



## ***CLOSED CASE SUMMARY***

ISSUED DATE: OCTOBER 22, 2021

FROM: DIRECTOR ANDREW MYERBERG  
OFFICE OF POLICE ACCOUNTABILITY

CASE NUMBER: 2021OPA-0088

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

#### **Named Employee #1**

Allegation(s):		Director's Findings
# 1	6.180 – Searches-General 1. Officers May Only Make Searches Pursuant to a Search Warrant unless a Specific Exception Applies	Sustained
# 2	6.180 – Searches-General 2. Consent Searches 1. Officers Conducting a Consent Search Will Ask Consenting Person to Sign a Consent to Search form	Not Sustained (Unfounded)
# 3	15.180 – Primary Investigations 5. Officers Shall Document all Primary investigations on a Report	Sustained
# 4	5.001 – Standards and Duties 11. Employees Shall Be Truthful and Complete in All Communication	Not Sustained (Inconclusive)

#### **Imposed Discipline**

Written Reprimand

#### **Named Employee #2**

Allegation(s):		Director's Findings
# 1	5.001 – Standards and Duties 6. Employees May Use Discretion	Not Sustained (Lawful and Proper)
# 2	1.020 – Chain of Command 7. Command Employees Take Responsibility for Every Aspect of Their Command	Not Sustained (Lawful and Proper)

#### **Named Employee #3**

Allegation(s):		Director's Findings
# 1	5.002 – Responsibilities of Employees Concerning Alleges Policy Violations 6. Employees Will Report Alleged Violations	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:**

It was alleged that Named Employee #1 may have conducted an unlawful search of a vehicle, that her report was inaccurate and incomplete, and that she was dishonest concerning her actions. It was further alleged that Named Employee #2 may have abused his discretion when he told officers to put a 72-hour notice on the Complainant's



vehicle and that he may have failed to properly supervise this incident. Lastly, it was alleged that Named Employee #3 may have failed to report potential misconduct engaged in by Named Employee #1.

**ADMINISTRATIVE NOTE:**

OPA initially found that Named Employee #1 engaged in dishonesty during this incident and that Named Employee #3 violated policy by not intervening in and/or reporting potential misconduct engaged in by Named Employee #1. The reasons for these changes are set forth below.

OPA also made several edits to correct typographical errors.

**SUMMARY OF INVESTIGATION:**

Named Employee #1 (NE#1) and Named Employee #3 (NE#3) were dispatched to a report of a stolen BMW. When they arrived at the scene, they located the BMW. They are determined that a Volvo parked nearby was also stolen. They observed that a male – later identified as the Complainant – was inside. The Complainant got out of the Volvo and was taken into custody. NE#3 walked him to the front of her patrol vehicle while NE#1 continued with the investigation into the stolen vehicles.

While in front of the patrol vehicle, the Complainant pointed to his personal vehicle, which was parked nearby, and asked whether it was going to be towed. NE#3 notified NE#1 that the Complainant's vehicle was also at the scene. NE#1 asked the Complainant: "Do you need anything out of your car?" The Complainant said "no." NE#1 responded: "No? You just want to leave the keys in it? Okay."

NE#1 then walked over to the Complainant's vehicle and shined her flashlight inside. She tried to open the front passenger door, which was locked. She then walked around the car and opened the driver's side door. She began to search the vehicle and remove items from within. Simultaneous to this, NE#3 asked the Complainant whether he wanted his vehicle to be locked and he said: "No...I don't want her to touch the car..." As he watched NE#1's actions, the Complainant stated to NE#3: "Why is she going into my car? Why is she doing that?" NE#3 replied: "I'm not sure what's she's doing...I'm over here..." The Complainant said: "She would have never even known had I not asked you...if my car would get towed." The Complainant then asked NE#3: "I don't understand what she's doing in front of my car...why is she doing that?" The Complainant further stated: "I don't understand why she's allowed to go through my car like that." NE#3 explained that it was "part of [NE#1's] investigation" and said: "I'm sure she went through to see if your wallet was there and your ID..."

NE#1 emerged from the vehicle with what appeared to be a passport in her hand. At that time, a Sergeant, Named Employee #2 (NE#2), responded to the scene. She asked NE#2 if she should take the Complainant's "shaved keys." The Sergeant said that she should. NE#1 removed keys from the vehicle. She then performed a further search inside, including looking in the backseat. There, she went through a bag, a box, and other items. She exited the vehicle with several items.

NE#2 advised NE#1 to put a 72-hour notice on the vehicle. He stated: "And then come back on our Monday...and like I said, not you [NE#1], don't you do it, but have one of them do it, throw a 91N [72-hour notice] on his car. If they keep him, let's impound it. I mean if nothing else, he can't use his car to go steal other cars..." NE#3 told NE#2 and NE#1 that the Complainant asked about his vehicle being towed. NE#2 confirmed: "We're not going to be towing it



right now.” NE#1 returned to the vehicle and looked inside one more time. NE#1 further checked the VIN and confirmed that the vehicle belonged to the Complainant.

NE#1 relayed to two other officers who came to the scene that NE#2 wanted a 72-hour notice placed on the Complainant’s vehicle. One officer told the other that he did not have any notices on him, and the other officer said that there were some at the precinct. They discussed getting the notice and then coming back that same shift or, depending on other responsibilities, in the morning. No 72-hour notice was ever placed on the vehicle.

NE#1 generated a report concerning this incident. She described locating the stolen BMW and then finding the Complainant inside of another stolen car. She stated that this formed probable cause to arrest him. NE#1 wrote that she found a woman’s identification in the Complainant’s wallet and that he was searched incident to arrest. NE#1 did not document that she searched the Complainant’s vehicle and what the legal justification for that search was. There was no statement in the report about the vehicle being impounded and that an inventory search was conducted secondary to that impound. NE#1 also provided no description as to how she recovered various items from the vehicle, including the shaved keys that were later entered into evidence.

The investigation was forwarded to a follow-up unit where a Detective was assigned to the case. The Detective determined that probable cause existed to charge the Complainant with auto theft, and he referred the case to a prosecuting attorney. In his report, the Detective noted that the Complainant called him concerning his personal property that had been entered into evidence.

OPA determined that the following items were placed into separate folders and then into evidence: (1) all of the keys located in the vehicle, including the shaved keys; (2) “passport, wallet, miscellaneous store cards, insurance card, EBT”; and (3) “license plate, registrations, gift cards.” On March 1, 2021, the Complainant’s personal keys to his vehicle were released to him. The shaved keys and other keys were each placed in a separate folder and entered back into evidence. Lastly, on March 16, 2021, a Washington State driver’s license was released to the Complainant. As far as OPA could determine, the remainder of the items are still in evidence.

The Complainant later filed a complaint concerning this incident with OPA. He alleged that SPD was improperly holding onto his property and that, when he tried to get it back, the Detective tried to get him to make a statement as a condition for release. The Complainant refused to do so. The Complainant stated that he got one key back, but that the remainder of his property was still in SPD custody. After receiving and reviewing the complaint and interviewing the Complainant, OPA commenced this investigation.

As part of its investigation, OPA reviewed the Body Worn Video (BWV) for this incident, as well as the reports generated by NE#1 and the Detective and evidence records. Based on its intake investigation, OPA added allegations against NE#1 for: the search of the vehicle; for the lack of a complete, thorough, and accurate report; and for potential dishonesty. OPA also added allegations against NE#2 for abuse of discretion for his decision to issue the 72-hour notice to the Complainant and for his potential failure to supervise this matter. Further, OPA added an allegation against NE#3 for failing to report potential misconduct on the part of NE#1.

OPA lastly interviewed all of the Named Employees. The relevant substance of their interviews is discussed below.

**ANALYSIS AND CONCLUSIONS:**



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

***6.180 – Searches-General 1. Officers May Only Make Searches Pursuant to a Search Warrant unless a Specific Exception Applies***

SPD Policy 6.180-POL-1 governs searches, including searches of vehicles. The policy states that a search warrant is required unless an exception to the warrant requirement applies. Included as an exception is consent by the owner of the vehicle. SPD Policy 6.181 concerns inventory searches of vehicles and, specifically, when such searches are appropriate and how to conduct them. SPD Policy 6.181-POL-1 makes clear that inventory searches are administrative in nature and that they are purposed to achieve the following: (1) “Protect and account for property of the arrested person”; (2) “Protect the officer and Department from false claims”; and (3) “Isolate dangerous items from police and jail facilities.” The policy explains that: “Inventory searches are not a substitute for obtaining a search warrant or consent.” The policy further states that: “Inventory searches of personal property or vehicles must occur as close in time as practical to placing an arrestee in a secure police or jail facility or impoundment of the vehicle.” SPD Policy 6.180-POL-3 directs that: “When impounding a vehicle to a tow company’s storage lot, officers may not enter or access the trunk or closed containers inside of the vehicle in an effort to perform an inventory search.” Lastly, SPD Policy 6.180-POL-5 mandates that officers must document the inventory search on a Custodial Property Summary.

As discussed more fully below, both the BWV and NE#1’s statements to OPA confirm that there was not consent to the search of the vehicle. To the contrary, the Complainant specifically said that he did not want the officers to go into the vehicle.

At her OPA interview, NE#1 acknowledged that she did not have a warrant to search the vehicle but said that the search was permitted regardless as an inventory search.

She described to OPA that she observed that the vehicle was illegally parked. She looked in the window and saw a passport on one of the seats, as well as various keys. She said that she “debated” whether she should impound the vehicle and she started searching inside. She provided the following explanation of what she did next:

[I] Take some keys out of the car, the vehicle actually comes back, he does own it. Still just doing a cursory search for property of the vehicle ...hadn’t decided if I want to impound it or not and then finally I (sounds like) have enough paperwork from all this, enough stolen stuff found in the Volvo SUV that I just decided to take his passport cuz I wouldn’t want my passport left in a vehicle in a high car prowler area or the keys to either my residence or the vehicle to get stolen...

NE#1 said that she removed the keys from the vehicle because she felt that they may be needed to start the vehicle. However, she did not try any of the keys in the ignition. NE#1 confirmed that she looked through a tool bag but did not remove those tools from the car. She said that she did not do so because she could not assess the value of the tools. She also observed an electronic device, but she did not remove it from the vehicle because it did not appear to her to be in working order.

When asked by OPA whether she discussed with anyone impounding the vehicle or citing the vehicle for being illegally parked, she said that she did not. She told OPA that, while at the precinct, she learned that the vehicle was parked in front of the Complainant’s girlfriend’s home and that the Complainant had permission to leave it there.



NE#1 told OPA that an inventory search needed to be documented only if the vehicle was actually impounded. She acknowledged not documenting that she searched the vehicle and what she removed from the vehicle. She also did not complete a tow impound form.

When evaluating both SPD Policy 6.180 and 6.181, OPA concludes that NE#1 conducted a warrantless search of the vehicle and that the exception for inventory searches was inapplicable. In reaching this finding, OPA relies on several determinations of fact.

First, based on NE#1's own testimony, she was debating whether to impound the vehicle at the time of the search. She said that she later determined that she would not impound the vehicle – as a favor to the Complainant. However, after she made that decision, she did not then return the Complainant's property or the shaved keys to the vehicle. Instead, she kept those items and entered them into evidence. If she was going to leave the vehicle locked and parked on the street, there was no need to take the property and, moreover, she had no legal right to possess these items. Fundamentally, what NE#1 did is not what the inventory search exception is purposed to allow. The policy does not contemplate an inventory search in connection with a "possible" impoundment. It is only permissible where the impound does, in fact, occur.

Second, even she recounted making the decision in her mind not to impound the vehicle, she still went back into the vehicle and performed additional searches.

Third, while NE#1 said after the fact that she conducted an inventory search of the vehicle, there is no evidence indicating that this was her intent at the time. Notably, she did not tell either NE#2 or NE#3 that she was conducting an inventory search, she did not ever call the tow company, and she did not complete a tow impound form. Moreover, when she was expressly told by NE#2 that they would not be impounding the vehicle, she did not notify him that she had expected the vehicle to be impounded and, in reliance on that expectation, had conducted an inventory search.

Third, NE#1 made no mention on her report that she had conducted an inventory search. Indeed, she was completely silent as to how the evidence obtained from the vehicle, including the shaved keys.

Fourth, even if an inventory search was appropriate, the search NE#1 conducted here exceeded its permissible parameters. The video indicated that NE#1 looked in at least one bag, which is expressly prohibited unless she had reason to believe that the contents of the bag were dangerous. She provided no indication that this was the case. NE#1 further expanded the search beyond its administrative limits, including by seizing the shaved keys. This was clearly sought as evidence of a crime and was not taken to protect the Complainant's property or to protect others. Indeed, this is further confirmed by the fact that all of the items taken from the vehicle were entered into evidence, not safekeeping.

Given the above, OPA finds that the search conducted by NE#1 violated policy. As such, OPA recommends that this allegation be Sustained.

Recommended Finding: **Sustained**

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

***6.180 – Searches-General 2. Consent Searches 1. Officers Conducting a Consent Search Will Ask Consenting Person to Sign a Consent to Search form***



SPD Policy 6.180-POL-2(1) governs consent searches and requires that officers who conduct such searches must first ask the consenting person to sign a consent to search form. If this form is not signed, the consent search cannot move forward.

No one involved in this incident claims that the search of the vehicle was based on consent obtained from the Complainant. In addition, the BWV is clear that no such consent was given or requested. As such, OPA recommends that this allegation be Not Sustained – Unfounded.

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

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

***15.180 – Primary Investigations 5. Officers Shall Document all Primary investigations on a Report***

SPD Policy 15.180-POL-5 requires that officers conducting a primary investigation must document that investigation in a report. All such reports must be complete, thorough, and accurate.

OPA finds that NE#1's report was neither thorough nor complete. NE#1 failed to provide any information concerning how she obtained the items from the Complainant's vehicle, to disclose that she conducted an inventory search, or to explain how the inventory search would have been valid given that the vehicle was not impounded.

In OPA's opinion, this was a significant omission as it went directly towards the legal sufficiency of the search in a case that was likely to be referred to a prosecutor. Accordingly, OPA recommends that this allegation be Sustained.

Recommended Finding: **Sustained**

**Named Employee #1 - Allegation #4**

***5.001 – Standards and Duties 11. Employees Shall Be Truthful and Complete in All Communication***

SPD Policy 5.001-POL-11 requires Department employees to be truthful and complete in all communications.

In OPA's initial DCM, OPA found that NE#1 had engaged in dishonesty. In reaching this decision, OPA reasoned as follows:

In support of such a finding are the following facts: (1) NE#1 made no contemporaneous mention that she was conducting an inventory search and went beyond the scope of such a search; (2) NE#1 did not call a tow company, she did not complete or begin a tow impound form, she did not tell NE#3 that she was considering an impound, and she took no other affirmative steps to initiate an impound; (3) NE#1 did not tell NE#2 that she had conducted an inventory search when he expressly stated that the vehicle would not be towed; and (4) NE#1 did not make any mention of how the Complainant's items were located in her report or note that any search was conducted of the vehicle, let alone an inventory search.



OPA also cited to NE#1 denial to OPA that she was dishonest and her assertion that she contemplated impounding the car but decided not to do so after the initial search had already been effectuated. However, OPA found this to be unconvincing for two main reasons:

First, if this was her belief, she would have logically replaced the items that were taken from the vehicle, especially the shaved keys that were clearly evidence of a crime, when she decided not to impound the vehicle. Second, she continued to go into the vehicle after she decided not to impound it.

OPA accordingly determined that, while a close call, the evidence established dishonesty on NE#1's part.

At the discipline meeting in this matter, the discipline committee discussed this finding and whether there was, as OPA initially believed, sufficient evidence to recommend that it be Sustained. After further deliberations, OPA agreed with the chain of command that it could not foreclose the possibility that NE#1 did, in fact, consider impounding the vehicle as she contended or that her actions stemmed from a misunderstanding and mishandling of the incident rather than intentional and knowing dishonesty. In changing its initial finding, OPA does not believe that this allegation is unfounded. To the contrary, OPA still believes it possible that NE#1 violated this policy and, as such, now recommends that this allegation be Not Sustained – Inconclusive.

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

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

##### ***5.001 – Standards and Duties 6. Employees May Use Discretion***

As indicated in SPD Policy 5.001-POL-6, “[e]mployees are authorized and expected to use discretion in a reasonable manner consistent with the mission of the department and duties of their office and assignment.” This policy further states that “[t]he scope of discretion is proportional to the severity of the crime or public safety issue being addressed.” (SPD Policy 5.001-POL-6.) It was alleged that NE#2's decision to place a 72-hour notice on the vehicle may have constituted an abuse of his discretion.

NE#2 denied that this was the case. He stated that he did not tell the officers to impound the car. He further stated that the Complainant was a “prolific auto thief” and NE#2 suspected him of using his vehicle to steal other cars. NE#2 also stated that he had a legal basis to apply the notice and, if the vehicle was not moved in 72-hours, for it to be impounded at that time.

Based on OPA's review of policy and the law, OPA does not believe that NE#2's decision in this regard violated the law enforcement discretion afforded to him. Even if OPA may disagree with the decision, the policy concerning discretion is not violated unless what NE#2 chose to do was so outside of what was reasonable to have made his decision improper. This was not the case here.

Accordingly, OPA recommends that this allegation be Not Sustained – Lawful and Proper.

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

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





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**1.020 – Chain of Command 7. Command Employees Take Responsibility for Every Aspect of Their Command**

SPD Policy 1.020-POL-7 governs the role and responsibilities of a supervisor. It states that command employees are expected to take responsibility for every aspect of their command. It was alleged that NE#2 may have violated this policy when he failed to take steps to determine whether the search of the vehicle was valid.

Based on a review of the BWV, when NE#2 arrived on scene, the search was already near its conclusion. NE#1 did not disclose the basis for the search or that she was considering that the vehicle should be impounded. NE#2 did not ask NE#1 any of these questions, but OPA sees no reason why he would have given the circumstances and the dearth of information available to him. Moreover, while NE#2 did not ensure that NE#1 described the inventory search in her report or catch that this information was not in there, he simply would not have known to have done so.

Given the above, there is no basis to conclude that NE#2 violated this policy. Accordingly, OPA recommends that this allegation be Not Sustained – Lawful and Proper.

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

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

**5.002 – Responsibilities of Employees Concerning Alleges Policy Violations 6. Employees Will Report Alleged Violations**

OPA alleged that NE#3 may have violated policy when she failed to stop NE#1 from conducting an improper search, and then again when she failed to report NE#1's conduct to a supervisor.

SPD Policy 5.002-POL-6 concerns the reporting of misconduct by Department employees. It specifies that minor misconduct must be reported by the employee to a supervisor, while potential serious misconduct, such as an illegal search, must be reported to a supervisor or directly to OPA. (SPD Policy 5.002-POL-6.) The policy further states the following: "Employees who witness or learn of a violation of public trust or an allegation of a violation of public trust will take action to prevent aggravation of the incident or loss of evidence that could prove or disprove the allegation." (*Id.*)

In OPA's initial DCM, it found that NE#3 acted contrary to policy when she did not intervene in and then report NE#1's potential misconduct. In reaching this determination, OPA relied heavily on the Department's recent ABLE training, which provided officers instruction as to when they were required to take action in the case of misconduct on the part of other officers.

However, at the discipline meeting in this matter, the chain of command correctly pointed out that NE#3 did not go through the ABLE training until March 22, 2021, approximately one and a half months after this incident. When evaluating the lack of training with the distance that NE#3 was away from NE#1 at the time, her focus on the Subject, and her relative newness to the Department, OPA believes that finding that she violated policy and imposing discipline would be the incorrect result. Instead, OPA recommends that NE#3 receive the below Training Referral.

- **Training Referral:** NE#3's chain of command should counsel and retrain her concerning this incident and to remind her of the obligation to, where possible, intervene to mitigate potential misconduct and to report. OPA also intends to propose this incident as an example to be used during future ABLE trainings. This





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retraining and counseling should be documented, and this documentation should be maintained in an appropriate database.

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