



## **CLOSED CASE SUMMARY**

ISSUED DATE: NOVEMBER 18, 2018

CASE NUMBER: 2018OPA-0201

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

**Named Employee #1**

<b>Allegation(s):</b>		<b>Director’s Findings</b>
# 1	6.180 - Searches-General 2. There are Specific Exceptions to the Search Warrant Requirement	Not Sustained (Training Referral)
# 2	5.001 - Standards and Duties 2. Employees Must Adhere to Laws, City Policy and Department Policy (Ferrier Warning)	Not Sustained (Management Action)
# 3	16.090 - In-Car and Body-Worn Video 5. Employees Recording Police Activity e. Recording in Residences and Private Areas	Not Sustained (Training Referral)

**Named Employee #2**

<b>Allegation(s):</b>		<b>Director’s Findings</b>
# 1	6.180 - Searches-General 2. There are Specific Exceptions to the Search Warrant Requirement	Not Sustained (Training Referral)
# 2	5.001 - Standards and Duties 2. Employees Must Adhere to Laws, City Policy and Department Policy (Ferrier Warning)	Not Sustained (Management Action)
# 3	16.090 - In-Car and Body-Worn Video 5. Employees Recording Police Activity e. Recording in Residences and Private Areas	Not Sustained (Training Referral)

***This Closed Case Summary (CCS) represents the opinion of the OPA Director regarding the misconduct alleged and therefore sections are written in the first person.***

**EXECUTIVE SUMMARY:**

The Complainant alleged that the Named Employees improperly entered and searched his residence. The Complainant further alleged that the Named Employees failed to provide *Ferrier* warnings prior to doing so. Lastly, it was alleged that the Named Employees failed to ask for consent to record Body Worn Video.

**ANALYSIS AND CONCLUSIONS:**

**Named Employee #1 - Allegations #1**

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

For the same reasons as set forth in the context of Named Employee #2 (NE#2), I find that Named Employee #1 (NE#1) acted contrary to this policy in this instance. While I conclude that his conduct is better remedied by training rather than a Sustained finding, as NE#1 no longer works for SPD, no training can be provided to him. Even though this is the case, I still recommend that this allegation be Not Sustained – Training Referral.



---

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

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

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

SPD Policy 5.001-POL-2 requires that employees must adhere to laws, City policy, and Department policy.

As discussed above, I find that the warrantless entry and search of the boarding house was not justified by either valid consent or by community caretaking. That being said, OPA attributes the Named Employees' failure to comply with policy and the law during this incident to the lack of search and seizure training they have historically received. Indeed, I conclude that the Named Employees' conduct on this case was based on mistake and misapprehension of the law.

For these reasons, I refer to the Management Action Recommendation that OPA previously issued to the Department concerning increasing search and seizure training. (See 2017OPA-1132 and 2018OPA-0053.) I again strongly encourage the Training Unit to create such a training and to provide it to, at the very least, all officers assigned to the Patrol Operations Bureau.

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

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

***16.090 - In-Car and Body-Worn Video 5. Employees Recording Police Activity e. Recording in Residences and Private Areas***

For the same reasons as set forth in the context of NE#2, I find that NE#1 acted contrary to this policy in this instance. While I conclude that his conduct is better remedied by training rather than a Sustained finding, as NE#1 no longer works for SPD, no training can be provided to him. Even though this is the case, I still recommend that this allegation be Not Sustained – Training Referral.

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

**Named Employee #2 - Allegations #1**

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

The Named Employees responded to a call concerning drug activity at a boarding house. Specifically, the caller stated that he had been in the boarding house approximately two hours prior and that the occupant of unit #6 was cooking meth. The Named Employees approached the residence and NE#2 remarked that he did not smell anything abnormal. The Named Employees knocked on the entrance to the boarding house and spoke to the individual who answered. They told the individual that someone had reported a strange odor coming from the residence. The individual who answered the door, and who also lived at the residence, told the officers that he had smelled a strange odor upon his return from work. The individual gave the officers permission to enter the boarding house. Several times, the Named Employees referenced natural gas. This was the case even though there had been no report concerning a potential natural gas leak.



The Named Employees walked upstairs and knocked on unit #6. The Complainant opened the door. The officers informed the Complainant that they were at the home in response to a call concerning strange odors. The Complainant stated that he and the other occupant in his room were fine and that they had not smelled any such odors. The Complainant told the officers that he did not think the residence even had natural gas. The Named Employees asked the Complainant whether they could enter his unit to make sure everything was okay. The Complainant responded that they could not without a warrant. The Complainant asked who had let the Named Employees into the residence and the Named Employees provided this information.

The Named Employees then knocked on two other doors and, when other roommates answered, confirmed that those individuals did not need police assistance. The Complainant exited his unit and spoke with the officers. The Named Employees thanked him and then left the residence. All in all, the officers were inside of the boarding house for just over five minutes.

The Complainant later initiated this complaint with OPA. The Complainant contended that the Named Employees engaged in the following improper behavior: pressured his roommate to allow them to enter the residence; searched the boarding house without a warrant; disregarded the rooms on the first and third floors but knocked on all the second-floor doors; told the Complainant “quite forcefully” that they were required to search all of the rooms in the house; and failed to issue *Ferrier* warnings to the occupants. The Complainant further contended that he told the Named Employees not to knock on the other residents’ doors given the late hour, as well as to leave the house and to get a warrant. He stated that the Named Employees left the residence “reluctantly.”

The Named Employees’ actions were completely captured on Body Worn Video (BWV). The BWV conclusively disproves several of the allegations made by the Complainant, including: that the Named Employees “pressured” the individual who answered the door to provide consent; that they “forcefully” told him that they were going to search rooms within the boarding house; that the Complainant ever told the Named Employees to leave the boarding house; and that they left the boarding house “reluctantly.”

At the time of OPA’s investigation, NE#1 had left the employment of SPD and, as such, OPA was unable to interview him. NE#2, who was interviewed, stated that they were there in “more of a community caretaking” role. NE#2 confirmed that neither he nor NE#1 told the individual who answered the door (or anyone else in the residence) of the report of meth being cooked in the house. NE#2 confirmed that when they entered the house they did not detect anything that appeared to be a potential danger to life safety.

NE#2 stated that neither he nor NE#1 asked the individual who answered the door whether they had permission to go to the second floor. However, NE#2 stated that, given that it was a boarding house, he treated the residence similar to an apartment complex. He explained that there was nothing he smelled or observed on the second floor that appeared to be a potential danger to life safety.

NE#2 recalled asking whether they could enter and search the Complainant’s apartment. When the Complainant said no, they did not do so and did not ask for consent a second time. NE#2 did not remember ever being asked to leave the boarding house by the Complainant. He explained that, had the Complainant made that request, he and NE#1 would have left.



---

SPD Policy 6.180-POL-2 concerns searches and seizures, including entries into residences. It specifically references the various exceptions to the search warrant requirement.

NE#2 asserted that he and NE#1 had consent to enter the boarding house and that their presence in the residence was further justified by the community caretaking exception to the search warrant requirement.

As a threshold matter, I agree that the individual who answered the door gave the Named Employees consent to enter the boarding house to determine the cause of the odor. That consent was not coerced or obtained under false pretenses. While the Named Employees referenced a possible gas leak, they primarily discussed an odor that had been reported by neighbors. The individual who opened the door agreed that such an odor was currently or had been present in the boarding house. The question, however, is whether the consent was voluntary as matter of law given that the Named Employees did not provide *Ferrier* warnings.

In evaluating this question, *State v. Kennedy*, 107 Wn. App. 972 (2001) is instructive. In *Kennedy*, officers responded to a motel room concerning a report of potential narcotics activity inside. They knocked and announced and, when the subject opened the door, requested consent to enter. No *Ferrier* warnings were provided. Consent was granted, the officers entered, and they located narcotics. The court found that *Ferrier* warnings were required because the officers went to the motel room to investigate a narcotics complaint, not, to the contrary, in response to a 911 call or to effectuate an arrest warrant. The court further did not find persuasive any “attempt to distinguish receiving consent to enter from consent to search.” The court reasoned that “the officers' request for permission to enter is, in effect, a request for permission to ‘search’ for anything in plain view.” As such, the court found the consent to have not been voluntary due to the absence of *Ferrier* warnings.

The *Kennedy* case is analogous to the facts here. The Named Employees responded to the boarding house based on a report of an odor suggesting possible narcotics activity. The report identified that the narcotics activity was specifically connected with unit #6. Based on a review of the record, it appears that the Named Employees' primary purpose for entering the boarding house was to determine whether the odor could be detected and, if so, whether it could be verified that narcotics activity was occurring in unit #6. Indeed, that was the first door the Named Employees knocked on. At the time the Named Employees sought consent to enter, they did not have an arrest warrant, they were not searching for a person, and they were not responding to an active 911 call (the narcotics activity was alleged to have occurred two hours prior). As such, and under *Kennedy* and other legal precedent. I find that *Ferrier* warnings were required and that the failure to provide these warnings yielded the consent involuntary.

The Named Employees also argue that the entry and search of the residence was warranted under the community caretaking exception to the warrant requirement. However, when evaluating the facts of the case, the evidence weighs against such a finding. In reaching this decision, I rely heavily on the Washington Court of Appeals' decision in *State v. Lawson*, 135 Wn. App. 430 (2001). In *Lawson*, officers responded to the subject's residence based on complaints of a strong ammonia order, suggestive of drugs, that was reported to be coming from the property. The officers asked for consent to enter the subject's shed and consent was provided. The officers did not provide *Ferrier* warnings. The officers then entered the shed and located evidence of drug activity. In evaluating the officers' argument that the entry was supported by the community caretaking exception to the search warrant requirement, the court explained that it had “endorsed an emergency entry only where the officers reasonably believed that a specific person or persons needed immediate help for health or safety reasons.” It further articulated the following: “We are unwilling to extend the doctrine to authorize warrantless entries where the officers express only a



---

generalized fear that methamphetamine labs and their ingredients are dangerous to people who might live in the neighborhood.” The court ultimately found that the search was not justified under community caretaking.

As in *Lawson*, there is insufficient evidence supporting the Named Employees’ community caretaking argument. Notably, at the time they sought consent to enter, the Named Employees: did not appear to actually smell any odors; were not responding to an active 911 call; had no evidence to believe that any one was injured or in imminent danger of harm; and did not have probable cause to believe that any crimes were actively occurring within the boarding house. Again, the purpose of entry was to search for the source of the odor and to verify if anyone was cooking meth, not to verify the health and safety of the occupants. While this was almost certainly a secondary motivation of the Named Employees, this simply does not satisfy the requirements for community caretaking – most notably, that there is the need to protect or preserve life, avoid serious injury or protect property in danger of damage that justifies an entry that would otherwise be illegal absent an emergency. Lastly, I note that community caretaking is not actually included in SPD policy as a valid exception to the search warrant requirement. OPA has recommended that the Department amend this policy to include this exception. (See 2018OPA-0353.) However, given OPA’s finding, this open issue has no impact on the ultimate disposition of this case.

As I find that the entry and search was not justified under either consent or community caretaking, I conclude that the Named Employees’ actions in this regard were contrary to this policy. That being said, I believe that the Named Employees’ conduct represented a mistake rather than intentional misconduct. Moreover, as discussed below, I further find that their mistake can be attributed, as least in part, to the dearth of either formal or informal search and seizure training provided to them by the Department. For these reasons, I recommend that the Named Employees receive Training Referrals rather than Sustained findings.

- **Training Referral:** NE#2 should receive retraining concerning SPD Policy 6.180. He should receive specific retraining concerning consent searches, when *Ferrier* warnings are required, and when entry based on community caretaking is justified. NE#2’s chain of command should discuss this case with him and go over the caselaw referenced in this DCM. NE#2’s chain of command should consider using this case as a roll call training to ensure that NE#2’s fellow officers also learn from this incident. This retraining and associated counseling should be documented and this documentation should be maintained in an appropriate database.

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

**Named Employee #2 - Allegations #2**

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

For the same reasons as stated above (see Named Employee #1, Allegation #2), I recommend that this allegation be Not Sustained – Management Action.

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

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

***16.090 - In-Car and Body-Worn Video 5. Employees Recording Police Activity e. Recording in Residences and Private Areas***



SPD Policy 16.090-POL-1(5)(e) concerns the recording of BWV while inside of residences and private areas. The policy instructs that: “Employees will ask for consent to record with BWV in residences or other private areas not open to the public unless there is a crime in progress, or other circumstances exist that would allow the employee to be lawfully present without a warrant. The request and any response will be recorded.” (SPD Policy 16.090-POL-1(5)(e).)

When they arrived at the location, NE#1 informed the individual who answered the door that he was being audio and video recorded. However, NE#1 did not ask for permission to record within the boarding house. He and NE#2 were required to do so, particularly given that there was not probable cause to believe that there was a crime in progress and because the Named Employees did not have a legal justification to be within the apartment.

I also note that SPD Policy 16.090-POL-1(5)(a) states that officers are required to provide a notice of recording at the inception of the incident, as well as to “make reasonable efforts to repeat the notification, if practical, for additional people that become involved in the recording.” Here, NE#1 provided notice of recording to both the individual who answered the door and to the Complainant; however, neither he nor NE#2 provided notice to either of the next two individuals they interacted with. From OPA’s review of the BWV, there is no evidence that such notice would have been impractical under the circumstances.

While the Named Employees may not have complied with aspects of these policies, I find that this is a performance issue that is best corrected by additional training. As such, I recommend that NE#2 receive the following Training Referral.

- **Training Referral:** NE#2 should receive retraining as to the elements of SPD Policies 16.090-POL-1(5)(a) and (e). He should be reminded of his obligation to comply with these policies. This retraining and any associated counseling should be documented and this documentation should be maintained in an appropriate database.

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