



CLOSED CASE SUMMARY

ISSUED DATE: JANUARY 3, 2019

CASE NUMBER: 2018OPA-0642

Allegations of Misconduct & Director’s Findings

Named Employee #1

Allegation(s):		Director’s Findings
# 1	5.001 - Standards and Duties 2. Employees Must Adhere to Laws, City Policy and Department Policy	Allegation Removed
# 2	6.180 - Searches-General POL-6.180 2. There are Specific Exceptions to the Search Warrant Requirement	Sustained
# 3	5.001 - Standards and Duties 10. Employees Shall Strive to be Professional	Not Sustained (Training Referral)
# 4	5.140 - Bias-Free Policing 2. Officers Will Not Engage in Bias-Based Policing	Not Sustained (Unfounded)
# 5	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)
# 6	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 [...]	Not Sustained (Lawful and Proper)
# 7	6.220 - Voluntary Contacts, Terry Stops & Detentions 10. Officers Must Document All Terry Stops	Not Sustained (Training Referral)

Imposed Discipline

Written Reprimand

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 the Named Employee violated a number of SPD policies while searching for assault suspects in various encampments.

ADMINISTRATIVE NOTE:

In the original DCM in this matter, OPA recommended that the allegation surrounding bias be Not Sustained – Inconclusive. The Named Employee’s chain of command expressed its concerns regarding this finding. The chain of command stated that they did not believe that the Named Employee’s actions, even if admittedly erroneous, were motivated by bias. Instead, they contended that the Named Employee was motivated by a concern that there was a potentially armed felony suspect somewhere within the encampment and that the actions he took in this case based on that belief, not on an impermissible motive. After further review and consideration, I agree and change the finding on this allegation to Not Sustained – Unfounded.

At the *Loudermill* hearing in this matter, the Named Employee raised several other concerns with OPA’s findings. Specifically, the Named Employee believed that he did have a basis to frisk the male he encountered in the last set of

tents. Based on his arguments, OPA believed that it would be helpful to have another meeting with the Named Employee and, accordingly, proposed that such a meeting occur. On February 8, 2019, OPA met with the Named Employee and his Guild representative. At that meeting, NE#1 further explained his actions and set forth compelling arguments for OPA to reconsider not just Allegation #6, which concerned the frisk, but also Allegation #1 and Allegation #3.

With regard to Allegation #1, the Named Employee argued that the Sustained finding for a violation of law was duplicative of the similar finding that he violated SPD Policy 6.180-POL-2. OPA agrees and now recommends that Allegation #1 be removed. With regard to Allegation #3, the Named Employee asserted that, at the time of the detention of the male, the Named Employee had probable cause to stop him as he was trespassing. As such, the Named Employee asserted that he was technically not required to complete a *Terry* Template. Based on a re-reading of the policy, OPA again agrees with the Named Employee. However, even if a *Terry* Template was not required, the Named Employee should have documented the specific facts of the stop, including the basis for the detention, the duration, whether a frisk occurred, and the reasons justifying that frisk. As the Named Employee did not do so, his report was not complete, thorough, and accurate, as required by SPD Policy 15.180-POL-5. For this reason, while OPA reverses its previous finding on this allegation, OPA issues the Named Employee a Training Referral.

STATEMENT OF FACTS:

Officers, including Named Employee #1 (NE#1), responded to a report of a rape. The victim indicated that she was assaulted and raped in a homeless encampment referred to as the "Jungle." The victim appeared to have been maced and stabbed in the leg. NE#1 determined that there were numerous subjects who were potentially involved.

NE#1 learned that there were numerous subjects that were potentially involved in the victim's assault. The perpetrator of the rape was identified by the victim as a Black man, shorter and taller in stature, with a goatee, and wearing a hat with either a Space Jam or Miami Heat logo on it. After further discussion with NE#1, the victim tentatively identified this individual as "Merlin," who the officers were aware lived in the Jungle. The officers knew the general vicinity of where Merlin resided and knew that he had previously been a suspect in criminal activity, including weapons possession.

The officers then began making their way towards the encampment. They spoke to a group of juvenile males, one of whom recalled seeing a man hit a woman. The juvenile identified the man as wearing a Miami Heat hat but stated that he was White not Black. The juvenile also recalled that the female who was assaulted was White with black hair (the actual victim was Black). Lastly, the juvenile stated that he observed the man throw a gun away. The juvenile's statement appears to have been unreliable.

The officers called for a K-9 officer and they began a track. After a period of time, the K-9 hit on a wooded area. NE#1 approached with his handgun out and ordered anyone in the vicinity to come out. No one was there. The officers then neared an encampment; however, the K-9 did not hit on that location.

As the officers approached the encampment area, Body Worn Video (BWV) showed a White male enter a tent. NE#1 told him not to do so and, after the male went inside, ordered him out of the tent. The male and several other individuals exited. The individuals asked what was going on and NE#1 questioned them about the incident. NE#1 asked the male whether he knew Merlin and the male said that he did not. All of the individuals stated that they did not see any altercation. NE#1 then asked all of the individuals for their names. The male asked why they had to provide that information and both NE#1 and another officer (referred to herein as Witness Officer #1 or WO#1) stated that they were trespassing. NE#1 stated that if the individuals did not provide their names, the officers would not be leaving. Once they collected the individuals' names, the officers informed them that they were free to go.

The officers walked further through the encampment. They approached a tent and NE#1 told the occupant to come out. NE#1 asked WO#1 whether it appeared that someone lived within the tent and WO#1 stated that it did. Shortly thereafter, NE#1 asked WO#1 and a second officer (referred to herein as Witness Officer #2 or WO#2) the following

question: "Is there a way to just walk through those tents to see if anybody is in there?" WO#1 shook his head no. WO#2 responded: "Treat it like a house, it's a house."

The officers approached another series of tents. NE#1 walked up to one of the tents and, using his knife, cut a hole in the tent. He then looked inside. He repeated this act several more times. NE#1 then spoke with several individuals in the near vicinity. He asked them if they knew Merlin. One of the individuals said that he had not seen Merlin since the day before and that Merlin now lived in a tent across I-90.

The officers walked to another encampment. While there, NE#1 approached a red tent. He took out his pocket knife and appeared, from the sound captured by the BWV, to cut the tent; however, a review of the video does not conclusively establish this fact. NE#1 then walked over to a blue and grey tent. He ordered the occupant of the tent outside and the occupant, a Black male with dreadlocks, exited. The male did not match the description of Merlin and the officers had no information connecting this individual to the assault. NE#1 frisked the waistband of the male and directed him to sit on a ladder. NE#1 asked the male whether he knew Merlin and the male said that Merlin lived in another encampment. The male stated that he had no knowledge of the assault. NE#1 then ended the detention.

An Acting Sergeant, who was the supervisor of the officers, reported to OPA that NE#1's actions during this incident, including cutting and looking into tents, may have violated Department policy. This OPA investigation ensued.

OPA's investigation included reviewing the documentation generated by the officers, as well as reviewing the BWV. In addition, OPA interviewed NE#1, WO#1, and WO#2.

ANALYSIS AND CONCLUSIONS:

Named Employee #1 - Allegations #1

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 adhere to laws, City policy, and Department policy.

In *State of Washington v. Pippin*, ___ Wn. App. ___, 2017 WL 451094 (Div. II, Oct. 10, 2017), the Washington State Court of Appeals ruled that the occupant of a tent possessed a reasonable expectation of privacy. This was found to be the case even where the tent was situated in a place where the occupant had no right to be – for example, on public land. This law was in force as of October 10, 2017, and the Department provided its officers of notice of this change in the law.

As such, at the time of this incident, it was clearly established that an officer did not have unfettered access to enter and/or search a tent. To that end, it was also clearly established that cutting open a tent – which is considered a private domicile under *Pippin* – to observe who or what may be within also violated the law.

At his OPA interview, NE#1 was asked about the case law surrounding tents and cutting tents to gain access. He was further specifically asked about *Pippin*. While his testimony on this point was confusing, NE#1 appeared to recognize that *Pippin* provided a privacy interest to tent occupants and that making entry, including cutting open the tents, was unjustified without a warrant. Instead, NE#1 asserted that his cutting of the tents was justified by the exigent circumstances exception to the warrant requirement. He cited to *State v. Wolters*, 135 P.3d 562 (2006), which sets forth the standard for when exigent circumstances to make a warrantless entry is present and contended that he satisfied eleven out of the eleven factors discussed in that decision. As discussed more fully below, however, this argument is simply unsupported by the undisputed facts in the record.

I find that the search represented a technical violation of law and that the specific violation in question – cutting open tents which were private residences under *Pippin* – was serious. However, as discussed above, I agree with NE#1 that this conduct is already captured by the Sustained finding in Allegation #2. Accordingly, I recommend that this allegation be removed.

Recommended Finding: Allegation Removed

Named Employee #1 - Allegation #2

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

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. One such exception is where there are exigent circumstances. (SPD Policy 6.180-POL-2(b).) With regard to this exception, the policy states the following: "Police may conduct an immediate, warrantless search or seizure under emergency conditions, if there is probable cause to believe that delay in getting a warrant would result in the loss of evidence, escape of the suspect, or harm to police or public." (*Id.*) The policy specifically references exigent circumstances in suspected domestic violence cases and instructs: "Exigent circumstances also exist if the police are responding to a domestic violence call. Entry may be made if a person's health, welfare, or safety is concerned." (*Id.*)

As discussed above, NE#1 contended that his cutting open of tents and entering them to search for occupants was justified by exigent circumstances. Based on the totality of the evidence, and when applying a preponderance of the evidence standard, I disagree.

In support of NE#1's belief that his actions were legally justified, he asserted the following: the crime at issue was serious; Merlin, who was believed to be the primary suspect, purportedly owned assault weapons; he was possibly still within the vicinity of the encampments; and he was possibly in the tents observed by the officers. NE#1 stated that he felt his actions were necessary to ensure the safety of officer and others.

All of NE#1's criteria for why he believed exigency circumstances present were speculative. He did not definitively know that Merlin was the perpetrator, he did not conclusively know that Merlin was armed, and he did not know whether Merlin was still in the Jungle or within any of the tents he cut.

Notably, NE#1 had no idea which tent the suspect or suspects were inside of, if any. However, he cut multiple tents open in an attempt to find them. This is a significant departure from *Wolters*, where the officer knew where the subject lived and that he was inside of his residence at the time of the entry. Consider how NE#1's behavior would have appeared under different circumstances. If NE#1 believed that the subjects may have lived in one of a number of connected row houses and were possibly inside one of those rowhouses, would he have been permitted under exigent circumstances to kick down each door or break the front window of each residence to verify this? Of course not – and the same goes for tents.

At the time, all of the officers appeared to recognize that NE#1's acts were inconsistent with policy – hence, the OPA referral by the Acting Sergeant. When interviewed by OPA, WO#2 reiterated his belief that, at the time of the incident, he did not think there were exigent circumstances warranting the cutting of the tents. However, WO#1 agreed with NE#1 that exigency did support the cutting open of the tents and cited the same factors as referenced by NE#1. As discussed above, I agree with NE#1 and disagree with the analysis put forth by NE#1 and WO#1.

Ultimately, I find that there was insufficient non-speculative information to establish exigent circumstances to cut open the tents. Again, under SPD policy, exigent circumstances exist only under "emergency conditions." The evidence in this case, including the BWV, proves that no such conditions were present here.

For these reasons, I recommend that this allegation be Sustained.

Recommended Finding: Sustained

Named Employee #1 - Allegation #3

5.001 - Standards and Duties 10. Employees Shall Strive to be Professional

SPD Policy 5.001-POL-10 requires that SPD employees “strive to be professional at all times.” The policy further instructs that “employees may not engage in behavior that undermines public trust in the Department, the officer, or other officers.” (SPD Policy 5.001-POL-10.) The policy further states the following: “Any time employees represent the Department or identify themselves as police officers or Department employees, they will not use profanity directed as an insult or any language that is derogatory, contemptuous, or disrespectful toward any person.” (*Id.*) Lastly, the policy instructs Department employees to “avoid unnecessary escalation of events even if those events do not end in reportable uses of force.” (*Id.*)

This allegation was classified against NE#1 based on the possibility that his actions in cutting open tents and engaging in behavior that could have been construed as discriminatory against homeless individuals undermined public trust in both NE#1 and the Department as a whole. As discussed more fully below, I find the evidence to be insufficient to establish that NE#1 engaged in bias policing during this incident.

With regard to professionalism, I find that NE#1’s conduct in cutting open the tents violated both SPD policy and Washington State law. In that respect, I further conclude that it undermined public trust in both NE#1 and the Department. However, this conduct is already captured by the Sustained findings set forth in Allegations #1 and 2. As such, and even though I find NE#1’s decision to cut the tents to be unwarranted and problematic, I do not recommend that this allegation also be Sustained. Instead, I recommend that NE#1 receive the below Training Referral.

- **Training Referral:** NE#1 should receive retraining concerning SPD Policy 6.180-POL-2. Specifically, he should be counseled concerning his actions in this case, how he did not have exigent circumstances to cut open and search the tents, and how his decision to do so constituted a violation of law. When officers engage in such behavior, even if with good intentions, it undermines the community’s trust and confidence in that officer and in the Department. NE#1 should be instructed not to revisit these mistakes in the future. This retraining and counseling should be documented and this documentation should be maintained in an appropriate database.

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

Named Employee #1 - Allegations #4

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

It was alleged that NE#1’s conduct in this case, including cutting tents open, constituted biased policing. The logic behind this allegation was that NE#1 would not have engaged in this same type of conduct had the suspects and the individuals he interacted with in the Jungle not been unsheltered.

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.*)

NE#1 told OPA that the housing status of the suspects and those he interacted with had no bearing on what actions he took. He stated that, even had the suspects resided in a house, he still would have conducted himself in the same manner. He said the following: “Yes, absolutely, 100 percent. No questions asked. And I believe that my policing experience and reputation thus for absolutely would back that up.” He specifically denied that bias towards unsheltered individuals had any bearing on what steps he took during this incident.

As discussed above, I maintain my concern that NE#1 would likely have not have treated a home as he did the tents in the encampment. However, I agree with the chain of command that his actions, even if misguided, were based on his belief that there was a potentially armed felon at large and his desire to effectuate the arrest of that individual. Accordingly, I find that his actions were not motivated by impermissible bias and I recommend that this allegation be Not Sustained – Unfounded.

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

Named Employee #1 - Allegation #5

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.*)

NE#1 stated that the detentions he effectuated of the multiple individuals in the Jungle were legally justified. He explained that they were all trespassing and he had probable cause to arrest them at that point.

Technically, NE#1 is correct. He certainly had reasonable suspicion to believe that the individuals were trespassing and, as such, had a lawful basis to detain them. However, this was not the actual reason why he did so. He ordered the individuals out of their respective tents in order to investigate their potential involvement in the assault and rape. I do not see how he had sufficient information to establish reasonable suspicion that they were involved in those crimes. Indeed, reasonable suspicion must be based on specific, objective, and articulable facts, not simply conjecture, as appeared to be the case here. Regardless, this concern is academic given the alternative legal justification for the stop.

For these reasons, and even given the issues discussed above, I recommend that this allegation be Not Sustained – Lawful and Proper.

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

Named Employee #1 - Allegation #6

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 [...]

SPD Policy 6.220-POL-8 states that: “Officers may conduct a frisk or a pat-down of a stopped subject only if they reasonably suspect that the subject may be armed and presently dangerous.” The policy explains that: “The decision to conduct a frisk or pat-down is based upon the totality of the circumstances and the reasonable conclusions drawn from the officer’s training and experience.” (SPD Policy 6.220-POL-8.) The policy provides a non-exclusive list of factors supporting such a search. (*See id.*)

As discussed above, NE#1 effectuated four *Terry* stops while in the Jungle. During the fourth stop, NE#1 ordered an individual out of a tent, did not inform him of the reason for the detention, frisked him, and then directed him to sit. Unlike with the other three individuals, NE#1 did not tell the fourth detainee that he was being stopped because he was trespassing. Instead, NE#1 asked him whether he knew Merlin and whether he observed the assault. Again, as referenced in the context of Allegation #5, NE#1 did not have reasonable suspicion to detain the male for his involvement in the assault and rape. There was no reason to believe that he was Merlin or that he was involved in criminal activity – particularly given that he did not match the description.

In the initial DCM, OPA found that NE#1 did not have the additional reasonable suspicion to believe that the male was armed and presently dangerous needed in order to justify the frisk. However, both at his *Loudermill* hearing

and, again, during his later meeting with OPA, NE#1 convincingly explained his mindset and why he felt it necessary to frisk the male. He stated that he was investigating a crime of violence, he thought that individuals within the group that he was searching for were armed, and he thought a weapon could be concealed in the fanny pack that the male was wearing. From OPA's review of the evidence, OPA cannot say that a reasonable officer in NE#1's place would not have felt similarly. Accordingly, OPA cannot find that NE#1 violated policy when he frisked the male and I change my finding from Sustained to Not Sustained – Lawful and Proper.

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

Named Employee #1 - Allegations #7

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

SPD Policy 6.220-POL-10 requires that officers document all *Terry* stops using a *Terry* Template. Within the *Terry* Template, officers are instructed to "clearly articulate the objective facts they rely upon in determining reasonable suspicion." (SPD Policy 6.220-POL-10.) Officers must also include the following information in the *Terry* Template: "The reason (including reasonable suspicion or probable cause) and disposition of the stop (including whether an arrest resulted; and whether a frisk or search was conducted and the result of the frisk or search)." (*Id.*) A *Terry* Template may be completed in conjunction with a General Offense Report. (*See id.*) Stated differently, that a General Offense Report was completed does not excuse officers from also generating a *Terry* Template if it is required under the circumstances.

During this incident, NE#1 effectuated detentions of a number of individuals. He did not, however, complete a *Terry* Template for any of those stops. When asked when he did not do so during his OPA interview, NE#1 provided two rationales. First, he contended that a *Terry* Template was not required because he had probable cause to arrest the detainees for trespassing. Second, NE#1 contended, in the alternative, that such documentation was not required because his actions and the stops were captured by BWV.

With regard to NE#1's second argument, I believe it clear that this is not what the policy contemplates and, indeed, that NE#1's interpretation is inconsistent with its plain language.

After further consideration, and after conducting another review of the policy, I agree with NE#1's first argument and find that he was not required to complete a *Terry* Template in this case as the stops he effectuated were supported by probable cause. As discussed in other cases, OPA does not necessarily agree with the policy in this respect; however, OPA is bound by its terms.

OPA further notes that, while a *Terry* Template was not required, NE#1 did have to complete a General Offense Report. While NE#1 did so, he failed to provide virtually any detail concerning: who he detained; the nature and duration of the stops; the scope of the stops and, with regard to the frisk of the male, the basis for taking that additional action. In this respect, his General Offense Report was deficient and inconsistent with policy. However, SPD Policy 15.180-POL-5 was not classified for investigation in this case and, as such, it would be improper to issue a Sustained finding. Instead, I recommend that NE#1 receive the below Training Referral.

- **Training Referral:** NE#1 should be reminded that, where he effectuates a probable cause stop and does not complete a *Terry* Template, he must still provide sufficient detail and information concerning the stop in a General Offense Report. The failure to do so is contrary to SPD Policy 15.180-POL-5. NE#1 should be counseled to ensure that he more closely complies with this policy moving forward. This counseling and any associated retraining should be documented and this documentation should be maintained in an appropriate database.

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