



CLOSED CASE SUMMARY

ISSUED DATE: JULY 16, 2018

CASE NUMBER: 2018OPA-0067

Allegations of Misconduct & Director’s Findings

Named Employee #1

Allegation(s):		Director’s Findings
# 1	16.090 - In-Car and Body-Worn Video 5. Employees Recording Police Activity	Not Sustained (Training Referral)
# 2	16.090 - Recording with ICV and BWV 7. Employees Will Document the Existence of Video or Reason for Lack of Video	Not Sustained (Training Referral)

Named Employee #2

Allegation(s):		Director’s Findings
# 1	16.090 - In-Car and Body-Worn Video 5. Employees Recording Police Activity	Not Sustained (Training Referral)
# 2	16.090 - Recording with ICV and BWV 7. Employees Will Document the Existence of Video or Reason for Lack of Video	Not Sustained (Training Referral)

Named Employee #3

Allegation(s):		Director’s Findings
# 1	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 (Lawful and Proper)
# 2	6.220 - Voluntary Contacts, Terry Stops & Detentions 10. Officers Must Document All Terry Stops	Not Sustained (Training Referral)
# 3	6.220 - Voluntary Contacts, Terry Stops & Detentions 8. Officers May Conduct a Frisk or Pat-Down of Stopped Subject(s) Only if They Reasonably Suspect That the Subject(s) May Be Armed	Not Sustained (Lawful and Proper)

Named Employee #4

Allegation(s):		Director’s Findings
# 1	8.200 - Using Force 1. Use of Force: When Authorized	Not Sustained (Unfounded)
# 2	8.400 - Use of Force Reporting and Investigation 1. Officers Shall Report All Uses of Force Except De Minimis Force	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:

It was alleged that Named Employee #1 and Named Employee #2 may have failed to timely record Body Worn Video, as well as that they failed to notify a supervisor of that failure and to document it in an appropriate report. It was



further alleged that Named Employee #3 may have conducted a Terry stop without sufficient reasonable suspicion, that he failed to document that stop, and that he conducted a frisk of an individual without justification to do so. Lastly, it was alleged that Named Employee #4 used force when he allegedly pointed his firearm at an individual, as well as that he potentially violated policy when he failed to report that alleged force.

ANALYSIS AND CONCLUSIONS:

Named Employee #1 - Allegations #1

16.090 - In-Car and Body-Worn Video 5. Employees Recording Police Activity

SPD Policy 16.090-POL-5(b) requires that Department employees record specified law enforcement activity. Included among this is officers' responses to dispatched calls. The policy instructs that officers must begin recording: "starting before the employee arrives on the call to ensure adequate time to turn on cameras." (SPD Policy 16.090-POL-5(b).) This policy applies to both In-Car Video (ICV) and Body Worn Video (BWV).

Named Employee #1 (NE#1) and Named Employee #2 (NE#2) were equipped with BWV on the date in question (both were assigned BWV in November 2017). They did not, however, timely initiate their BWV prior to or upon their responses to the call. Both officers did timely activate their ICV and the entirety of their responses were recorded on ICV.

NE#1 acknowledged his failure to timely activate his BWV. He told OPA that the call began as a dynamic situation and he did not think about activating his BWV. Once the situation slowed down, however, he realized that he had not turned his BWV on and he did so. He characterized this as an "honest mistake." He told OPA that he was informed at BWV training that officers would not be held immediately accountable for these types of failures.

NE#2 also admitted failing to timely activate his BWV. He explained that he was in his patrol vehicle on his way to the call and tapped his camera to activate it. His camera did not turn on but he was focused on driving and did not notice this. As soon as he did realize that his BWV had failed to activate, he made sure to turn it on. NE#2, like NE#1, stated that this failure was a mistake not intentional misconduct.

While NE#1 and NE#2 acted contrary to policy in this instance, OPA has instituted a grace period for BWV. This was done as a matter of fairness given the newness of this technology and the reality that failures to activate and other mistakes will occur as officers familiarize themselves with BWV. The grace period was also instituted to allow officers to learn how to properly and proficiently use their BWV without the concern of a possible Sustained finding. NE#1's and NE#2's failures to activate their BWV fell within this grace period.

As such, instead of a Sustained finding, I recommend that NE#1 and NE#2 receive the following Training Referral.

- **Training Referral:** NE#1 and NE#2 should be retrained on the elements of SPD Policy 16.090-POL-5(b) and 16.090-POL-7. Specifically, NE#1 and NE#2 should be reminded as to their obligation to record their responses to dispatched calls and that this recording should begin prior to their arrival on the scene. They should be counseled concerning their failure to do so in this case, as well as concerning their failure to notify a supervisor of this failure and to document it in a report. They should be informed that future unjustified failures to notify a supervisor of a non-recording and to document that lack of a recording in an appropriate



report will likely result in a recommended Sustained finding, regardless if the failure to activate was an accident. 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 #1 - Allegation #2

16.090 - Recording with ICV and BWV 7. Employees Will Document the Existence of Video or Reason for Lack of Video

SPD Policy 16.090-POL-7 states that: "If this policy requires that an event be recorded, and the employee is aware that there is no recording or there was a delay in recording, employees must explain in writing why it was not recorded or why the start of the recording was delayed."

NE#1 and NE#2, who indisputably failed to timely activate their BWV, did not report these failures to a supervisor or document the lack of video in an appropriate report. This conduct violated policy. However, given the pending grace period for BWV, I recommend that NE#1 and NE#2 receive Training Referrals rather than Sustained findings and I refer to the Training Referral above. (See Named Employee #1, Allegation #1.)

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

Named Employee #2 - Allegations #1

16.090 - In-Car and Body-Worn Video 5. Employees Recording Police Activity

For the same reason as stated above (see Named Employee #1, Allegation #1), I recommend that NE#2 receive a Training Referral instead of a Sustained finding. I further refer to the above referenced Training Referral. (See Named Employee #1, Allegation #1.)

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

Named Employee #2 - Allegation #2

16.090 - Recording with ICV and BWV 7. Employees Will Document the Existence of Video or Reason for Lack of Video

For the same reason as stated above (see Named Employee #1, Allegation #2), I recommend that NE#2 receive a Training Referral instead of a Sustained finding. I further refer to the above referenced Training Referral. (See Named Employee #1, Allegation #1.)

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



Named Employee #3 - Allegations #1

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 governs Terry stops and 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.*)

Named Employee #3 (NE#3) and the other Named Employees were dispatched to DESC based on a report of someone therein who had dropped a firearm. The officers were aware that there were two individuals involved in an altercation, and one of those individuals – the suspect – had dropped the firearm. NE#3 stated that the description that was given of the suspect was as follows: a Hispanic male, approximately 25 years old, around 5'5", wearing a black tank top and blue pants. This was consistent with the description set forth in the CAD Call Report and the 911 recordings.

The Named Employees' response to DESC and later actions were largely recorded on BWV. When NE#3 arrived at DESC it was dark outside and there were a group of individuals near the entryway. He shined his flashlight to see if the suspect was among those individuals. He then looked into the building and saw someone standing inside who was wearing a tank top. NE#3 explained that he only had a few seconds to make the decision as to whether to stop that individual and he did so. NE#3 contended that he believed that the individual largely matched the description of the suspect.

NE#3 believed that he had reasonable suspicion to effectuate a Terry stop of the individual. He instructed the individual to get down on his knees, because he was wanted to put the individual in a position of disadvantage based on the concern that the individual could be armed. At that time, he was informed by a witness at DESC that the individual was not the suspect. NE#1, who was with NE#3, then ended the Terry stop. The Terry stop of the individual, from contact to when the officers walked away, lasted for approximately ten seconds.

The officers continued walking throughout the building to try to find the suspect. They then walked outside and were pointed to a male. A witness stated that this male – referred to here as the subject – had dropped what appeared to be a firearm (it was ultimately determined to be a pellet gun) during a physical altercation. NE#3 approached the subject and asked him his name. He told the subject that he was going to pat him down for weapons. NE#3 explained that he was doing so because the subject had been in a fight and a firearm had been dropped. After dealing with another emergent situation, NE#3 again made contact with the subject who was still speaking with officers. NE#3 explained to the subject for a second time the basis for the pat down. The officers continued to speak with the subject and another male until the subject walked away, a little over four minutes after the stop occurred. The officers did not effectuate any arrests.



Based on my review of the record, I find that both detentions were supported by reasonable suspicion. While the first individual stopped was not involved in the incident, he was a male that arguably fit the description provided to the officers that was standing in or around the location where the firearm had been dropped. As such, I believe that it was reasonable for NE#3 to have believed that he was the possible perpetrator. As NE#3 noted, when he entered DESC, he made the decision to effectuate the stop within seconds. Moreover, as soon as he realized that the individual was not the perpetrator he was released and the stop lasted no longer than ten seconds.

During the second stop, NE#3 was given information from a witness that the perpetrator was involved in an altercation during which a firearm was dropped. The witness specifically identified the subject. As such, NE#3 had reasonable suspicion to stop him and investigate these alleged crimes. This detention lasted for only around four minutes, at which point the subject was released.

For these reasons, I recommend that this allegation be Not Sustained – Lawful and Proper.

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

Named Employee #3 - Allegation #2

6.220 - Voluntary Contacts, Terry Stops & Detentions 10. Officers Must Document All Terry Stops

SPD policy required the officers to document the Terry stops they effectuated of the first individual and the subject in a form called a Terry Template. (See SPD Policy 6.220-POL-10.) They admittedly did not do so in this case. NE#3 explained that, after the incident, he spoke to NE#1, who was the primary officer, about the completion of Terry Templates. NE#1 stated that he would do so. This was the case even though NE#3, not NE#1, initiated both stops. NE#1 acknowledged to OPA that he volunteered to write the Terry Templates, but that he then forgot to do so.

Officers must document each and every time that they stop and detain someone. This is required not only by policy, but also under the Consent Decree and under law. (See SMC 14.11.060(C).) As such, they were required to complete a Terry Template. As NE#3 was the officer that actually effectuated the stops, he was responsible for doing so. Moreover, even if NE#1 volunteered to take on this task, NE#3 still bore the responsibility to ensure that it was done. He did not do so and no Terry Templates were completed.

While this constitutes a violation of policy, given the circumstances of this case and NE#3's recognition of his error at his OPA interview, I recommend that he receive a Training Referral rather than a Sustained finding.

- **Training Referral:** NE#3 should receive retraining on his obligation to complete a Terry Template after a Terry stop. He should be counseled by his chain of command concerning his failure to do so in this case. He should be informed that, even though another officer offered to write the Terry Templates, it was ultimately NE#3's responsibility to ensure that this was done. When he failed to do so, he not only violated SPD policy, but also violated City law. He should be instructed to ensure that he completes Terry Templates when required in the future. 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 #3 - Allegation #3

6.220 - Voluntary Contacts, Terry Stops & Detentions 8. Officers May Conduct a Frisk or Pat-Down of Stopped Subject(s) Only if They Reasonably Suspect That the Subject(s) May Be Armed

SPD Policy 6.220-POL-8 provides that officers may conduct a frisk or pat-down of an individual detained person to a Terry stop only if they reasonable suspect that the individual may be armed.

Here, NE#3 knew that a firearm had been dropped by someone at DESC. This firearm had been recovered and was ultimately handed over to the officers. He was informed by multiple witnesses that the person who dropped the firearm was the subject. As such, I find it reasonable that, when he stopped and detained the subject, NE#1 believed it possible that the subject could still be armed. I thus deem it appropriate that NE#3 conducted a brief frisk of the subject for weapons. I further note that, on two separate occasions, NE#3 clearly explained the reason for the frisk to the subject. On neither occasion did the subject present any objection or assert that he believed that the search violated his rights.

For these reasons, I find that the frisk in this case was consistent with policy and, accordingly, I recommend that this allegation be Not Sustained – Lawful and Proper.

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

Named Employee #4 - Allegations #1

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

Under SPD policy, when an officer points a firearm at an individual, this constitutes a Type I use of force. As such, for the pointing of the firearm to be permissible, it must be reasonable, necessary, and proportional under the circumstances.

The Complainant alleged that NE#4 pointed his firearm at a DESC employee while she was seated in her vehicle. The Complainant alleged that this woman was not involved in any criminal activity, did not represent any threat to the officers or others, and, thus, the pointing of a firearm at her was unwarranted and impermissible.

OPA's review of the BWV indicated that while NE#4 had his firearm drawn from his holster, when he approached the woman's vehicle and interacted with her, the firearm was in the "sul" position. This means that it was pointed downwards and not in the direction of the woman. As NE#4 did not point his firearm at the woman, he did not engage in a use of force. As such, I recommend that this allegation be Not Sustained – Unfounded.

I further note that I do not find the fact that NE#4 had his firearm out in the garage to have been unreasonable or "aggressive" behavior. The officers were responding to a call concerning a man with a firearm who was potentially somewhere within the DESC building. There very well could have been someone armed in the garage and the officers were warranted in entering that area with their handguns drawn. While it is certainly unfortunate that the DESC employee appeared to be alarmed, NE#4 did not engage in any misconduct or violate any Department tactics or training.



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

Named Employee #4 - Allegation #2

8.400 - Use of Force Reporting and Investigation 1. Officers Shall Report All Uses of Force Except De Minimis Force

SPD Policy 8.400-POL-1 requires that Department employee report any uses of force, except for de minimis force. If, as the Complainant contended, NE#4 pointed his firearm at the woman, it would have constituted Type I force that was required to be reported. As discussed above, NE#4 did not engage in such conduct. Accordingly, he was not required to report his holding of his firearm in the “sul” position, as it was de minimis force.

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

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