



CLOSED CASE SUMMARY

ISSUED DATE: MARCH 17, 2018

CASE NUMBER: 2017OPA-1132

Allegations of Misconduct & Director's Findings

Named Employee #1

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

Named Employee #2

Allegation(s):		Director's Findings
# 1	6.180 - Searches-General 2. There are Specific Exceptions to the Search Warrant Requirement a. Consent Searches	Not Sustained (Management Action)
# 2	5.001 - Standards and Duties 2. Employees Must Adhere to Laws, City Policy and Department Policy	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 Force Review Board alleged that the Named Employees failed to obtain consent to search a residence, per law and SPD policy, while searching for a suspect believed to have been recently involved in a felony.

ADMINISTRATIVE NOTE:

At the discipline meeting in this matter, OPA and the Named Employees' chain of command engaged in a robust discussion concerning search and seizure law and, specifically, when consent to enter an apartment is voluntary versus provided under duress. Ultimately, no conclusive agreement was reached on whether, under the circumstances of this case, the subject's consent was voluntary. What was clear, however, was that Department employees do not receive regular training on search and seizure law or regular legal bulletins in this and other like areas. While, as discussed below, I believe that there was not lawful consent to the entry in this instance, I recognize that a reasonable officer with the same lack of training and legal updates as the Named Employees may not have known that this was the case. As such, I amended my findings on Allegation #1 for both officers from Sustained to Not Sustained – Management Action.



ANALYSIS AND CONCLUSIONS:

Named Employee #1 - Allegation #1

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

The Named Employees responded to the subject's residence based on the belief that the suspect of a recently committed felony may have been inside. Notably, while the officers had probable cause to arrest the suspect, they did not have either an arrest warrant or a search warrant for the subject's home. Moreover, they had no exigent circumstances to enter the home and were not in "hot pursuit" of the suspect. When the Named Employees arrived at the subject's residence they knocked on the door. When the subject asked who was there through the closed door, the Named Employees announced themselves as police officers. The subject did not open the door at that time and did not respond to the officers' demands that she talk to them. After approximately three minutes of repeated knocking, during which the officers stated that they were not going to leave until they found the suspect, the subject opened her door. The Named Employees engaged in a conversation with the subject, during which she told them that the suspect was not in the apartment. The officers asked multiple times to be allowed to enter the apartment to search for the suspect, but the subject said no and asked the officers if they had a warrant. The Named Employees responded that they did not, but stated that they would apply for one. The Named Employees further told the subject that if they did apply for a warrant, she would be forced to wait outside of her apartment while it was secured prior to the execution of the warrant. The subject was told this right when she was about to re-enter her apartment and appeared, from the officers' perspective, to be surprised by that statement. At that point, the subject said to the Named Employees: "Fine, you want to invade my house, fine." The Named Employees then entered the apartment and located the suspect hiding therein.

Notably, prior to entering the apartment, the Named Employees did not provide the subject with and have her execute a Consent to Search form. The Named Employees additionally did not provide Ferrier warnings. This case was reviewed by the Force Review Board (FRB), which identified these issues and referred this matter to OPA. This investigation ensued.

At his OPA interview, Named Employee #1 (NE#1) stated that he did not believe that the subject consented to the search under duress. NE#1 stated that a Consent to Search form was not provided to the subject because the officers did not have one. He further indicated his belief that if a form was not available, he could utilize his ICV to memorialize consent. Lastly, while he admitted that Ferrier warnings were not provided to the subject, he stated that it was his understanding that he was not required to do so because he was looking for a person. I note that in his report written after the incident, NE#1 indicated that when the subject was about to re-enter her apartment, he told her that she could not do so if they were going to apply for a search warrant. He reported that she then agreed to allow the search.

During his OPA interview, Named Employee #2 (NE#2) also contended that he believed that the subject had voluntarily consented to the search of her home. NE#2 stated that he did not feel that consent was obtained under duress. NE#2 further indicated that they did not read a Consent to Search form to the subject and have her sign the form and that he did not have that form with him. He stated that he did not believe that he was required to utilize the form or to issue Ferrier warnings in this scenario as they were looking for a person, not evidence or contraband. In his report, generated after the incident, NE#2 noted that, prior to agreeing to allow the search, the subject told the officers that they were really "inconveniencing" her.



SPD Policy 6.180 generally sets forth the elements for searches effectuated by SPD employees and the requirement that search warrants are required. SPD Policy 6.180-POL-2 describes the exceptions to the search warrant requirement and, specifically, discusses consent searches. While SPD policy does not explicitly reference Ferrier warnings, these warnings are a requirement in certain circumstances under the Washington State Constitution. As a starting point, I find that the Named Employees were not obligated to provide Ferrier warnings in this situation. While I do not believe that the case cited by the officers (*State v. Khounvichai*) actually stands for this proposition and is distinguishable from the facts here, this holding has been reached in other cases. See, e.g., *State v. Westvang*, 184 Wn. App. 1, 353 P.3d 1024 (2014) (Ferrier warnings are not required when law enforcement officers seek consent to enter a home to execute an arrest warrant); *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). That being said, for the search to be valid, the officers still needed the subject's valid consent.

Here, however, I find that the Named Employees' statements to the subject and conduct were, even if unintended, coercive in nature and that consent was only obtained under duress. In this respect, I agree with the FRB. This finding is supported by the following facts: when initially knocking on the door, the Named Employees told the subject that they were not leaving without the suspect; the Named Employees repeatedly knocked on the subject's door for over three minutes; the Named Employees said that they would obtain a search warrant to enter the subject's home; and the Named Employees told the subject that, if they did so, she would not be allowed to re-enter her home until the warrant was obtained and the search effectuated. Lastly, the subject's contention that the officers were "inconveniencing" her and her statement to the officers at the time they accessed her apartment – "fine, if you want to invade my house, fine" – clearly evinced that she had only consented under duress. Lastly, "mere acquiescence to an officer's entry is not consent and is not an exception to our state's constitutional protection of the privacy of the home." *State v. Schultz*, 170 Wn.2d 746, 248 P.3d 484 (2011). Here, the subject's provision of permission for the officers to enter her home was more in line with resigned acquiescence than with voluntary and informed consent.

However, as indicated above, I understand that officers receive little if any training in search and seizure law and consent to search after the post-Basic Law Enforcement Academy phase of their employment (when they are referred to as student officer prior to becoming probationary officers). This may be an unfortunate result of a tight budget and the substantial training in other areas that is required under the Consent Decree. Even so, this is essential information for officers to know. The failure to understand how to obtain consent and what constitutes consent can result in, as I believe occurred here, violations of the constitutional rights of an individual and the sanctity of her home. Based on my review of the record, I believe it likely that neither officer intended to elicit involuntary consent. I also believe that the officers' errors in this case constitutes ignorance of the law and a mistake rather than misconduct. Given this fact, I lastly believe that ensuring that officers Department-wide receive up-to-date and accurate training and guidance on this area of the law, rather than simply sustaining this finding against the Named Employees, is the most impactful result. As such, I make the following Management Action Recommendation.

- **Management Action Recommendation:** SPD should provide Department-wide training concerning search and seizure law. This training could be accomplished either through classroom trainings, e-learning, or a series of legal bulletins or other instruction provided during roll calls. While I understand that this comes at a



financial cost to the Department, I request that SPD move forward with this training to ensure that its employees do not, even if inadvertently, engage in conduct contrary to the United States and Washington State Constitutions.

Recommended Finding: **Not Sustained (Management Action)**

Named Employee #1 - Allegation #2

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

While I find that the subject did not freely give consent and, thus, that the entry and subsequent search conducted by the Named Employees were unlawful, I do not deem it necessary to sustain this allegation against the Named Employees for the same reasons as discussed above. Accordingly, I recommend that this allegation be Not Sustained – Training Referral.

- **Training Referral:** NE#1 and NE#2 should receive additional training concerning SPD Policy 6.180. In addition, the Named Employees should receive counseling from their chain of command concerning their conduct in this case, the operative law, and how their statements served to procure invalid consent under duress, even if this was not the officers' intent. Lastly, the Named Employees should be given instruction to be careful to not act similarly in future situations. This re-training and associated counseling should be memorialized in PAS entries for the Named Employees.

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

Named Employee #2 - Allegation #1

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

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

Recommended Finding: **Not Sustained (Management Action)**

Named Employee #2 - Allegation #2

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

I refer to the training referral issued to NE#1 and NE#2 above. (See Named Employee #1, Allegation #2.)

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



City of Seattle

Office of Police Accountability

July 2, 2018

Chief Carmen Best
Seattle Police Department
PO Box 34986
Seattle, WA 98124-4986

RE: MANAGEMENT ACTION RECOMMENDATIONS – SECOND QUARTER 2018

Dear Chief Best:

I write to inform you of the Management Action Recommendations (MAR) that have been recently issued by OPA. The MARs contained herein are for the following cases: 2017OPA-0511, 2017OPA-0980, 2017OPA-1008, 2017OPA-1091, 2017OPA-1132, 2017OPA-1196, 2017OPA-1301, 2017OPA-1289, 2018OPA-0553, and 2018OPA-0101.

Case Number

- 2017OPA-0511

Summary

- The Named Employee allegedly violated SPD policy when he posted a message on his personal Facebook account that concerned an open investigation, included confidential criminal information, and identified a minor.

Analysis

- Policy *1.110 - Public Information* addresses the release of information to the media and specifically prohibits the release of much of what was contained in the Named Employee's Facebook post.
- Although the Named Employee had Facebook friends that he knew were active members of the media and who had access to his page, it is unclear whether his posting of sensitive and confidential material constituted a "release" to the media as contemplated by the policy.

Recommendation

- Modify policy *1.110 - Public Information – POL-1 General Policy (2)* to define "release" as it pertains to SPD employees disseminating information to the media via social media. The definition should clarify that a "release" includes posting law enforcement information on social media.
-

Case Number

- 2017OPA-1301
- 2018OPA-0101

Summary

- In both cases, the Named Employee allegedly failed to properly activate/log-in to both his In-Car Video (ICV) and Body Worn Video (BWV) systems when responding to incidents.

Analysis

- The Named Employee felt he met the requirements of the BWV policy because he interpreted it as requiring an officer to record on ICV or BWV, but not necessarily on both.
- OPA interprets the policy as requiring that, when equipped with both ICV and BWV, both systems must be activated for each call response. The Named Employee's understanding of this policy is inconsistent with the reasoning behind equipping officers with BWV in addition to ICV, which is to have a second mechanism to more fully record law enforcement activity, not to have discretion to choose which camera to utilize.

Recommended Action

- Modify *16.090 - In-Car and Body-Worn Video 5. Employees Recording Police Activity* to clarify that if officers are equipped with both ICV and BWV, they shall record on both systems. The new policy subsection could read: "Officers equipped with both ICV and BWV shall utilize both systems simultaneously when recording is required under 16.090-POL-1(5)(b). The failure to activate one or both systems constitutes a violation of policy and must be documented and reported consistent with 16.090-POL-1(4) and 16.090-POL-1(7)."
-

Case Number

- 2017OPA-1132
- 2018OPA-0053

Summary

- In the first case, prior to searching a residence for a suspect, the Named Employees failed to provide the subject with--and have her execute--a Consent to Search form. They also did not provide Ferrier warnings.
- In the second case, the Named Employees may have violated the Complainant's constitutional right to be secure against an unlawful search and seizure when they arrested him while he was still within the threshold of his residence.

Analysis

- Officers receive little training in search and seizure law and consent to search after the post-Basic Law Enforcement Academy phase of their employment. The failure to understand how to obtain consent and what constitutes consent can result in violations of the constitutional rights of individuals and the sanctity of their homes. OPA believes the officers' errors in these cases constitute ignorance of the law and mistakes rather than misconduct.

Recommended Action

- Provide Department-wide training on search and seizure law and policy *6.180 - Searches-General*. The training should specifically discuss the requirement that subjects be completely outside of the thresholds of their residences before arrests can be properly effectuated.
-

Case Number

- 2017OPA-1091

Summary

- The Named Employees conducted a Terry stop, but failed to document it using a Terry Template, as is required by SPD policy.
-

Analysis

- The Named Employees said a Terry Template was unnecessary because they had probable cause to arrest based on open warrants.
- Law, policy, and the Consent Decree state that officers must document each time they stop and detain someone, regardless of whether they believe they have probable cause to make an arrest.

Recommended Action

- Modify policy 6.220 - *Voluntary Contacts, Terry Stops & Detentions 10. Officers Must Document All Terry Stops* to state that when officers perform a Terry stop, a Terry template is always required (SMC 14.11.060(C)), regardless of whether the officers had probable cause to arrest at the time of the Terry stop.
-

Case Number

- 2017OPA-1196

Summary

- In reviewing a failure of an officer to carry a Taser during an incident, OPA evaluated whether the officer's supervisor failed to ensure the officer was carrying a Taser and/or that the Taser was in working condition.

Analysis

- SPD policy 5.100(III) sets forth the general responsibilities of patrol sergeants, including: "Check the personal appearance of assigned officers and ensure officers' equipment is in good condition." OPA's investigation of this case found that such inspections are rarely carried out, and sergeants are not held accountable for not doing so.

Recommended Action

- Modify policy 5.100 - *Operations Bureau Individual Responsibilities III. Patrol Sergeant B. Field Supervision* to clarify the frequency with which a patrol sergeant shall perform inspections to ensure that their officers are carrying the appropriate equipment and determine that the equipment is functioning properly.
 - Train patrol sergeants on their responsibility to perform inspections, including how to conduct an inspection and the frequency with which to conduct them.
-

Case Number

- 2017OPA-1008
- 2017OPA-0980

Summary

- The Named Employees failed to properly enter a firearm into evidence as required by Department policy and the unit manual.
- Another Named Employee failed to properly supervise the previously mentioned Named Employee.

Analysis

- SPD policy 7.010-POL-1 requires that employees secure collected evidence and place it into the Evidence Unit or an authorized evidence storage area before they end their shift. During their OPA

interview, one of the Named Employees contended that SPD policy did not define what an “authorized evidence storage area” was.

- Policy 5.001-POL-2 requires that SPD employees adhere to laws, City policy and Department Policy. Although it instructs officers to comply with the SPD Manual, published directives/special orders, and Department training, it does not state that non-compliance with a unit manual, such as the FIT Manual, constitutes a violation of SPD Policy.
- The FIT Manual lacks clarity regarding the requirements for FIT Sergeants to actively monitor the investigations conducted by Detectives and to ensure that evidence is timely placed into evidence.
- FIT previously did not take custody of rifles or shotguns; rather, such weapons were processed by CSI. OPA suggested that FIT institute this same process for handguns, as it may result in more consistent treatment of and processing standards for all firearms. FIT has since made this change.

Recommended Action

- Modify policy 7.010 - *Submitting Evidence* to define what an authorized evidence storage location is and clarify that personal offices are not such authorized locations.
 - Modify the *FIT Manual* to:
 - Clarify that officers will, as soon as feasible, take case evidence to the Evidence Unit.
 - Indicate what, if any, other authorized evidence storage locations exist in the FIT unit, noting that evidence should never be stored in personal offices.
 - Provide more detail on expectations for evidence handling.
 - More clearly define the expectations for the FIT Sergeant (such as memorializing the requirement that the FIT Sergeant check-in with Detectives to determine the location and status of evidence and firearms)
 - Train FIT Detectives and supervisors in evidence handling.
 - Modify policy 5.001 - *Standards and Duties 2. Employees Must Adhere to Laws, City Policy and Department Policy* to include unit manuals as one of the types of regulations to which officers are responsible for adhering.
 - Reevaluate the current FIT practice of taking possession and maintaining custody of handguns. (OPA recognizes that this has been implemented since initial conversations about this case occurred, but is noting it here nonetheless.)
-

Case Number

- 2017OPA-1289

Summary

- The Named Employee failed to conduct a preliminary inquiry into a bias allegation and to generate a Bias Review.

Analysis

- SPD policy 5.140-POL-7 requires that Department supervisors conduct preliminary inquiries into biased policing. The Named Employee told OPA he did not know how to do a Bias Review and was not familiar with the Bias policy, even though he had served as an acting sergeant for about 20 to 25 days per year over several years. He further told OPA that he was not familiar with the policies concerning the investigation and reporting of force, as well as the policy concerning the reporting of misconduct. Lastly, the Named Employee told OPA that he had not attended SPD’s First Line Supervisor Training nor any other type of supervisor training during his over 25 years with the Department.
- The Named Employee was placed in a position where he was expected to supervise his fellow employees without any training on how to do so, per policy 4.020, which states that “Captains will

send officers to Department sergeant training for acting sergeant assignments over 60 consecutive days.” Since the Named Employee’s assignment as acting sergeant was for less than 60 consecutive days, training was not mandated.

Recommended Action

- Modify policy 4.020 – *Reporting and Recording Overtime/Out of Classification Pay 17. Officers Assigned as Acting Sergeants Receive Training* to require that Captains send officers to sergeant training prior to any acting sergeant assignment.

Thank you very much for your prompt attention to these matters. I look forward to receiving your written responses to these recommendations and, should you decide to act as a result, the progress of these actions. Alternatively, to the extent that the above recommendations are not feasible, or a different policy modification may be more fitting, OPA would appreciate the opportunity to help you find a workable solution through an in-person discussion.

Please feel free to contact me with any questions or concerns.

Sincerely,

Andrew Myerberg

Andrew Myerberg
Director, Office of Police Accountability

cc: Deputy Chief Chris Fowler, Seattle Police Department
Assistant Chief Lesley Cordner, Standards and Compliance, Seattle Police Department
Rebecca Boatright, Senior Police Counsel, Seattle Police Department
Fe Lopez, Executive Director, Community Police Commission
Lisa Judge, Inspector General for Public Safety
Tito Rodriguez, Office of Police Accountability Interim Auditor
Josh Johnson, Assistant City Attorney, Seattle City Attorney’s Office
Anne Bettsworth, Senior Policy Advisor, Office of Police Accountability