

CITY OF ALBUQUERQUE



CIVILIAN POLICE OVERSIGHT AGENCY

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March 11, 2016

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

Re: I-48-15

Dear Chief Eden,

FINDINGS AND CONCLUSIONS REGARDING APPLICABLE STANDARD OPERATING PROCEDURES REGARDING Lt. B.'S CONDUCT

The Executive Director of the CPOA reviewed the investigation conducted by the Internal Affairs Investigators, and the Multi-Jurisdictional Investigative team, which included a review of the applicable SOPs, the Complaint, SID/Narcotics team interviews, the CADS reports, the arrest report, officer interviews and lapel videos synopsis.

1. Did Lt B comply with Albuquerque Police Department Special Investigation Division # 3-01-301b, which mandates:

3-01-3 UNDERCOVER INVESTIGATIONS POLICY

D. RULES

1. OPERATIONAL PLANNING

b. In addition to the operational plan, the undercover detective will review the anticipated scenario with the supervisor and determine if there will be any unusual circumstances that surveillance detectives should be aware of.

On January 9, 2015 members of Albuquerque Police Department's Special Investigations Division/Narcotics decided to conduct a buy bust operation. The operation would include two (2) undercover officers, Det. HG and Det. JG. There were four (4) other members of this Narcotics team. Det. HG had a target she'd been in contact with over the past 24 hours. This target was going to supply \$50-60 worth of methamphetamine. The buy was to take place in the Western Skies corridor. Det. HG agreed to drive to a location to meet the seller.

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Between the hours of 9-10 am on January 9, 2015 Det. HG conducted an operational briefing for the buy bust. The attendees of this briefing were: Sergeant S, Det. R. Det. M., Det. HG, and Det. JG. LT B. did not attend this briefing.

The operation would have two targets. Det. HG would drive her UC car a 2007 Lexus. The Lexus had darkly tinted windows; however this did not present, in the opinion of the operational team, a problem for this particular operation. Det. HG would also wear a wire to transmit conversations from inside the vehicle. Additionally, Det. JG would have an I-Phone-based listening device.

The operation would entail picking up the two targets, driving to the location for the buy, and then driving to a different location for the bust. Other details discussed in the briefing: included the signal for the bust, the time to execute the arrest, and most importantly, in accordance with the Units protocols, Det. HG would drive and Det. JG would be seated directly behind on the driver's side rear of the vehicle.

As the team exited the briefing room Sgt. S. called Lt. B on an unrelated matter, but mentioned the operation that was about to take place. Lt. B. was downtown at the main police station and stated he would begin making his way over to the area of the operation. No other details of the operation were discussed during this telephone conversation.

While in route to the area of the operation Lt. B turned on and monitored the police radio narcotics channel. During this broadcast, the two targets are described as black males, one wearing a white jacket. Also, that the buy is taking place at the Econolodge. Lt. B. parked his vehicle and waited in the parking lot of the adjacent McDonalds. He waited for the bust portion of the operation to begin.

Once the buy took place, in accordance with the briefing plan, the team drove away from the buy location. Det. HG pulled the 2007 Lexus into the McDonald's parking lot. Lt. B pulled in directly behind the Lexus in front of, a fully briefed, team member's vehicle. Once, the Lexus was parked, Lt. B. exited his truck, pulled his weapon, and began shouting commands to the occupants of the vehicle.

The CPOA finds Lt B.'s conduct SUSTAINED regarding the allegation of a violation of this SOP, which means the investigation determined, by a preponderance of the evidence that the alleged misconduct did occur.

2. Did Lt B comply with Albuquerque Police Department Procedural Orders # 2-52-3A, B, 2-52-3 C1, 2, 3, 2-52-3D, E, G, I, J, K, 2-52-4A, 2-52-58,C, & 2-52-5E1 which mandates:

2-52-3 General Requirements and Expectations of all Officers with regard to Uses of Force.

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A. Officers may use force when objectively reasonable based on a totality of the circumstances. The objectives for which force may be appropriate include:

- To effect a lawful arrest or detention of a person.
- To gain control of a combative prisoner
- Prevent and/or terminate the commission of a crime.
- To intervene in a suicide or self-inflicted injury
- To defend an officer or member of the public from the physical acts of another.

B. Reasonable force requires balancing the governmental interests in seizing a person weighed against that of the individual's 4th Amendment rights. In general, the greater the intrusion against the individual, the more objective justification needed for it to be a reasonable course of action.

C. While it is not possible to precisely define what is reasonable for a given situation, use of force requires careful consideration of the facts and circumstances that surround that particular situation.

When determining whether force is reasonable and the level of force used, officers will always consider:

1. Threats presented by the subject to the officer and/or the public and the immediacy of them.
2. The Severity of the crime being committed by subject(s).
3. Attempts by the subject to actively resist arrest or evade arrest by flight.

D. The Supreme Court has held that uses of force by police must be evaluated under the totality of the circumstances known or perceived by the officer at the time the decision to use force is made.

E. Independently, the following will not justify a use of force, however, officers should be alert to the following circumstances throughout their encounter with a subject:

- Known history of the subject to include violent tendencies, previous encounters with law enforcement which were combative, etc.
- Known or perceived belief the subject is under the influence of alcohol and/or drugs.
- Relative size, age, condition of the subject as compared to the officer.
- The number of subjects compared to the number of officers.
- Availability of weapons to the subject.
- Duration of the action e.g. officer exhaustion during a physical confrontation.
- The subject's mental or psychiatric history known to the officer at the time. Where it is apparent to the officer a subject is in a state of crisis, this must be taken into account in the officer's approach to the situation.

- Presence of innocent bystanders who could be harmed if force is not used.
- Location of incident and probability of sympathy for the subject amongst bystanders present
- Special Knowledge possessed by the subject (i.e. known experience in martial arts or hand-to-hand combat)
- Physical confrontations with the subject in which the officer is on the ground.
- Environmental/Terrain factors such as an incident near a busy street.

Officers must be able to provide an objectively reasonable basis for any factors used to justify the level of force used.

G. When circumstances allow, in their interaction with subjects, officers should use advisements, warning, verbal persuasion, and other tactics in an attempt to resolve the incident.

I. When practicable officers must not engage in unreasonable actions or tactics that precipitate the use of force as a result of tactical, strategic, and procedural errors that unduly jeopardizes their safety or the safety of others.

J. Officers must continually assess the effectiveness of their actions and consider the desired outcome for the level of force used, including:

- Can the resistant subject physically comply with the officer's commands?
- Does the officer have the ability to utilize additional resources to bring the situation to a peaceful resolution?
- What is the officer's end objective for using force and is the risk of injury to either the subject or officer worth achieving this objective?
- As agents of the Government, officers must attempt to balance the public need of affecting the arrest of the individual against that of the individual's rights.

K. When a confrontation escalates suddenly, an officer may use any means or device necessary to defend him/her as long as the force is reasonable given the existing circumstances.

2-52-4 Deadly Force

A. The decision to use Deadly Force still falls under the general requirements for all uses of force as outlined in 2-52-3 of this policy. Additionally, the reasonableness of the officer's decision will include:

> Reasonable belief the subject presents an immediate threat to cause serious physical injury to the officer, another officer, or another member of the public

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> Probable cause for the officer to believe the subject has just committed a crime involving inflicted/threatened infliction of serious physical injury to another and deadly force is necessary to prevent the escape of the subject in order to protect the public or another officer(s).

2-52-5 Response to High Threat Level Situations

B. When reasonable under the totality of circumstances, officers should gather information about the incident, assess the risks, assemble resources, attempt to slow momentum, and communicate and coordinate a response.

C. Supervisors should become involved in the management of the overall response to potential violent encounters by coordinating resources and officers' tactical actions.

E. Individual officers should not arrive on a potentially violent encounter and attempt to resolve the incident by themselves. Officers should arrive and secure additional less lethal and lethal resources as part of a force array prior to initiating contact.

1. Although these tactics are intended to provide a force array for officers to resolve unknown violent encounters, this section in no way prohibits officers from responding independently to violent on going calls involving death or great bodily harm (Active-Threat)

On January 9, 2015 at approximately 11:30am Lt. B. approached the 2007 4 door Lexus with his weapon in a low ready position. He used his left hand to open the rear driver's side door. From 1 ½ to 2 feet he observed the occupant of the seat directly behind the driver holding a handgun. The handgun was pointed towards the opposite side of the vehicle. Members of the arrest team were approaching the vehicle from the rear on the opposite side. Lt. B yelled "gun, gun, gun" and one second later, according to the lapel video, he began firing his weapon into the driver's side rear of the 2007 Lexus. Lt. B retreated from the vehicle while firing his weapon, a .45 cal. handgun. He emptied the first magazine and reloaded his weapon. 17 seconds after he began firing into the vehicle he realized the occupant of the vehicle holding the gun he observed was Det. JG. He'd fired 7 or 8 rounds into the vehicle.

Albuquerque Police Department use of force policy mirrors the U. S. Supreme Court's Decision *Graham v. Conner* 490 U.S. 386 (1989). Use of force must be analyzed under the 4th amendment's "objective reasonableness" standard. The officer's actions must be reasonable in light of the facts and circumstances confronting them.

Lt. B has conducted "hundreds" of these buy bust operations. What was the totality of the circumstances facing Lt. B? What were the facts he knew, or should have known as he approached that 2007 Lexus?

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- His personnel - he worked with Det. JG for over 2 years & Det. HG for a few months
- Det. HG is the driver of the 2007 Lexus,
- His personnel will be armed,
- The two subjects of the operation are black males,
- One black male is wearing a white jacket
- He did not attend the briefing session for the operation,
- He had not been fully briefed during the operation,
- The standard protocol for his SID/Narcotics operation: When a UC detective is driving a vehicle, and another UC is in the vehicle, the other UC always sits behind the driver for safety of the officers involved.

There's an additional factor to consider in this case. In or around March of 2014 the Commander of the SID/Narcotics division counselled Lt. B. about two incidents. One occurred in January 2014, the other in March of 2014. The commander's directives to Lt. B. were to: only involve himself in operations as a supervisor; in other words, be in command and control. Secondly, only insert himself in an operation if there were an emergency. Sgt. S. stated Lt. B had not inserted himself in an operation since the March 2014 talk from the commander, until the morning of January 9, 2015.

If Lt. B had come upon a traffic stop with similar circumstances, the use of force in that case may have been objectively reasonable. However, this was not a traffic stop on a high risk vehicle. This was an operation being conducted by his team, which by all accounts was going well until he inserted himself into the operation.

Lt. B is not entitled to the same protections afforded an officer in unfamiliar circumstances; the kind of circumstances that could not have been known by the officer at the time of the use of force. Lt. B ignored readily available information, his commander's directives, and his team's standard operating protocols for undercover operations. Therefore, I find the use of force in this case to be unreasonable.

The CPOA finds Lt B.'s conduct SUSTAINED regarding the allegation of a violation of this SOP, which means the investigation determined, by a preponderance of the evidence that the alleged misconduct did occur.

3. Did Lt B comply with Albuquerque Police Department General Orders # 1-02-201&2, which mandates:

1-02-2 ENFORCEMENT OF LAWS, ORDINANCES, AND POLICE REGULATIONS

D. Officer shall use of discretion by during the performance of their law enforcement duties.

1. When sworn employees of this department are faced with a situation where discretion can be exercised, they must evaluate the circumstances, consider the available resources, and rely on their training, department policies, department procedures, statutory law, and supervision in making the appropriate decision.

2. In addition, within each situation, the appropriate decision should be the least restrictive that still accomplishes the intent of the law, is in accordance with department policy, and does not compromise officers' safety.

Based upon the review of the case as outlined above: The CPOA finds Lt B.'s conduct **SUSTAINED** regarding the allegation of a violation of this SOP, which means the investigation determined, by a preponderance of the evidence that the alleged misconduct did occur.

The CPOA recommendation for discipline is **TERMINATION OF EMPLOYMENT**.

Policy recommendations:

1. Immediately only allow buy bust operations after the scenarios have been fully briefed, in person, by all supervisors and participants.
2. End the practice of "radio briefings"
3. Immediately prohibit not briefed parties from participation in any operation, unless officers' request back-up.
4. Institute a drug policy: Immediately test all officers that discharge their firearms in the line of duty.
5. APD should only use legal level of window tint on vehicles. Windows that have dark tint creates a safety issue for officers.
6. APD should ensure that officers involved in undercover operations are wearing reliable wires in order for the Detectives who are involved to hear what is going on.

Training recommendations:

1. SID immediately review all its policies and procedures with all assigned personnel
2. All personnel operating in an undercover capacity must attend DEA training
3. Counsel personnel to pay close attention to details, i.e. no police equipment in a UC car.

Sincerely,
The Civilian Police Oversight Agency by



Edward W. Harness, Esq.
Executive Director