



Timothy M. Keller  
Mayor

# City of Albuquerque

## Albuquerque Police Department



Eric J. Garcia  
Interim Superintendent of Police Reform

### Interoffice Memorandum

January 10, 2022

**To:** Diane McDermott, Interim Executive Director, CPOA  
**From:** Eric J. Garcia, Interim Superintendent of Police Reform/DCAO  
**Subject:** Non-Concurrence of Findings and/or Discipline re: CPC 100-21

This memorandum serves to convey the articulation for APD's points of non-concurrence in the above captioned administrative investigation conducted by the Civilian Police Oversight Agency.

#### Summary of non-concurrence of finding(s):

| Policy       | CPOA Finding | APD Finding |
|--------------|--------------|-------------|
| 2-42-3(A)(1) | Sustained    | Exonerated  |

**Rationale for non-concurrence of finding for 2-42-3(A)(1) against Ofc. K S , Sgt. J H Ofc. M W --, and Sgt. D G :**

I concur with the recommendation provided by Deputy Chief J B as follows:

#### Facts

- no driving witnessed by sworn personnel
- no MVA or other collision
- contact with individual was several hours post-driving
- individual admitted driving but hours before and not since
- individual admitted drinking but not before driving and had been at or near the location and on foot for hours
- residents wanted the individual to leave
- sworn personnel did not make an arrest
- sworn personnel arranged a ride to a place to stay

#### Probable Cause to Arrest & Totality of Circumstances

Sworn personnel *may* have reasonable grounds to believe that a suspect had been driving while under the influence based on the totality of circumstances they observed. Sworn personnel do not necessarily have to eyewitness a person operating a vehicle in order to make this conclusion. However, without observation of driving (or evidence of a collision), it becomes much more challenging.

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One published case that serves as a good example is State v. Jones, 1998-NMCA-076, in which an officer came upon an accident scene. The accident had happened shortly before. The driver was still on scene. The driver's breath smelled strongly of alcohol. The driver had watery and bloodshot eyes, slurred speech, and was unable to successfully complete FSTs.

Here, sworn personnel had zero facts at their disposal to suggest that the individual had been operating a vehicle *contemporaneously* with their contact with him rather than hours beforehand. Similarly, they had no evidence that the individual's impairment coincided in any way with operating a motor vehicle.

#### **Time Delay Between Alleged Vehicle Operation and Contact with Individual**

Timing is an essential element of DWI. At trial, the State must prove a nexus between a BAC of 0.08 or more and the time the driver operated a motor vehicle. A blood or breath alcohol test administered *over two hours* after the time of driving, and yielding only marginal results, must be corroborated by additional evidence to support a verdict for DWI. Otherwise, a conviction cannot stand. State v. Baldwin, 2001-NMCA-063.

In the situation at hand, sworn personnel would have been unable to substantiate a nexus between driving and impairment. Sworn personnel did not observe any operation of a motor vehicle. There was no collision. While the driver was clearly impaired when they encountered him, there was no apparent nexus between the impairment and any actual period of operating a motor vehicle. There were no available facts or circumstances that would support a determination that the driver had been operating the vehicle *while* he was impaired. In other words, the available facts/circumstances could just as easily result in a conclusion that the driver became impaired *after* driving.

#### **Ramifications of Delayed Breath or Blood Test**

While there is no set amount of time by which a test must be administered, even a breath test conducted 90 minutes after driving would need to be supported with additional evidence in order for a conviction to stand. State v. Martinez, 2002-NMCA-043. By contrast, a blood test conducted 4 hours after a collision is not automatically excluded from evidence provided it is buttressed by expert testimony. State v. Hughey, 2007-NMSC-036. This distinction is likely due to the difference between breath and blood tests and what the results can tell us.

In the present case, a blood draw would not have been permitted at all. SOP 2-42-3(F)(1) allows a blood draw "for felony cases involving great bodily harm or death by motor vehicle and the driver is injured or incapacitated after a warrant is obtained." Again, there was no crash here.

#### **Conclusion**

Sworn personnel in the situation at hand did not have legal authority to make an arrest for any criminal offense. They had no evidence of any nexus between actual operation of a motor vehicle and impairment. Had an arrest been made in this case, it is almost a certainty that the matter would not result in a conviction at trial. This assumes that a judge or prosecutor wouldn't dismiss the complaint outright at the first appearance.

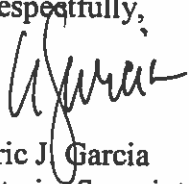
#### **Finding**

I find that all officers involved in this case, Officer S                      Sergeant F                      , Officer W                      and Sergeant G                      are all exonerated. No further action is required.

**Conclusion:**

Based on the aforementioned points of non-concurrence, and the changing of the CPOAs adverse finding to a non-adverse finding, no discipline will be imposed on the involved Officers in this case.

Respectfully,



Eric J. Garcia  
Interim Superintendent of Police Reform/DCAO  
Albuquerque Police Department, Police Reform Bureau

cc: Harold J. Medina, Chief of Police