



City of Seattle

Seattle Police Department

June 20, 2018

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RE: OPA Case No. 2017-0950

Dear Mayor Durkan and Council President Harrell:

I am providing this written statement of disagreement with the recommended findings in OPA 2017-0950 as required by the Seattle Municipal Code. The underlying incident in this case involves an officer's *Terry* stop of an individual who was walking down a public street while largely unclothed. As you know, the Office of Police Accountability (OPA) independently manages investigations of potential police misconduct and submits recommendations to the Department concerning complaints which the Director of OPA believes should include Sustained findings of Department policy violations. After its considerable work, the OPA found that the officer¹ violated the Department's policy on *Terry* stops and its professionalism policy. I have reviewed the record in this case thoroughly, including OPA's investigation, officer statements, and available video. I have taken into consideration the statements made during the *Loudermill* meeting with the officer and my own experience as a law enforcement officer. I also met with the

¹ SMC 3.28.812 and 3.29.135 (D) direct that this letter not contain the name of the subject employee or any personal information.

Director of the OPA to hear his concerns directly. After much consideration, for the reasons summarized below, I do not agree with OPA's application of the facts of this case to Department policies. As explained below, I am changing the recommended Sustained finding for violation of both policies to Not Sustained—Inconclusive.

FACTUAL SUMMARY

On September 7, 2017, the involved Officer on-viewed a disturbance. Soon thereafter, he observed a woman walking with a metal pipe, heard what sounded like the pipe dropping, and observed a mostly naked male walking down the street. The male was wearing a few pieces of ripped clothing around his neck and his genital area was covered, at least in part, by leaves and branches. The officer initiated a *Terry* stop, contacting the male to investigate further and advising him that he was not free to leave. The officer explained that the *Terry* stop was based on several reasons, including: 1) investigating a potential crime of indecent exposure, and 2) investigating whether the man was involved in a disturbance with a metal pipe. When stopped by the officer, the individual asked if he was being detained. The officer told him he was being detained. In response to questions about the reason for the detention, the officer said "this" while gesturing towards the individual's state of dress. The individual responded by stating that he was "covered," asked if the officer was video recording and moved in front of the camera to show what he was wearing. He simultaneously began attempting to move the pieces of clothing from his neck area to around his genital area.

The officer and the individual then got into a verbal argument about the stop, and the stopped individual became physically animated and began yelling. The officer and individual later got into a physical altercation and the officer used Type 1 force.² The individual then pulled away from the officer and ran. He was arrested and ultimately pleaded guilty to Obstructing a Public Officer.

THE TERRY STOP

The Department's Stops, Detentions and Arrests policy governs this *Terry* stop and provides officers guidance about their authority: "A *Terry* stop must be based on reasonable suspicion and documented using specific articulable facts as described in this policy." The policy prohibits *Terry* stops where an officer lacks reasonable suspicion that a subject has been, is, or is about to be engaged in the commission of a crime.

The Department's policy language mirrors what is required to conduct a permissible and lawful *Terry* stop under Washington and federal constitutional law. In considering the legality of a *Terry* stop, "reasonableness is measured not by exactitudes, but by probabilities." *State v. Mercer*, 45 Wn. App. 769, 774 (1986). An 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).

² OPA reviewed the officer's use of force, finding it inconclusive whether the force was consistent with Department policy.

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. The officer may have had a sufficient basis to believe that the nearly naked individual was violating RCW 9A.88.010 – Indecent Exposure. That criminal statute is violated where an individual creates “an intentional and ‘obscene exposure’ in the presence of another that offends society’s sense of instinctive modesty, human decency, and common propriety.” See *State v. Vars*, 157 Wash.App. 482 (2010). Lawyers could argue about whether the indecent exposure statute was violated under these facts, when the individual was not completely naked, where they may not have been a victim, and when notions of societal norms on modesty are ever-changing. However, the question before me is not whether the individual could be successfully prosecuted for indecent exposure but whether the officer was justified in initiating a *Terry* stop to further investigate.

Reasonable minds can differ as to the legal application of *Terry* to these facts. Courts regularly adjudicate highly contested *Terry* issues, which are very fact-driven and highly nuanced. Officers on the street must make every effort to ensure that each stop they make comports with the latest *Terry* standards. Ultimately, officers are not the adjudicators of whether a stop is deemed lawful. Here, I do not find it a violation under the Department’s policy for the reasons set forth above. 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 finding for violation of Stops, Detentions and Arrests - 6.220 (*Terry* stop) to Not Sustained—Inconclusive.

PROFESSIONALISM

I expect all members of this police service to interact with people in a highly professional manner. The professionalism policy is central to the mission of the Seattle Police Department. The policy requires that employees refrain from engaging “in behavior that undermines public trust in the Department, the officer, or other officers.” It also requires that officers “avoid unnecessary escalation of events even if those events do not end in reportable force.” The OPA Director recommended finding that the officer’s actions violated the professionalism policy based on two reasons: 1) the officer lacked a sufficient legal basis for the stop, and 2) the officer did not provide a satisfactory explanation to the individual for why he was being stopped. The first point was addressed above. The OPA Director questioned whether the officer’s gesture and single word response (“this”) was a sufficient explanation. However, the individual showed that he understood that he was being stopped due to his state of undress. He responded to the officer’s comment by arguing that he was “covered” and also making efforts to cover up more, tearing the clothing remnants that were around his neck and moving them to his upper legs.

I agree with the OPA Director that the officer could have done more to explain the situation to the individual. Had he responded to the individual’s questions in more depth, and communicated with him more empathetically, the interaction may have resolved without the individual becoming agitated, yelling, using profanity, and ultimately attempting to flee from the officer. I also agree with the OPA Director that the individual may have responded more calmly had the officer shown the individual more compassion. Where the OPA Director and I disagree is whether the brevity of the officer’s explanation to the individual about why he was being stopped violated the Department’s professionalism policy. While the officer could have shown more compassion towards the individual, that does not transform his actions into misconduct or a policy violation.

For the reasons set forth above, the stop and the officer's explanation for it did not violate the professionalism policy. As such, I am changing the recommended Sustained finding for violation of this policy to Not Sustained—Inconclusive.

Please let me know if you have additional questions.

Sincerely,



Carmen Best
Interim Chief of Police

cc: Sally Bagshaw, District 7
Lisa Herbold, District 1
Rob Johnson, District 4
Debora Juarez, District 5
Teresa Mosqueda, Position 8
Mike O'Brien, District 6
Kshama Sawant, District 3
File