



OMBUDSMAN'S REPORT

Complaint Investigation & Findings

OMB07/0065 - January 29, 2008

THE SITUATION

In late spring of 2007, just after midnight, two Boise Police Department (BPD) officers (Officer #1 and Officer #2) responded to a noise complaint. After determining that the loud music was coming from the Complainant's home, the officers knocked on the door. The Complainant invited the officers to come inside, which they did. After a brief conversation in which the officers asked the Complainant for his identification, one of the officers asked the Complainant to step outside. The Complainant initially declined to do so. However, at the urging of a friend who was in the house with him, the Complainant went outside with the officers. A few moments after the Complainant stepped outside, there was physical contact between one of the officers and the Complainant. Immediately after this, the two officers handcuffed the Complainant and placed him under arrest. The Complainant was charged with Resisting and Obstructing an Officer and with a noise violation.

THE COMPLAINT

Three days after the incident occurred, the Complainant filed a complaint with the Office of the Community Ombudsman by email. In the complaint, he alleged that Officer #1 and Officer #2 used force on him that was neither reasonable nor necessary under the circumstances. The force that was alleged to have been used was that of taking hold of the Complainant's shoulder, grabbing his arm, and placing him in handcuffs. These alleged actions, if true, would be a violation of 1.01.02 – Authorization (Use of Force).

THE COMPLAINT INVESTIGATION

The investigation into the complaint included interviews of the following persons: the Complainant; Witness #1 and Witness #2, both of whom were at the Complainant's house at the time the two officers arrived; Witness #3 and Witness #4, who live across the street from the Complainant; Witness #5, the Complainant's neighbor who called the police with the noise complaint; Officer #1; and Officer #2. The investigation included a review of the following documents: the dispatch record; the police report; and the digital audio recordings made by the officers during the incident. In the course of the investigation it was found that Officer #2 wrote a report that appeared not to reflect accurately the statements or actions of Witness #5. For this reason, an investigation into the possible violation of Boise Police Department's Policy § 11.03.02 – Performance of Duty was also conducted.

WHAT THE COMPLAINT INVESTIGATION FOUND

Based on the preponderance of the evidence obtained and reviewed in the course of this investigation, I issue the following findings of fact:

1. The incident occurred after 12:00 a.m. on a day in late spring of 2007.
2. The Complainant was in his residence playing music with the volume turned up to the point that the music could be heard in the street outside the residence.
3. A neighbor reported the loud music; and two BPD officers, Officer #1 and Officer #2, went to the Complainant's house.
4. The officers knocked on the door of the Complainant's house.

5. The Complainant turned the music off.
6. The Complainant said, "Come in." The officers entered the Complainant's home.
7. Officer #2 asked the Complainant for his identification. The Complainant told the officer that they had his identification. One of the officers asked why they had his identification; and the Complainant told them to, "think about it."
8. Officer #2 requested that the Complainant step outside.
9. The Complainant declined the request to go outside.
10. Officer #2 told the Complainant that he was already going to receive a citation for a noise violation and that he was talking his way into jail for resisting and obstructing because he was delaying the officers' investigation.
11. Officer #2 again requested that the Complainant come outside.
12. The Complainant again declined to go outside and asked the officer what the problem was.
13. Two friends of the Complainant were at the Complainant's house. One of the friends encouraged the Complainant to go outside with the officers.
14. The Complainant then said, "O.K. Let's talk." He then went outside with the officers.
15. Officer #2 went outside first, followed by the Complainant. Officer #1, who was the last person to exit the house, closed the door behind himself.

16. The Complainant said, "Don't close my door. Please open that."
17. Officer #1 said, "It's O.K."
18. The Complainant then stated, "No, please open my door."
19. Officer #1 touched the Complainant somewhere on the upper body and said, "Hey, man." This occurred as the Complainant turned to go back into his house.
20. The Complainant pushed Officer #1's hand off of his (the Complainant's) body and told Officer #1 not to touch him.
21. Officer #1 then handcuffed the Complainant and placed him under arrest, stating, "You want to play stupid, you're going to go to jail."
22. After the Complainant was placed under arrest, Officer #2 interviewed Witness #5, the neighbor who had called the police.
23. Witness #5 made comments to Officer #2 concerning the noise the Complainant had been making. She also made a comment concerning the Complainant being "cocky."
24. Officer #1 stated in his police report that the neighbor had agreed that the Complainant was "being belligerent toward [the officers] and refusing [their] commands."

OMBUDSMAN'S ANALYSIS

I. Use of Unreasonable and Unnecessary Force.

A. Conditions Under Which Force May Be Used.

The first issue in this case is whether Officer #1 and Officer #2 used unreasonable and unnecessary force, first when Officer #1 touched the Complainant on the upper body, and second, when Officer #1 and Officer #2 took hold of the Complainant and placed him in handcuffs. BPD policy authorizes the use of force by its officers; BPD Policy § 01.01.02 – Authorization (Use of Force) states:

An officer shall use only the amount of force that is reasonable and necessary to protect life, affect a lawful arrest, and/or gain control in any lawful circumstance.¹

This policy limits the situations in which an officer may use force. Under the policy, an officer may use force in three circumstances: 1) to protect life; 2) to effect a lawful arrest; and 3) to gain control in any lawful circumstance. Before determining whether the amount of force used is reasonable and necessary, it must be determined whether any circumstance existed that would justify the use of force at all.

B. The Fourth Amendment.

The United States Supreme Court established the general proposition that the excessive use of force by a law enforcement officer is contrary to the Fourth Amendment. For this reason, a person has a constitutional right not to be subjected to excessive force by police officers. In this case, the question is whether it was necessary or reasonable for the officers to use force either to stop the Complainant from re-entering his home or to arrest him.

¹ This section was amended, effective October 31, 2007. The word, “affect,” was changed to “effect.”

C. The Questions Presented in the Case.

In this case, Officer #1 touched the Complainant's body in an attempt to keep the Complainant from ending a voluntary encounter with the officers. When the Complainant tried to end the voluntary encounter with the police by going back into his house, the officers placed him under arrest. The analysis of whether the officers' use of force was reasonable and necessary requires that several issues be resolved. The first question is whether the officers detained the Complainant prior to placing him under arrest. The answer to this question turns on whether the officers used physical force or any show of authority that would have led a reasonable person to believe that he or she was not free to leave. If the officers did not detain the Complainant, the contact remained a voluntary encounter. Even assuming that the officers had intended to detain the Complainant, there remains a question whether force was necessary to accomplish that detention. The last question is whether the officers had probable cause to believe that the Complainant had committed a criminal offense, thus authorizing them to use reasonable and necessary force to effect the arrest of the Complainant.

D. The Test for Determining Whether a Person Has been Detained.

The first question is whether the officers detained, or in other words, "seized," the Complainant. Not all encounters between police officers and members of the public involve the seizure of a person. Generally, there are three types of encounters between police officers and individuals: 1) an arrest that must be supported by probable cause; 2) a temporary seizure of a person, also known as a *Terry* stop referring to a famous United States Supreme Court decision, that must be supported by a reasonable and articulable suspicion of criminal activity; and 3) a voluntary encounter, which involves no restraint or coercion and therefore does not constitute a seizure. A seizure does not occur simply because a police officer approaches an individual and asks the individual if he or she is willing to answer

some questions. Similarly, a seizure does not occur simply because an officer approaches an individual and begins asking questions, assuming the individual is willing to listen. The United States Supreme Court has held that an encounter becomes a seizure only when an officer, by means of physical force or show of authority, has restrained the liberty of a person.

To determine whether a person has been seized, courts use an objective or “reasonable person” test. The United States Supreme Court has held that a seizure occurs, “only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.” *United States v. Mendenhall*, 446 U.S. 544, 554 (1980). The Court listed some circumstances that might indicate a seizure, to include: the threatening presence of several officers, the display of a weapon by an officer, the physical touching of the person, or the use of tone or language that would indicate that compliance with an officer’s request might be required. In the absence of evidence that the person was not free to leave, voluntary contact between a person and a police officer cannot, as a matter of law, amount to a seizure of that person.

When officers have made a *Terry* stop, or, in other words, detained a person, the officer communicates to the detainee, either orally or through a show of force or authority, that he is not free to go about his business. It is important to keep in mind that the right to detain a person is not the same as actually having detained someone. If there are no words or actions by the police that objectively would have conveyed to a person that he or she was being ordered to restrict his or her movement, the person is not detained. A person who is simply being questioned by police, prior to any seizure, is free to decline to listen to the questions and to go his or her own way.

E. Was the Complainant Detained While In the House?

With these concepts in mind, the first question is whether the Complainant was detained, or “seized,” at any time while the officers were inside his home. In other words, did the officers detain the Complainant after they entered his house. A review of the facts will help to answer this question.

The police went to the Complainant’s house to investigate a violation of a noise ordinance. Officer #2 stated that he had initially planned to issue only a warning, but at some later point, decided to issue a citation. The Complainant invited the officers into his house, telling them to, “Come in.” When the officers asked for the Complainant’s identification, he told them that they already had his identification. He was referring to the fact that his driver’s license had been seized as the result of a prior law enforcement action. The officers did not ask the Complainant for his name or tell him that another form of identification besides his driver’s license would be acceptable.

It is not entirely clear at what point Officer #2 decided to issue a citation rather than give the Complainant a warning. Officer #2 asked the Complainant to come outside to talk to him. The Complainant said, “No. What is your problem?” While Officer #2 stated at one point that he planned to give the Complainant a citation, it was not clear from a review of the audio recording, and it was certainly not clear to the Complainant, that the reason he was being asked to step outside was to provide Officer #2 with an opportunity to issue the citation.

As soon as the Complainant made the remark that the officers already had his identification, Officer #2 stated that it was, “too late,” to which the Complainant responded, “What do you mean, it’s too late?” Seconds later, following a repeated request from Officer #2 that he step outside, the Complainant declined to go outside. Officer #2 then said, “Okay. One, you are going to get a ticket already for a noise ordinance violation. Two, you’re pretty much talking your way into going to jail for resisting and obstructing because I am asking you to come out

and talk with me. I am doing an investigation and I can't complete that." Based on the sequence of events revealed in the audio recording, it appears that Officer #2 made a decision to issue a citation and make an arrest within seconds of the Complainant having made the comment concerning the police having his identification.

Though Officer #2 had had ample opportunity to begin the process of issuing a citation while he was in the Complainant's house, he continued to request that the Complainant come outside. The Complainant asked Officer #2 what the problem was. After Witness #2 encouraged the Complainant to go outside with the officers, the Complainant said, "O.K., let's talk," and went outside. The entire contact between the officers and the Complainant inside the house lasted about a minute and forty seconds.

Officer #2 clearly made a request, rather than a command, that the Complainant come outside. A request that a person do something is different from a command or an order. Because Officer #2 had made no show of authority, no detention had occurred at this point.

As noted above, the question whether a person has been seized for the purpose of a Fourth Amendment analysis is whether, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave. The question does not involve an analysis of whether the officer believed he had detained the person. In this case, Officer #2 did only two things that could arguably be considered to be indications that the Complainant was not free to leave: first, he asked the Complainant to provide identification; and second, he asked the Complainant to step outside.

Neither request would indicate to a reasonable person that he or she was not free to leave. The Idaho Supreme Court has held that asking a person for identification or questioning a person concerning his identification does not, in and of itself, constitute a seizure. The officers in this case issued no orders. They used no physical force. Without additional

evidence, the officer's actions in asking for the Complainant's identification was not a detention.²

With respect to the issue of being asked to step outside, Officer #2 confirmed during the course of the investigation that it was a request rather than an order. The Complainant showed by his actions that he felt that he had a right to decline this request. Most importantly, a reasonable person would not believe that a verbal request to step outside one's home was anything other than a request if the officer does not use words that indicate that he or she is issuing a command, or if the officer does not use a volume or tone of voice that indicates that compliance is required. Not every word an officer speaks is a command. For these reasons, Officer #2's requests to the Complainant that he step outside was not a "seizure" or detention of the Complainant.

It could be suggested that the threat of arrest made by Officer #2 was a show of authority that converted the request into a command. The audio recording indicates that Officer #2 told the Complainant that he was going to be issued a citation and that he was talking his way into jail because Officer #2 was asking the Complainant to come outside and talk with him, and because the Complainant was somehow preventing Officer #2 from completing his investigation. As noted before, the test for determining whether a person has been detained is based on whether a reasonable person would believe they were free to leave. A reasonable person is presumed to know the law and to be aware of their constitutional rights. A reasonable person would know that he or she was not required to produce identification under these circumstances. A reasonable person would also know that he or she could not be arrested for violation of a noise ordinance. Consequently, a reasonable person would see that the threat of arrest under these circumstances was an attempt to intimidate or coerce him or her into doing something that was not required by law. As such, it would be seen to be a threat to act without a basis in law, rather than a command. An officer's baseless attempt to

² It is noted that the act of obtaining a person's driver's license is considered a seizure in the context of a peace officer stopping a motor vehicle.

intimidate is not something that a reasonable person would consider to be a limitation on his or her movements.

In addition, a reasonable person would know that an officer has authority to make a *Terry* stop only when the officer has a reasonable and articulable suspicion of criminal activity. A violation of the noise ordinance is an infraction, which is a civil public offense. An infraction is, by definition, not a crime.³ Because violation of a noise ordinance is not a crime, it is questionable whether a reasonable officer could even detain a person for having committed such an offense. In a recent decision by the Ninth Circuit Court of Appeals, the court held that it was unreasonable for Nampa Police officers to have pulled the defendant (Grigg) over, “on suspicion of having played his music too loudly where they did not duly consider the lack of any threat to public safety, especially given the untested alternative means of ascertaining Grigg’s identity.”⁴ In its decision, the Ninth Circuit specifically cited a decision by the Supreme Court of Washington⁵ declining to extend the *Terry* stop exception to include nontraffic civil infractions.

A reasonable person would know not only that an officer could not make an arrest for the commission of a civil public offense, but would also question, as did the Complainant, whether the officer could even detain a person for having committed a civil public offense that poses no threat to public safety. For these reasons, a reasonable person would see the

³ Idaho Code § 18-111 states:

*FELONY, MISDEMEANOR AND INFRACTION DEFINED. A felony is a crime which is punishable with death or by imprisonment in the state prison. An infraction is a civil public offense, **not constituting a crime**, which is punishable only by a penalty not exceeding one hundred dollars (\$100) and for which no period of incarceration may be imposed. Every other crime is a misdemeanor. When a crime punishable by imprisonment in the state prison is also punishable by fine or imprisonment in a county jail, in the discretion of the court, it shall be deemed a misdemeanor for all purposes after a judgment imposing a punishment other than imprisonment in the state prison. (Emphasis added).*

⁴ *U.S. v. Grigg*, 082207 Fed.9, 06-30368 (9th Cir. August 8, 2007).

⁵ The case cited is *State v. Duncan*, 146 Wn.2d 166, 43 P.3d 513 (2001).

threat of arrest under these circumstances as an attempt to coerce or intimidate rather than a show of authority.

The Complainant's interaction with the officers while in his home was a voluntary encounter, which involved no restraint or coercion. Nothing happened while the officers were inside the Complainant's home that converted the voluntary encounter into a seizure. As long as police do not convey a message that compliance with a request is required, the encounter is deemed consensual. Furthermore, because Officer #2 asked rather than commanded that the Complainant step outside, the Complainant's compliance with the request was consensual. Thus, when the Complainant stepped outside, the contact remained consensual.

F. Was the Complainant Detained Outside of the House?

The next question is whether anything happened outside the house that converted the voluntary or consensual encounter into a seizure. This inquiry, again, requires a review of the facts. As noted above, an encounter becomes a seizure only when an officer, by means of physical force or show of authority, has restrained the liberty of a citizen. In the course of this complaint investigation, one of the officers suggested that the Complainant lost his freedom to go back into his home once he stepped outside. The act of the Complainant in stepping out the door is not a use of physical force or show of authority by an officer. It is a voluntary act by the Complainant. No seizure occurred at this point.

The next question is whether Officer #1's action in shutting the door constituted a seizure. As soon as the Complainant stepped outside, followed by Officer #1, Officer #1 shut the door to the Complainant's house. The audio recording indicates that the Complainant politely asked the officers to open his door. Officer #1 did not reopen the door, but reassured the Complainant by saying, "It's O.K." The Complainant then repeated his request, saying, "No, please open my door."

Officer #1's act in closing the door was not a show of authority. The Complainant did not perceive it as a show of authority because he politely asked Officer #1 to reopen the door and later tried to re-enter his home through the door. The question, however, is not whether Officer #1 or the Complainant believed the action to be a show of authority, but whether a reasonable person would consider the act of closing a door to indicate that he or she was not free to leave.

There are a number of reasons an officer might close a door in that situation. These would include, as one of the officers explained during the investigation, officer safety or keeping the house free of insects. The reasons could also include protecting the privacy of the person to whom the police were speaking, creating a situation in which a person can speak confidentially, or simply finding a quiet spot in which the persons engaged in conversation can hear each other's words. It is unlikely that a person would assume that the act of closing a door, by itself, was an indication that the person's freedom had been restrained. This is especially true in the present case. Immediately before the Complainant asked a second time for the door to be re-opened, Officer #1 said, "It's O.K." This is a phrase intended to provide reassurance. It is not a phrase that indicates a show of authority. For this reason, the act of closing the door was not an act that converted the voluntary encounter into a seizure.

The next question is whether Officer #1 standing in front of the door constituted a seizure. It could be argued that the fact that Officer #1 was standing in front of the door should have indicated to the Complainant that he was not free to go back inside. An officer's choice of where to stand, with no other fact added to it, is not a show of force under these circumstances. Both Officer #2 and the Complainant had gone out the door and stepped onto the walkway. Officer #1 was behind the Complainant and it would be entirely reasonable to believe that Officer #1 was going to step down onto the walkway, too. Officer #1 had turned to shut the door; a pause of a second or two would not indicate to a reasonable person that his presence on the step was intended to communicate that a person's movements were being restricted.

The final question is whether the act of Officer #1 in touching the Complainant's shoulder was an act that converted a voluntary encounter into a seizure. Again, it is important to look at the actions and the words that accompanied them. After Officer #1 told the Complainant that it was, "O.K.," the Complainant turned to go back into his house. Officer #1 then said, "Hey, man," at which point he apparently touched the Complainant because the Complainant then said, "Don't touch me." This raises the question whether Officer #1's act in touching the Complainant's shoulder was a show of authority. In other words, in the same circumstances, would a reasonable person have believed that he or she was not free to leave when an officer touched his or her shoulder.

This portion of the incident began with a verbal exchange between the Complainant and Officer #1 regarding the door. Both Officer #1 and Officer #2 had an opportunity to issue an order at the outset had they wished to convey to the Complainant that he was not free to go back inside his house. Instead of telling the Complainant that he was being ordered to stay outside, Officer #1 reassured the Complainant that it was all right to have his door closed by saying, "It's O.K." He did not say anything to the effect of, "Stay here," an order that would have taken the same amount of time to articulate.

As the Complainant began to turn toward the door to re-enter his house, Officer #1 touched the Complainant's shoulder and said, "Hey, man." "Hey, man," is not an order. To a reasonable person, the informality of the words and use of slang make it sound more like a request to continue a voluntary encounter than a signal that a voluntary encounter is over. On the other hand, the single syllable word, "Stop," would convey to a reasonable person that an order was being given and that the person was not free to leave.

In summary, there was no order either explicit or implicit in Officer #1's words or actions. Officer #1's touching of the Complainant's shoulder appears to have been an act of reassurance or a request to stay outside rather than an attempt to control the Complainant's

movements. Officer #1 knew the Complainant wanted his door open and had already tried to reassure the Complainant that everything was, "O.K." Not only had Officer #1 tried to reassure the Complainant, a request that the Complainant remain outside would be consistent with Officer #2 having initially made a request, rather than a command, to step outside. For these reasons, Officer #1's act in touching the Complainant's shoulder would not have indicated to a reasonable person that the voluntary encounter had been converted to a seizure of the person.

In summary, prior to the Complainant being handcuffed, the officers had not seized him. There were no words or actions by the officers that objectively would have conveyed to the Complainant that he was being ordered to restrict his movement.

G. Arrest Must Be Based on Accurate Knowledge of the Law.

The last question is whether the officers used unreasonable and unnecessary force in arresting the Complainant. As discussed earlier, the officers did not have the statutory authority to arrest the Complainant for violating the noise ordinance. The Complainant was arrested for the crime of Resisting and Obstructing an Officer. In order to evaluate this issue, it is necessary to consider whether a reasonable officer would have concluded that a crime had occurred. The following discussion is for the purpose of analysis, and is not intended to establish the Complainant's guilt or innocence with respect to the adjudication of the underlying charges; however, a review of the facts indicates that a reasonable officer would have concluded that there was no basis to arrest the Complainant. Without a basis for arrest, the use of force was unnecessary.

Officer #2 told the Complainant, while they were still inside the house, that he was talking his way into being arrested for resisting and obstructing an officer because the Complainant was delaying the investigation by not providing Officer #2 with his identification. While

such statutes apply in limited situations,⁶ the State of Idaho has not enacted any statute generally requiring a person to present identification to a peace officer upon that officer's demand. The officers appeared to be unaware of this fact. Because there is no law requiring the Complainant to identify himself in this situation, the Complainant's inability or refusal to produce identification documents to the officers, particularly while in his own home, does not constitute the crime of Resisting and Obstructing an Officer.

In the course of this investigation, one of the officers also suggested that the Complainant was obstructing the investigation by not coming outside. Officer #2 did not order the Complainant to step outside. He asked the Complainant to come outside. Where Officer #2 did not issue a command or order, the Complainant remained free to decline Officer #2's request. For this reason, Officer #2 had no basis to arrest the Complainant for declining to step outside.

It has also been suggested that the Complainant was resisting by not turning around and placing his hands behind his back after he had been told that he was under arrest. The audio recording indicates that Officer #1 did not tell the Complainant he was under arrest until well after he placed him in handcuffs. The audio recording also confirms that neither officer told the Complainant to turn around and put his hands behind his back. Without being told that he was under arrest and without having been instructed to turn around and place his hands behind his back, there is no basis to conclude that the Complainant's failure to do so was resisting or obstructing an officer. In addition, it would be illogical to conclude that the act of resisting, a refusal to turn around and place his hands behind his back for handcuffing, for which the Complainant was supposedly being arrested occurred after the officers decided to arrest and handcuff him for Resisting and Obstructing an Officer.

⁶ I.C. § 49-316 requires a driver to surrender a driver's license to a police officer upon demand. Similarly, Idaho Code § 23-943A, provides that it is a misdemeanor to refuse to present identification to a peace officer when on premises licensed to sell alcohol.

It is important to note that, under Idaho law, an officer must tell a person that he or she is under arrest before an officer uses force against the person. Idaho Code § 19-610 states:

When the arrest is being made by an officer under the authority of a warrant or when the arrest is being made without a warrant but is supported by probable cause to believe that the person has committed an offense, after information of the intention to make the arrest, if the person to be arrested either flees or forcibly resists, the officer may use all reasonable and necessary means to effect the arrest and will be justified in using deadly force under conditions set out in section 18-4011, Idaho Code.

In this case, the officers forcibly handcuffed the Complainant before they informed the Complainant that they intended to arrest him. Idaho Code § 19-608 requires that a person, including a peace officer, making the arrest inform the person to be arrested of the cause of the arrest, unless the person to be arrested is in the commission of a crime, is being pursued, or after the person has escaped and been recaptured:

The person making the arrest must inform the person to be arrested of the intention to arrest him, of the cause of the arrest, and the authority to make it, except when the person to be arrested is actually engaged in the commission of, or an attempt to commit, an offense, or is pursued immediately after its commission, or after an escape.

The Complainant was attempting to end a voluntary encounter with the officers. He was not committing or attempting to commit a crime. Because the Complainant had not yet been detained and was, therefore, free to leave, he was not fleeing from the officers when he turned to go back inside his house. He was not resisting the officers because no order had been made. There was no pursuit; and there had been no escape. The officers had an obligation to inform the Complainant of their intent to arrest him; and they failed to comply with this statutory obligation.

One of the last alleged incidents that could possibly be construed to be an act of resistance is the alleged one-handed shove that the Complainant directed toward Officer #1. The police report states that the Complainant attempted to push Officer #1 aside in order to regain

access to his residence. Based on a preponderance of the evidence obtained in this investigation, I have found that this shove did not occur. Because no shove occurred, the alleged shove cannot be the basis for a criminal charge of resisting and obstructing an officer.

It is possible that the shove referred to in the police report was, in fact, the Complainant's act to push Officer #1's hand off his upper body. As was discussed earlier, Officer #1's act of touching the Complainant on the upper body appeared, at best, to be a request to remain outside. It had been preceded by words of assurance when Officer #1 told the Complainant it was, "O.K." The touching was not accompanied by an order, such as, "Stop;" instead, it was accompanied by the words, "Hey, man," a form of familiar, streetwise-sounding jargon used by some officers in an attempt to establish trust and camaraderie. "Hey, man," is not a command; and it is not an order. "Hey, man," combined with a touch on the shoulder or upper body, is not enough to indicate to a reasonable person that he or she has been detained by an officer. Because the touch on the shoulder was not an indicia of detention, the Complainant's action in brushing or batting Officer #1's hand away was not an act of resistance or obstruction. In summary, the facts of this case show that a reasonable officer would not have concluded that the crime of Resisting and Obstructing an Officer occurred. Consequently, any force used in making the arrest was unnecessary.

For all the reasons stated above, the allegations against Officer #1 and Officer #2 for using unnecessary and unreasonable force in forcibly handcuffing the Complainant are sustained.

II. Performance of Duty.

The Boise Police Department's policy (§ 11.03.02) Performance of Duty states:

An employee shall perform his/her duties in a manner which will maintain the highest standards of efficiency in carrying out the Department's functions and objectives. Satisfactory performance and competence is demonstrated by:

- *Adequate knowledge of the application of laws required to be enforced*
- *Willingness and ability to perform assigned tasks properly*

- *Conformance to the work standards established for the employee's rank, grade, or position*
- *Taking appropriate and timely action when a crime, disorder, or other situation requiring police action occurs*

As noted above, in this case, Officer #2 wrote in his report that Witness #5 had agreed that the Complainant was refusing the officers' commands. The preponderance of the evidence indicates that this was not an accurate description of what Witness #5 communicated to him.

The audio recording of the entire conversation between Officer #2 and Witness #5 does not include a statement by Witness #5 that the Complainant was refusing the officers' commands. When interviewed as part of this complaint investigation, Witness #5 said that she did not tell Officer #2 that the Complainant refused the officers' commands. In addition, Witness #5 said that she did not indicate agreement in either a verbal or non-verbal manner that the Complainant was refusing the officers' commands. It is clear that what Officer #2 wrote in his report concerning the statements of Witness #5 did not accurately reflect what she actually communicated to him.

In Officer #2's dictated supplement to the police report, he referred several times to the fact that he asked the Complainant to step outside. Following this, Officer #2 stated in his report that the Complainant failed to obey his commands, which he had earlier characterized as requests. Officer #2 did not give commands. He made requests. The Complainant declined to comply with Officer #2's requests. The Complainant did not fail to obey an order. Failing to obey an officer's legal command can be the basis for charging that person with the crime of Resisting and Obstructing an Officer. Declining to comply with a request cannot. This is a critical difference.

An inaccurate description in a police report of a fact that is an element of a crime shows that the officer who offered the report did not render a satisfactory performance. In addition to not maintaining high standards, it shows an inadequate knowledge of the application of the

laws to be enforced. For all the reasons stated above, I have issued a sustained finding against Officer #2 for violating BPD Policy § 11.03.02.

OMBUDSMAN'S FINDINGS

Officer #1

| | | |
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| P.M. § 1.01.02 | Use of Force – Authorization | Sustained |
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Officer #2

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| P.M. § 1.01.02 | Use of Force – Authorization | Sustained |
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| P.M. § 11.01.07 | Performance of Duty | Sustained |
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