



CLOSED CASE SUMMARY

ISSUED DATE: JANUARY 25, 2022

FROM: DIRECTOR ANDREW MYERBERG
OFFICE OF POLICE ACCOUNTABILITY

CASE NUMBER: 2021OPA-0312

Allegations of Misconduct & Director's Findings

Named Employee #1

Allegation(s):		Director's Findings
# 1	5.001 - Standards and Duties 6. Employees May Use Discretion	Not Sustained (Lawful and Proper)
# 2	6.180 – POL - 2- Consent Searches	Not Sustained (Training Referral)

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	6.180 – POL - 2- Consent Searches	Not Sustained (Training Referral)

Named Employee #3

Allegation(s):		Director's Findings
# 1	5.001 - Standards and Duties 6. Employees May Use Discretion	Not Sustained (Lawful and Proper)
# 2	6.180 – POL - 2- Consent Searches	Not Sustained (Training Referral)
# 3	1.020 - Chain of Command 7. Command Employees Take Responsibility for Every Aspect of Their Command	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 the Named Employees violated policy when they allowed the Subject's girlfriend (Community Member #1) and her mother (Community Member #2) to enter the Subject's apartment without his consent. The Complainant also stated that Community Member #1 and Community Member #2 stole the Subject's property from his apartment. OPA investigated allegations that the Named Employees used unreasonable discretion and conducted an unlawful search. OPA also investigated allegations that Named Employee #3, a sergeant, failed to supervise Named Employee #1 and Named Employee #2.

SUMMARY OF INVESTIGATION:

The Complainant reported to OPA that her son (the Subject) was recently arrested in connection with a domestic dispute with his girlfriend, Community Member #1. The Complainant stated that Community Member #1 and Community Member #2 lied to the police to have the Subject arrested. The Complainant complained that the Named Employees "allowed the girlfriend and her mother back into his apartment to retrieve her things. While they were in the apartment they stole some personal items." OPA commenced this investigation.



OPA reviewed the Complaint and attempted, unsuccessfully, to schedule interviews with the Complainant and Community Member #1. OPA also reviewed the CAD, Incident/Offense Report, BWV, and interviewed the Named Employees. The relevant facts for this incident were audio and video recorded on BWV and, so, are not in dispute.

On July 2, 2021, Community Member #2 called 911 to report that the Subject had punched Community Member #1 in the face and that the Subject was armed with a blue handgun. Dispatch advised the Named Employees that there was a protection order in place against the Subject.

The Named Employees responded. Named Employee #1 and Named Employee #2 spotted the Subject near the location, but lost sight of him after he fled. A brief canvass and foot pursuit followed, after which the Subject was apprehended without incident. As he was being apprehended, the Subject stated: "her mom came over here trying to fuck with me, I swear to god." A firearm was not recovered from the Subject.

Named Employee #1 and Named Employee #2 then contacted the two Community Members, who were standing outside of the high-rise apartment building in which the Subject and Community Member #1 resided (Building). The Community Members both made statements regarding how they had "won" or "always win." In summary, the Community Members then accused the Subject, among other things, of having punched Community Member #1 earlier in the day, as well as hitting Community Member #2 and displaying a firearm. The Community Members also explained that the apartment lease was in the Subject's name, but that Community Member #1 resided in the apartment with the Subject. Both Community Members expressed that the firearm was inside the apartment.

While speaking with both Community Members and Named Employee #2, Named Employee #1 stated: "So, they both live there and if we can get consent to go in there. We're good right?" Named Employee #1 and Named Employee #2 decided that they needed to screen this issue with their sergeant, Named Employee #3.

Named Employee #1 walked away and screened the issue separately with Named Employee #3 with the following exchange:

NE#1: We're almost positive the gun's upstairs in the apartment. They both live there. She's giving us consent to go in there and look for the gun. I just wanted to run that by you to see if that's...

NE#3: I think he would have to give consent as well. I think. Now, if she goes up there and finds it and presents it to you...that's different...but...

NE#1: OK. Well, we can ask her if she's willing to do that...

NE#3: ...yeah...

NE#1: ...that...that seems a lot easier...

NE#3: Well, it's also realistic, I mean...

NE#1: ...yeah...



NE#3: ...we...

NE#1: Well, she's telling us where it would be too, so she already knows where to look.
We'll do that then.

NE#3: OK.

Named Employee #1 then returned to the where Named Employee #2 and the Community Members were standing. Named Employee #1 stated: "I ran it by sarge, and he said we'll probably need to get consent from both of them to go in the apartment." Named Employee #1 then said to Community Member #1: "But if you want to go up there, grab the gun. We can take it." To which Community Member #1 responded: "yeah, it's important." Named Employee #1 then went to retrieve an evidence bag and rubber gloves for the Community Members to wear as they searched the apartment for the firearm and ammunition. Before entering the Building, Community Member #1 stated that she had personal effects inside that she wanted to recover as well.

Named Employee #1 and Named Employee #2 then proceeded to the Subject's apartment (Apartment) with the Community Members. They found the door had been secured with some kind of latch. After the Community Members made some efforts to open the door, Community Member #2 applied enough force against the door to open it. After the Community Members entered the Apartment, Named Employee #2 asked Community Member #1 to put her gloves on and, later, told her to "handle everything with your gloves." Community Member #2 asked for a pair of gloves as well, which Named Employee #1 provided. Community Member #2 then recovered a magazine with ammunition in it, which she gave to Named Employee #1. At various points throughout the search of the Apartment, Named Employee #1, Named Employee #2, and the Community Members discussed their understanding that the law did not permit the officers to enter the apartment absent a warrant or the Subject's consent. At one point, Named Employee #1 stated: "Here's what's going to happen, if we come in without his permission and find the gun, then his lawyer is going to try to throw it out." Ultimately, the firearm was not recovered. The Community Members exited the Apartment with a brown paper bag, presumably containing Community Member #1's personal items.

A short time later, Named Employee #1 was present for a conversation between the Community Members where they were discussing a cell phone that Community Member #1 was holding. Community Member #1 showed Community Member #2 the cellphone and said: "there's no password ... this is going to be my phone." Community Member #2 responded: "Exactly. You are going to go somewhere – and we are going to get your dad to turn that off for you. And we're going to get you a new case – because we don't want it to look like his phone." A short time later at the Southwest Precinct, Named Employee #2 asked Community Member #1: "So, do you not have your own phone?" To which Community Member #1 replied: "This is my phone now, but I have to get it turned on. This was his phone but it's going to be mine now." Named Employee #2 responded "alright."

ANALYSIS AND CONCLUSIONS:

Named Employee #1 - Allegation #1

5.001 - Standards and Duties 6. Employees May Use Discretion

It was alleged that all three Named Employees used unreasonable discretion in permitting the Community Members to enter the Subject's apartment and remove items from it.



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 “[d]iscretion is proportional to the severity of the crime or public safety issue being addressed.” (SPD Policy 5.001-POL-6.)

None of the Named Officers abused their discretion by allowing the Community Members to reenter the Apartment, in which Community Member #1 resided with the Subject. Both Community Member #1 and the Subject stated that Community Member #1 lived at the location. The Subject had an order of protection against him for the benefit of Community Member #1. Moreover, given that she resided in the Apartment and her property was inside, nothing prevented Community Member #1 from returning at another time to retrieve her items, nor did the Named Employees facilitate her entry into the unit. Instead, given the report from the Community Members that other unknown individuals may be inside the Apartment, Named Employee #1 and Named Employee #2 did nothing other than “standby to assure the peace.” SPD Policy 15.410-POL-6 (“Officers dispatched to standby to assure the peace will attempt to determine if unreported domestic violence has occurred and if a current court order involves any of the parties.”).

Although the SPD Policy regarding civil standbys appears to contemplate that both involved parties would be present “while property is being gathered,” the Subject’s absence at that time was due entirely to his contemporary arrest. Under these circumstances, it would have been unreasonable for the officers to force Community Member #1 to leave her residence without any opportunity to obtain personal effects. Although some facts suggest that there might have been some dispute as to the ownership of the cellphone that Community Member #1 removed from the Apartment, the law dictates that “officers will not determine disputed property ownership without specific court ordered instructions.” (SPD Policy 15.410-POL-6. *See also* RCW 26.50.060). Finally, the Community Members only appeared to gather one paper shopping bag worth of items from the Apartment. Nothing about the facts before them would have suggested that Community Member #1 was doing anything other than removing her personal effects from her home.

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

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

Named Employee #1 - Allegation #2

6.180 – POL - 2- Consent Searches

The Complainant alleged that Named Employee #1 and Named Employee #2 unlawfully searched the Subject’s Apartment without his consent. OPA further alleged that Named Employee #3 also acted contrary to this policy as he was the supervisor and the incident was contemporaneously screened with him prior to the search occurring.

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 consent is given for the search. (SPD Policy 6.180-POL-2(a).) Consent must be given voluntarily and not coerced, and the consenting person must have authority to consent to the search. (*Id.*)

In this case, Named Employee #1 and Named Employee #2 sought guidance from Named Employee #3 concerning their ability to search the Apartment with only the consent of Community Member #1. Named Employee #3 correctly advised Named Employee #1 that they also needed the consent of the Subject in order to effect a valid consent search.



See SPD Policy 6.180-POL-2(3) ("All cohabitants (roommates)...who are present must affirmatively provide their consent prior to the search."). However, Named Employee #3 erred by suggesting that Community Member #1 could "go[] up there and find[] it and present[] it to you...that's different."

Although the Fourth Amendment generally does not protect "against unreasonable intrusions by private individuals," it does prohibit "unreasonable intrusions by private individuals who are acting as government instruments or agents." *United States v. Reed*, 15 F.3d 928, 930 (9th Cir. 1994) (citing *Coolidge v. New Hampshire*, 403 U.S. 443, 487(1971). Determining whether a private individual was acting as a government instrument is a two-part test: "(1) whether the government knew of and acquiesced in the intrusive conduct; and (2) whether the party performing the search intended to assist law enforcement or further his own ends." *Id.* at 931.

The two-part test is "best resolved on a case by case basis." Here the preponderance of the evidence suggests that the Community Members were acting as agents of the Named Employees. First, they were fully present for Named Employee #1 and Named Employee #2's discussion concerning whether they were legally permitted to enter the apartment based on consent. After being informed—wrongly—that they could enter and retrieve the firearm for the officers, Community Member #1 responded that she would do it because it was "important." Moreover, the officers both accompanied the Community Members and provided them with latex gloves so as not to get their fingerprints on the evidence. The Community Members were well aware that they were conducting the search for the firearm and ammunition at the behest of the officers and that they were proceeding in that manner so that the Subject's lawyer would not "try to throw it out." The implication of this conduct is clear: both the Named Employees and Community Members were seeking to recover the firearm so that it could be used as evidence against the Subject. The Community Members were not furthering their "own ends." See *id.* at 932 ("interest in preventing criminal activity" is "not a legitimate independent motivation").

From OPA's review of the video and its interviews of the Named Employees, it appears clear that none were intentionally seeking to violate law or policy. Ultimately, the incident appeared to be the result of a lack of a clear understanding of what search could appropriately be conducted, coupled with miscommunication between the officers and their supervisor. No firearm was actually recovered and, thus, there were no fruits of the improper search; however, all of the Named Employees would benefit from considering what went wrong here, instruction on the legal parameters at issue, and a discussion concerning how such an incident could be better handled in the future.

Accordingly, OPA recommends that this allegation be Not Sustained – Training Referral as against all three Named Employees.

- **Training Referral:** The Named Employees' chain of command should discuss OPA's findings with them, review SPD Policy 6.180-POL-2 with them, and advise the Named Employees that the "the Fourth Amendment does prohibit unreasonable intrusions by private individuals who are acting as government instruments or agents." *United States v. Reed*, 15 F.3d 928, 930 (9th Cir. 1994) (citing *Coolidge v. New Hampshire*, 403 U.S. 443, 487(1971)). The chain of command should provide appropriate case law for the Named Employees to review. The chain of command should also provide any further retraining and counseling that it deems appropriate. Lastly, the Southwest Precinct should use this incident as a teaching moment at rolls calls as it is clearly an area of confusion and as doing so would ideally prevent other officers from engaging in the same actions in the future. The retraining and counseling conducted should be documented in Blue Team.

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



Named Employee #2 - Allegation #1

5.001 - Standards and Duties 6. Employees May Use Discretion

For the reasons stated above at Named Employee #1, Allegation #1, OPA recommends that this allegation be Not Sustained – Lawful and Proper.

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

Named Employee #2 - Allegation #2

6.180 – POL - 2- Consent Searches

OPA recommends that this allegation be Not Sustained and refers to the above Training Referral (see Named Employee #1 – Allegation #2).

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

Named Employee #3 - Allegation #1

5.001 - Standards and Duties 6. Employees May Use Discretion

For the reasons stated above at Named Employee #1, Allegation #1, OPA recommends that this allegation be Not Sustained – Lawful and Proper.

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

Named Employee #3 - Allegation #2

6.180 – POL - 2- Consent Searches

OPA recommends that this allegation be Not Sustained and refers to the above Training Referral (see Named Employee #1 – Allegation #2).

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

Named Employee #3 - Allegation #3

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

It was alleged that Named Employee #3 failed to adequately coordinate and direct his subordinates in accordance with policy in achieving their objective.

SPD Policy 1.020-POL-7 states that command employees are required to take responsibility for every aspect of their command. The policy further instructs that: “Employees in a supervisory role will coordinate and direct subordinates and allocate resources to achieve the operations objective.” (SPD Policy 1.020-POL-7.) Lastly, the policy makes clear that supervisors will “perform the full range of administrative functions relying upon policy, direction, training, and personal initiative as a guide for themselves and their command in achieving the highest level of performance possible.” (*Id.*)



Commendably, in his OPA interview Named Employee #3 accepted full responsibility for his subordinates' missteps. Named Employee #3 explained that this was a miscommunication that he caused. Specifically, Named Employee #3 stated that, when he told Named Employee #1 that it would be different if Community Member #1 "presented it to you," he meant "present" in terms of a voluntary presentation—not the result of a search performed at the request of the police. Moreover, Named Employee #3 acknowledged that he should have explicitly told Named Employee #1 that he did not want to have Community Member #1 search the Apartment at the behest of the police. This was particularly the case as Named Employee #1 told Named Employee #3, referring to the possible search: "OK. Well, we can ask her if she's willing to do that." This exemplifies the miscommunication that was at issue here.

This being said, given Named Employee #3's acceptance of responsibility and clear understanding of how he could have handled this incident better, OPA believes that retraining is the appropriate result. Accordingly, OPA recommends that this allegation be Not Sustained – Training Referral.

- **Training Referral:** Named Employee #3's chain of command should discuss his supervision of this incident with him and identify any ways in which he could have better communicated his approval of the search, as well as the parameters within which it needed to be conducted, with his officers. This counseling and any associated retraining should be documented in Blue Team.

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