



## CLOSED CASE SUMMARY

ISSUED DATE:     APRIL 24, 2018

CASE NUMBER:    2017OPA-1179

### Allegations of Misconduct & Director’s Findings

**Named Employee #1**

Allegation(s):		Director’s Findings
# 1	5.140 - Bias-Free Policing 5. Employees Will Call a Supervisor in Response to Allegations of Bias-Based Policing	Sustained
# 2	5.140 - Bias-Free Policing 2. Officers Will Not Engage in Bias-Based Policing	Not Sustained (Inconclusive)
# 3	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 (Inconclusive)
# 4	5.001 - Standards and Duties 10. Employees Shall Be Truthful and Complete In All Communication	Not Sustained (Inconclusive)

**Imposed Discipline**

Written Reprimand
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**Named Employee #2**

Allegation(s):		Director’s Findings
# 1	5.140 - Bias-Free Policing 5. Employees Will Call a Supervisor in Response to Allegations of Bias-Based Policing	Sustained
# 2	5.140 - Bias-Free Policing 2. Officers Will Not Engage in Bias-Based Policing	Not Sustained (Inconclusive)
# 3	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 (Training Referral)

**Imposed Discipline**

Oral Reprimand
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***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 Named Employees conducted a stop of a subject based on a description provided over the radio. The subject was a Black female and the alleged perpetrator was a Black male. During the stop, the subject alleged to Named Employee #2 that she was being racially profiled. Neither Named Employee #2 nor Named Employee #1, who was also aware of the allegation of biased policing, notified a supervisor and requested that supervisor to come to the scene. This case was referred to OPA by the supervisor due to the officers’ failure to timely notify her. The supervisor further referred to OPA the possibility that there may not have been reasonable suspicion underlying the stop. Lastly, the supervisor indicated that Named Employee #1 may have been dishonest when recounting his perception of the subject.



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**ANALYSIS AND CONCLUSIONS:**

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

***5.140 - Bias-Free Policing 5. Employees Will Call a Supervisor in Response to Allegations of Bias-Based Policing***

SPD Policy 5.140-POL-5 requires that employees call a supervisor in response to allegations of biased policing. The officers are required to call the supervisor to the scene of the bias complaint and to review the circumstances of the incident and determine an appropriate course of action. (SPD Policy 5.140-POL-5.) The policy further states that: "If officers have completed their business with the person making the allegation, and the supervisor has not yet arrived, the officer will wait at the location for the supervisor to arrive." (*Id.*)

Here, it is undisputed that NE#1 and NE#2 did not contact their supervisor and have their supervisor come to the scene. Moreover, they did not wait at the scene for their supervisor to arrive. Instead, they made the decision to screen the complaint of bias with their supervisor when they returned to the precinct. Once they arrived at the precinct and informed their supervisor, they were told that they had acted contrary to policy and the supervisor directed them to drive her to the scene. They went to the scene together, but the subject had already left and the supervisor was not able to investigate the allegation of bias as required by policy.

NE#1's and NE#2's actions clearly violated policy. Neither of them presented any plausible argument to the contrary or explanation that excused them from compliance. As such, I recommend that this allegation be Sustained as against both of them.

Recommended Finding: **Sustained**

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

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

During the stop of her conducted by the officers, which was captured by In-Car Video (ICV), the subject alleged biased policing. She stated to the officers that she was the "only Black person that you wanted to search, right?" She repeated that multiple times. She then alleged that she was being racially profiled. NE#2 denied doing so. He then became angry with the subject. They engaged in a further back and forth during which the subject asked why the officers did not approach and search another individual, NE#2 told her that they had a description, and the subject responded: "oh, a Black person?" NE#2 then told her that he was not going to "sit" there and be accused of racially profiling her. As discussed above, he did not notify a supervisor of the subject's allegation of biased policing.

NE#2 told OPA that he contacted the subject based on his belief that she possibly matched the description that had been provided, not because of her race. NE#2 further denied that he engaged in biased policing. NE#1 also stated that the stop of the subject was due to the fact that the officers believed that she matched the description. NE#1, like NE#2, denied that he engaged in biased 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.*)



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As explained more fully below, there is insufficient evidence for me to determine how the subject appeared or presented as on the date in question and, as such, whether she matched the general description provided to the officers. If she did not and the officers indiscriminately stopped a Black woman who did not plausibly match the description of the suspect, this could constitute biased policing. However, I am unable to conclusively make this determination. Given this, I recommend that this allegation be Not Sustained – Inconclusive as against both NE#1 and NE#2.

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

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

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

SPD Policy 6.220-POL-1 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.*) Lastly, officers are required to inform the detainee of the reason for the detention as early on in the contact as safety permits. (SPD Policy 6.220-POL-5.)

At his OPA interview, NE#2 stated that he was conducting an area search for a suspect who was suspected of committing a burglary. The suspect was described as a Black male, in his thirties, wearing blue jeans and a blue jacket, and possessing a backpack. NE#2 viewed an individual sitting in the near vicinity of where the crime had occurred who he believed matched the description of the subject. NE#2 reported that the subject was wearing clothing similar to that described. He indicated that this individual appeared “androgynous.” When asked to describe what he meant by androgynous, NE#2 stated the following:

So it’s, so in appearance they look, they look male and female. So it could be, so I guess those names would, they, they were dressed, they had the ex—almost the exact same dressing but it was, it was like, you know, just shorter hair, could’ve been mistaken for a male. So it was a—I, I, I could see me being close up and just staring at this person that, okay, this person could, this person’s most likely a female, but driving by, it could, it could be a male or a female. I mean as I was driving by I was like, that person could be male or female but...

NE#2 asserted that he believed it was possible that the subject could have been mistaken for a male when the description was initially provided.



NE#1 told OPA that he was with NE#2 when they spotted the subject, who he believed “matched the description.” He further explained that while the description provided was of a Black male wearing a blue jacket and blue jeans and possessing a backpack, he stated that his “perception was that this individual was a female who either identified as a male or had the outwards appearance of a male.” NE#1 stated that the subject not only had a backpack, but also had a white shopping bag. This was part of the description that had been conveyed. NE#1 noted that the description was general and he asserted that, in his best judgment, the subject largely matched that description.

I note that, while the audio of the interaction between the officers and the subject was captured by ICV, the incident occurred outside of the view of the camera. As such, there was no video and, aside from the officers’ accounts, I do not have any evidence as to how the subject appeared or presented on the date in question. As such, I cannot determine whether the subject did or did not present as male and potentially match the description that had been provided. This is the determinative question here and, as I cannot conclusively answer it, I further cannot determine whether the Terry stop in this case was consistent with policy and law.

As such, I recommend that this allegation be Not Sustained – Inconclusive against NE#1.

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

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

***5.001 - Standards and Duties 10. Employees Shall Be Truthful and Complete In All Communication***

In the complaint she submitted to OPA, the Complainant recounted that she discussed with the Named Employees the stop of the subject and her concerns regarding their conduct. She wrote that NE#1: “initially told me that he did not know the suspect was a female until he spoke to her and heard her voice. I asked if the suspect was transgender and he said she was not.” The Complainant then reviewed the ICV of the incident and realized that NE#1’s statement to her was inaccurate. Specifically, she wrote the following: “I also learned that [NE#1] had told [a witness officer] that the subject they wanted to stop was a female and not a male prior to initiating contact with her. He mentions whether or not they want to ‘open up this can of worms.’ This contradicted what he told me earlier about not knowing the subject was female until after he spoke to her.”

At her OPA interview, the Complainant indicated that she was “shocked” by NE#1’s inaccuracy. When asked whether she believed that NE#1 was deliberately dishonest, the Complainant responded: “It’s kind of hard for me to say exactly why he said that. I, I will just say, you’d have to ask him because it didn’t add up to me. He told me one thing very clearly, and later, when I found out it was not true I was somewhat disappointed.”

NE#2 told OPA that he discussed with NE#1 his belief that the subject matched the description and NE#2 said: “hey, I’ll just go talk to her.” This provides support for the fact that NE#1 was aware that the subject was female before the decision to effectuate the stop was made.

OPA also interviewed a Witness Officer who was involved in this incident. The Witness Officer agreed that his ICV reflected that NE#1 told him that his perception was that the subject was female prior to the stop. The Witness Officer indicated that he did not know what NE#1 was thinking when he decided to go forward with the Terry stop given that fact.



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NE#1 was questioned by OPA concerning his perception of the subject's gender and, specifically, what he told the Complainant. NE#1 stated:

Yeah. I explained to her exactly what I just explained to you. In that this person appeared to be a fema—or in my perception was a female who either was transgender or identified as a male or simply had the outwards appearance of a male. After we contacted her it became clear by her vocals, to me anyway, that it was indeed a female who just simply had the outwards appearance of a male.

This description of the conversation provided by NE#1 is contrary to that conveyed by the Complainant. Specifically, the Complainant explicitly stated that NE#1 never told her that he believed that the subject was transgender, even when he was directly asked that question. NE#1 further told OPA that he used “she” when referring to the subject during his conversation with the Witness Officer, because he “was using a pronoun” that he “believed was true” at the time. NE#1 asserted that he was truthful in his communications with the Complainant.

SPD Policy 5.001-POL-10 requires that Department employees be truthful and complete in all communications. While NE#1 was certainly inaccurate and incomplete in his communications with the Complainant, this allegation should only be sustained if it can be proved that NE#1 was deliberately and materially dishonest.

I am troubled by the inconsistencies between NE#1's accounts as captured on ICV, as conveyed by the Complainant, and as articulated by him at his OPA interview. For example, while NE#1 told OPA that he indicated to the Complainant that the subject could have been “transgender,” this was expressly contrary to what the Complainant reported. Moreover, the Complainant stated that NE#1 initially told her that he did not know that the subject was female until he heard her voice, but NE#1's OPA interview and the ICV of the incident indicated otherwise. These were clearly material facts. Had NE#1 conclusively known the subject to have been female, it would have undermined if not possibly eliminated his reasonable suspicion for the stop. As such, he had a motive to assert this fact, potentially falsely, to his supervisor. Based on her interview and the OPA complaint that she submitted, the Complainant was clearly concerned that these inconsistencies arose to the level of dishonesty and I share her concern.

Ultimately, the question of whether NE#1 was dishonest is a close one. To so find, I must apply a higher quantum of evidence than is required for any other allegation of misconduct. Even with my substantial concerns regarding NE#1's honesty in this matter, I do not believe that I can meet the evidentiary burden required. Instead, I give NE#1 the benefit of the doubt in this instance and I conclude, as he contends, that this was an innocent error and no dishonesty was at play. That being said, I counsel NE#1 to be careful to not find himself in a similar situation in the future as such a case may have a different result.

For these reasons, I recommend that this allegation be Not Sustained – Inconclusive.

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



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

***5.140 - Bias-Free Policing 5. Employees Will Call a Supervisor in Response to Allegations of Bias-Based Policing***

For the same reasons as stated above (see Named Employee #1, Allegation #1), I recommend that this allegation be Sustained.

Recommended Finding: **Sustained**

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

***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 #2), I recommend that this allegation be Not Sustained – Unfounded.

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

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

***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 #3), I believe that this allegation is inconclusive.

However, I note that NE#2 appeared to be unaware that he conducted a Terry stop in this instance and instead believed that this was a social contact. NE#2's supervisor disagreed with him and directed him to complete a Terry Template. I agree with his supervisor. I believe that NE#2's lack of understanding concerning the functional result of his conduct necessitates a Training Referral.

- **Training Referral:** NE#2 should be retrained as to SPD Policy 6.220 and the distinction between a Terry stop and a voluntary contact. NE#2 should be counseled by his chain of command concerning the fact that his actions in this case constituted a Terry stop. NE#2 should be further reminded that a Terry Template is required any time he effectuates a Terry stop. This re-training and associated counseling should be memorialized in a PAS entry.

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