

CITY OF ALBUQUERQUE



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March 16, 2017

Gorden Eden Jr., Chief of Police
C/O Internal Affairs Unit
Albuquerque Police Department
400 Roma NW
Albuquerque, NM 87102

Re: I-169-15

Dear Chief Eden:

The shooting occurred on December 14, 2014. The Multi-jurisdictional Investigative team concluded its investigation April 14, 2015.

The Bernalillo County District Attorney's Office ruled on this shooting September 22, 2015. Internal Affairs completed their review on November 23, 2015.

As to the officer who discharged his weapon:

1. Did Officer N comply with Albuquerque Police Department Procedural Order 2-52-6(11), which states:

2-52-6 Firearms

1. Pre-Deployment considerations

- i. Officers will adhere to all firearms safety rules as outlined in department training.
- ii. Officers must recognize once a firearm is drawn and no longer secured in the holster their ability to react with other than deadly force to a particular situation may be diminished. It is therefore vital a firearm be drawn only when deadly force can be reasonable anticipated.

1. Nothing in this section is meant to prevent officers from having their firearms in a deployed position when

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confronted with situations which may escalate with such speed as the officer's ability to react defensively would be unacceptably slow as a result of having a holstered firearm.

Firearms Safety Rules

1. All guns are always loaded.
2. Never let the muzzle cover anything you are not willing to destroy.
3. *Keep your finger off the trigger unless your sights are on target and you've made the decision to fire. (emphasis added)*
4. *Be sure of your target. (emphasis added)*

Finding: The CPOA finds Officer N.'s conduct **SUSTAINED** where the investigation determines, by a preponderance of the evidence that the alleged misconduct did occur.

- 1) **Recommendation:** The policy in place on December 14, 2014 lists a violation of this SOP as a level 3. This is his first offense. Therefore, I recommend an 88 hour suspension for Officer N.
- 2) **Recommendation:** The Internal Affairs Division review the investigation and findings reached by Det. D. and provide the POB with a report an after action report.
- 3) **Recommendation:** The Internal Affairs Division initiate an investigation into the improper search (protective sweep) of 513 Charleston St SE, Apt. 4, ordered by Sgt. K.

On December 14, 2014 at approximately 5:01 am Officers were dispatched to 513 Charleston St. SE regarding a possible burglary. The caller stated two men arrived at the location in a red pick-up truck and were removing items from apartment number 4. Upon arrival near the scene Officers N & A approached the apartment complex on foot. Officer A observed a green sedan being driven out of the apartment complex. He noted the license plate of the vehicle, but did not stop it. Officers also observed a red pick-up truck parked on the opposite side of the street from the apartment complex. Officers made contact with the driver of the truck, later identified as David McCloskey.

Mr. McCloskey stated he went to the apartment with a friend "Drew" to retrieve some of Drew's property. He further stated Drew entered the apartment through a window and handed

him items from within the apartment. One of those items being a scooter. Officer N. located a scooter in the back of the truck. Mr. McCloskey was detained and placed in the back of Officer N's police car.

Relevant timeline:

- 1) At approximately 5:01am officers dispatched.
- 2) At approximately 5:18am officers arrive on scene.
- 3) At approximately 5:28am officers advise one person in custody.
- 4) At approximately 5:33am officer request a Field investigator.
- 5) At approximately 5:42am Sgt. K advised dispatch to send the on-call burglary. Detective's number to Officers N & A.
- 6) At approximately 5:53am Sgt. K arrived on the scene.
- 7) At approximately 6:00am Sgt. K. ordered a protective sweep of the apartment.
- 8) At approximately 6:02am Sgt. K advised shots fired.

Upon the order of Sgt. K., Officers N & A went to apartment 4 to conduct a protective sweep of the apartment in order to allow the Field Evidence Tech to process the burglary scene. At this point in the investigation officers had not identified a victim, nor had they established Mr. McCloskey and "Drew" did not have permission to enter the apartment and retrieve property. Additionally, a warrantless search (protective sweep) incident to a lawful arrest may only be conducted in an area "adjoining the arrest". Mr. McCloskey was detained across the street from the apartment complex. This is contrary to the standard outlined in *Maryland v. Buie* 494 U.S. 325 (1990). Also, this is contrary to APD Procedural Order 2-17-16-D Search and Seizure Without Warrant. Therefore I recommend Sgt. K be investigated for ordering an out-of-policy search.

Officer N & A approached the apartment. They removed a plastic covering from a broken window and called for any possible occupants to come forward. Officer N entered the apartment through the broken window. He drew his firearm from its holster. As he stepped forward he slipped, causing his weapon to discharge. The projectile went through the floor into the apartment below striking the victim in the neck. The internal investigation does not reveal any evidence to show the weapon malfunctioned. Therefore the only conclusion is Officer N's finger pulled the trigger of his firearm causing it to discharge. That is a violation of the policy outlined above. Therefore, I recommend an 88 hour suspension for Officer N.

A complete burglary investigation revealed the apartment was rented by Orlando Parada. At the time of this incident he was detained at Metropolitan Detention Center. The window of the apartment had been broken the previous night by Orlando's fiancé and had been reported to APD. The investigation further revealed "Drew" was Andrew Serna a friend of Orlando's who had permission to enter the apartment and remove the items he removed.

Officers were conducting an out-of-policy search when Officer N discharged his weapon. But for this out-of-policy search the officer would have never been in the position to discharge his weapon and injure and the innocent victim.

Regarding the review by the IA Detective, the Detective reviews the conduct in relation to utilization of department equipment. (An issue I deem irrelevant), and exonerates the officer. The detective also finds **Not Sustained** as to the firearm discharge. His reasoning, in part, is as follows: "Officer N. was entering an apartment that had just been burglarized and had information of possible multiple suspects inside." That statement is false. He goes on to explain possible contributing factors as wetness of boots, dark conditions, and "many unforeseeable factors" that led to the accidental discharge. However, he acknowledges Officer N's finger pulled the trigger. The policy is clear when an officer may pull the trigger of their firearm. Therefore, I recommend Internal Affairs Division review the investigation and findings reached by Det. D. and provide the POB with an after action report.

Review of the investigative file of Internal Affairs and any opinion expressed in this letter are pursuant to the duties of the CPOA as described in the POB Ordinance and are not intended for any other purpose.

Please contact me if there are questions or concerns. I look forward to your response to the concerns and recommendations contained in this letter.

Please ensure the findings are placed in the officer's retention file.

Sincerely,



Edward Harness, Esq.
Executive Director
Civilian Police Oversight Agency
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