone in the apartment that was positioned to record. CM#1 states that the cell phone belonged to him, and he wanted to record "in case anything happens." NE#2 asked how long the phone had been set up for to which CM#1 replied about 3 minutes. NE#2 was present when NE#3 asked, "What happened?" CM#1 responded, "No comment." NE#3 continued, "Did she use any drugs?" CM#1 responded again, "No Comment." NE#2 asked, "Did you hurt [subject]?" CM#1 responded, "No Comment." NE#2 continued and asked, "Can you tell us anything about what happened, anything at all? CM#1 responded and explained at length about how they had an



argument and explained how the argument unfolded. CM#1 then explained how he found the subject in the bathroom and what he did thereafter. The full conversation is captured on BWV.

When questioned by OPA, NE#2 believed that he did not violate SPD Policy 6.150 Advise a Person of Right to Counsel, because CM#1 “never invoked his right to counsel. He never asked for a lawyer.”

Whether a person “unambiguously” invokes their right to silence by stating “no comment” in response to questions is a factual issue. The resolution depends on context. One line of cases views “no comment” statements as ambiguous. *See, e.g., State v. Pouliot*, --- A.3d ---, 174 N.H. 15, 2021 WL 117585 (Jan. 13, 2021) (“no comment” statement was not invocation), *Dillon v. Smith*, 07 CV 10728, 2015 WL 13745783 (S.D.N.Y. Dec. 22, 2015) (twice stating “no comment” during custodial interrogation did not unequivocally invoke right to silence), *State v. Marden*, 673 A.2d 1304, 1309-10 (Me. 1996) (“no comment” is not unambiguous), *Henderson v. Singeltary*, 968 F.2d 1070, 1072-73 (11th Cir. 1992), *but see State v. Hukowicz*, No. M1999-00073 CCA R9 CD, 2000 WL 1246430 (Ct. Crim. Appeals. Tenn. Aug. 18, 2000) (defendant invoked right to silence by stating “no comment”).

However, one 9th Circuit case held that, under the specific facts of that case, “no comment” statements could be seen as invoking the right to silence—or, at the very least, did not indicate a desire to waive a previously invoked right. *See Arnold v. Runnels*, 421 F.3d 859 (9th Cir. 2005) (following *Miranda*, defendant advised officer that he did not want to speak on tape; officer began taping anyway, reiterated *Miranda*, asked questions, to which defendant replied “no comment”; it was error for trial court to admit defendant’s “no comment” responses against him at trial).

Under Washington law, the “test as to whether a suspect’s invocation of his right to remain silent was unequivocal is an objective one, asking whether ‘a reasonable police officer in the circumstances would understand the statement’ to be an invocation of *Miranda* rights. [The Washington] Supreme Court recently stated the test as follows, ‘[t]o be unequivocal, an invocation of *Miranda* requires the expression of an objective intent to cease communication with interrogating officers.’ Once a suspect has clearly invoked the right to remain silent, police questioning must immediately cease.” *State v. I.B.*, 187 Wash.App. 315, 321-24 (2015) (internal citations omitted).

Here, CM#1’s statement of “no comment” came in response to specific investigatory questions *after* CM#1 had been read *Miranda* and answered earlier post-*Miranda* questions. Under these circumstances, OPA finds that a reasonable officer would understand CM#1’s statement of “no comment” ambiguous as to whether CM#1 was refusing to answer all future questions, or just had “no comment” to the specific question that was posed to him. On these facts, CM#1 did not “clearly” invoke his right to remain silent and NE#2 did not violate policy by continuing to ask CM#1 questions.

Accordingly, OPA recommends that this allegation be Not Sustained - Unfounded.

Recommended Finding: **Not Sustained - Unfounded**

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

#### **6.220 - POL – 2 Conducting a Terry Stop 2. During a Terry Stop, Officers Will Limit the Seizure to a Reasonable Scope**

The Complainant alleged that NE#2 detained his client was held “without reason.”



SPD Policy 6.220-POL-2(2) requires that officers limit a seizure to a reasonable scope. The policy further states that: "Actions that would indicate to a reasonable person that they are being arrested or indefinitely detained may convert a Terry stop into an arrest." (SPD Policy 6.220-POL-2(2).)

During his OPA interview, NE#2 stated that he conducted a *Terry Stop* with CM#1 to investigate the death of the subject, CM#1's partner. NE#2 acknowledged that he advised the screening sergeant of CM#1's arrest but did not in fact inform CM#1 of either being arrested or indeed the reason of his arrest. NE#2 transported CM#1 to SPD Headquarters at the request of a Homicide Sergeant. NE#2 further acknowledged that he failed to document, in his statement, his reason for handcuffing CM#1. CM#1 was handcuffed for approximately 35 minutes before he was transported to SPD Headquarters.

OPA questions the length of time that CM#1 was detained in this case, the fact that he was handcuffed, and then transported away from the scene. Moreover, SPD Policy 6.220-POL-2(2) directs that "officers must have additional articulable justification for further limiting a person's freedom during Terry stop" by "applying handcuffs" or "transporting any distance away from the scene of the initial stop." Ultimately, given the fact that the named employees were investigating a suspicious death, OPA believes these issues represent only possible violations of policy, not willful behavior rising to the level of misconduct.

Accordingly, OPA recommends that this allegation be Not sustained Training Referral

- **Training Referral:** NE#2's chain of command should discuss OPA's findings with NE#2. The Training Referral should incorporate counseling and training on relevant sections of SPD Policy 6.220-POL-2. In addition to this, Supervisory staff should ensure that NE#2 recognizes and appropriately documents the articulation of the reasons for an arrest to detainees when required to do so. NE#2 should also be cognizant of the appropriate information which is required in these reports. The retraining and counseling conducted should be documented, and this documentation should be maintained in Blue Team.

Recommended Finding: **Not Sustained - Training Referral**

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

***6.150 - Advising Persons of Right to Counsel and Miranda 13. Should an Arrestee Clearly Invoke the Right to Remain Silent, Officers Must Read Miranda Again if They Later Re-Initiate Contact***

The fact pattern is as described above for Named Employee #2 – Allegation #1.

When questioned, NE#3 stated that he did not believe CM#1 had invoked his *Miranda* rights he responded with "no comment" to the questions. In interview, NE#3 stated that he took CM#1's response to mean that he did not want to answer those specific questions. NE#3 said that he didn't see a need to advise CM#1 of his *Miranda* Rights a second time because he was recently advised and acknowledged that he understood his rights. NE#3 believed that he did not violate this policy because CM#1 was advised of his *Miranda* Rights prior to questioning, and he did not request to speak with an attorney.

For the same reasons as stated above (Named Employee #2 – Allegation #2), OPA recommends that this allegation be Not Sustained – Unfounded

Recommended Finding: **Not Sustained - Unfounded**



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

***6.220 - POL – 2 Conducting a Terry Stop 2. During a Terry Stop, Officers Will Limit the Seizure to a Reasonable Scope***

When interviewed, NE#3 stated that he initiated a *Terry* stop when he placed CM#1 in handcuffs and asked him to be seated. NE#3 believed that CM#1 was detained reasonable amount of time to allow Officers to investigate a potential homicide. BWV shows that CM#1 was detained for approximately 35 minutes before being transported to SPD Headquarters. NE#3 said he did not document the duration of the *Terry* Stop in his statement. OPA does not believe that in these circumstances, 35 minutes is necessarily an unreasonable period of time. However, the lack of clarity between the detention and subsequent arrest of CM#1 has blurred the understanding of when CM#1 was actually placed under arrest.

Accordingly, OPA recommends that this allegation be Not Sustained – Training Referral.

- **Training Referral:** NE#3's chain of command should discuss OPA's findings with NE#3. The Training Referral should incorporate counseling and training on relevant sections of SPD Policy 6.220 Pol 2. In addition to this, Supervisory staff should ensure that NE#3 recognizes and appropriately documents the articulation of the reasons for an arrest to detainees when required to do so. NE#3 should also be cognizant of the appropriate information which is required in these reports. The retraining and counseling conducted should be documented, and this documentation should be maintained in Blue Team.

Recommended Finding: **Not Sustained - Training Referral**



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

***6.150 - Advising Persons of Right to Counsel and Miranda 13. Should an Arrestee Clearly Invoke the Right to Remain Silent, Officers Must Read Miranda Again if They Later Re-Initiate Contact***

The facts are as stated above at Named Employee #2 – Allegation #1.

When questioned by OPA, NE#4 stated that he believed CM#1's response of "no comment" was ambiguous because he answered several other questions and described what led to the argument with the subject. NE#4 stated that he believed that CM#1 did not want to talk.

For the reasons as explained above, OPA recommends that this allegation be Not Sustained – Unfounded.

Recommended Finding: **Not Sustained - Unfounded**

**Named Employee #4 - Allegation #2**

***5.100 - Operations Bureau Individual Responsibilities III. Patrol Sergeant A. Responsibilities & B. Field Supervision***

OPA alleged that NE#4 may have failed to properly exercise his supervisory responsibilities when he approved the detention.

NE#4 was interviewed about the collection of evidence in the apartment. NE#4 said that Officers conducted a warrantless entry due to exigency, but once the subject was declared deceased officers needed to apply for a search warrant. In interview, NE#4 noted, "Once she was pronounced, once she was deceased, pronounced deceased, by the Fire Department. It would have been correct to exit the unit and apply for a warrant. We no longer have exigency to enter the unit and we don't have consent and the only way to search someone's unit or collect any evidence is under a warrant with the Fourth Amendment protections"

BWV details the conversation between NE#1 and WO#1 on the phone after the deceased was declared deceased. BWV depicted WO#1 speaking on the phone with NE#1. NE#1, the lead detective stated, "Anything you guys suspect as ligature, take it,...and if there's medication or anything in the bathroom that's registered to her, take pictures of it... if you can see the doctors name we can follow up." WO#1 explains to NE#1 how they have the subject's pink backpack stating, "we only rummaged through enough to get her ID, but we don't look through the whole thing." NE#1 then stated, "take the backpack, we can put it in evidence." In interview, NE#4 accepted that he could have handled the scene differently in the collection of evidence.

NE#4 was informed that CSI was not going to respond to examine the scene. NE#4 was not cognizant of creating a crime scene log. NE#4 did not know who the primary officer at scene was. NE#4 was unaware if CM#1 was told that he was under arrest. NE#4 did not follow up with any questions with CM#1 following his arrest. NE#4 contacted the homicide sergeant and informed him that CM#1's phone was recording and that he would bring it with him to SPD Headquarters. NE#4 had no recollection whether or not CM#1 was informed of the reason for his arrest.

OPA recognizes that this was somewhat of a chaotic scene where there was suspicion between a suicide and a homicide. OPA further recognizes that NE#4 was a new Sergeant with only about three months of supervisory experience when this incident occurred and believes that this should be taken into consideration in this matter. NE#4 stated that, as a new Sergeant, he felt that "he did the best he could at the time." NE#4's candor with respect to his



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shortcomings at this scene is encouraging. While there was a possible violation of policy, OPA does not believe that this was a willful neglect of duty by NE#4 rising to the level of misconduct. Instead, NE#4 appeared to have acted in good faith but was hampered by inexperience, a difficult scene, and limited available resources.

Accordingly, OPA recommends that this allegation be Not Sustained – Training Referral.

- **Training Referral:** NE#4's chain of command should discuss OPA's findings with NE#4. The Training Referral should emphasize counseling and training of the duties and responsibility of a Patrol Sergeant and Supervisor as outlined under SPD Policies 5.100III. A & B and 15.055 – Death Investigations. NE#4 needs to be fluent in his understanding and exercise of his role and responsibilities as a Patrol Sergeant. The retraining and counseling conducted should be documented, and this documentation should be maintained in Blue Team.

Recommended Finding: **Not Sustained - Training Referral**