



City of Seattle

Seattle Police Department

September 15, 2015

Mayor Ed Murray
Seattle City Hall
600 4th Avenue
Seattle, WA 98124-4769

Councilmember President Tim Burgess
Seattle City Hall
600 4th Avenue
Seattle, WA 98124-4769

Subject: OPA #2015-OPA-0117

Dear Mayor Murray and Councilmember President Tim Burgess:

I write to report on the findings and discipline in 2015-OPA-0117. As you know, the Office of Professional Accountability independently manages the investigation and submits recommendations to the Department concerning disposition of the complaint. I am sustaining the recommendations for Standards & Duties: Exercise of Discretion 5.001; Use of Force Core Principles: De-escalation 8.000 (2); and Bias-Free Policing 5.140. Based on these sustained findings, I am terminating the subject employee¹.

This particular case—involving bias, abuse of police discretion, and escalation of a contact that should have been resolved without any confrontation—is of great concern to the Seattle community and the Seattle Police Department. In considering this case, however, it is critically important that I act fairly to assess the evidence before me and make decisions of the head, not just the heart. Therefore, I also write to explain my reasons for not following two of the five sustained recommendations for alleged violations of Stops, Detentions and Arrests - 6.220 (*Terry* stop) and Use of Force Core Principles – 8.000. Based upon a thorough review of the record, including the testimony of the subject officer at OPA, the relevant video, and statements made to me at the *Loudermill* hearing, I do not believe I have sufficient evidence to sustain these recommendations.

Stops, Detentions and Arrests - 6.220 (*Terry* stop)

In her sworn statement in response to questions from OPA, the officer testified that as she was driving a marked police car, she perceived a blur next to her open car window and heard a clang of metal on metal, turned and looked in her mirror, and saw a civilian swinging a golf club and glaring at her. The in-car video did not capture, nor was it positioned to capture, these events; instead, all video information is of the subsequent interaction between the officer and the civilian after the officer drove around the block to initiate the *Terry* stop. The civilian exercised his right

¹ SMC 3.28.810 directs that this letter not contain the name of the subject employee or any personal information.

not to provide information or respond to questions from OPA and therefore, other than a general denial by the civilian captured on the video, there is no material evidence presented to contradict the perception of the officer.

The Stops, Detentions and Arrests policy provides officers guidance about what lawful authority they possess. As stated:

A *Terry* stop must be based on reasonable suspicion and documented using specific articulable facts as described in this policy.

This policy prohibits *Terry* stops when an officer lacks reasonable suspicion that a subject has been, is, or is about to be engaged in the commission of a crime.

Searches and seizures by officers are lawful to the extent they meet the requirements of the 4th Amendment and Washington Constitution Art. 1, Section 7. (See *Terry v. Ohio*, 392 U.S. 1 (1968))

The Department's policy language mirrors what is required to conduct a permissible and lawful *Terry* stop under Washington and federal constitutional law². In considering the reasonableness of a *Terry* stop, while "the circumstances must be more consistent with criminal than innocent conduct, 'reasonableness is measured not by exactitudes, but by probabilities.'" *State v. Mercer*, 45 Wn. App. 769, 774 (1986). Moreover, "[w]hile an inchoate hunch is insufficient to justify a stop, circumstances which appear innocuous to the average person may appear incriminating to a police officer in light of past experience." *State v. Samsel*, 39 Wn. App. 564, 571 (1985). "[A]n officer may briefly stop an individual based upon reasonable suspicion of criminal activity if necessary to maintain the status quo while obtaining more information." *State v. Miller*, 91 Wn. App 181, 184 (1998). The standard for *Terry* does not require probable cause, which "exists when there is a fair probability or substantial chance of criminal activity." *United States v. Patayan Soriano*, 361 F.3d 494, 505 (9th Cir.2004).

Here, under the required objective analysis, based on the record developed in the OPA investigation, and without the benefit of additional testimony or material contrary evidence, I conclude that there may have been lawful authority for a *Terry* stop. On the other hand, as there are facts to reasonably support a competing argument, I cannot conclude that the stop was lawful and proper. As such, I am changing the sustained finding for violation of Stops, Detentions and Arrests - 6.220 (*Terry* stop) to **INCONCLUSIVE**.

Although I am changing the disposition to inconclusive, I still disapprove of the officer's approach, demeanor, decision-making, use of discretion, and the role of bias in this event (and am sustaining the findings in these areas). I simply cannot conclude that the officer did not meet the relatively modest threshold of reasonable suspicion under the facts before me.

² In addition, I sought and received counsel from the Seattle City Attorney's Office on the *Terry* analysis.

Force - Use - 8.000 - Use of Force Core Principles

The sole force at issue here is a 24 second period during the civilian's arrest where the officer gently, but firmly, holds his wrist against her patrol car. Holding a wrist is *de minimis* force under SPD policy and is not reportable. The force allegation was sustained solely because OPA recommended that the *Terry* violation be sustained, and concluded that without a valid *Terry* stop, there could be no "law enforcement purpose" to use any force.

As I do not follow the sustained finding for the *Terry* stop, the logical basis for the OPA recommendation for sustaining the *de minimis* force no longer applies³. To be consistent, I am changing the sustained finding for violation of Use of Force Core Principles – 8.000 to **INCONCLUSIVE**.

Please let me know if you have additional questions.

Thank you,



Kathleen M. O'Toole
Chief of Police

cc: Peter Holmes, Seattle City Attorney
Pierce Murphy, Director Office of Professional Accountability
Sally Bagshaw, Councilmember
Jean Godden, Councilmember
Bruce A. Harrell, Councilmember
Nick Licata, Councilmember
Mike O'Brien, Councilmember
John Okamoto, Councilmember
Tom Rasmussen, Councilmember
Kshama Sawant, Councilmember
File

³ I also question whether the reasonableness of force rises and falls with the legality of the underlying stop or arrest. Courts have routinely rejected such arguments because the examination of the reasonableness of the seizure (the *Terry* stop or arrest) is an independent inquiry from the force. See *Beier v. City of Lewiston*, 354 F.3d 1058, 1064 (9th Cir.2004) ("Because the excessive force and false arrest factual inquiries are distinct, establishing a lack of probable cause to make an arrest does not establish an excessive force claim, and vice-versa."); *Mattos v. Agarano*, 661 F.3d 433, 441 (9th Cir.2011) (*en banc*) (rejecting plaintiff's argument that "any amount of force against her" was excessive if the officers did not have probable cause, as the absence of probable cause alone is insufficient to establish excessive force).