



CIVILIAN OFFICE OF POLICE ACCOUNTABILITY

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April 29, 2019

Max A. Caproni  
Executive Director, Chicago Police Board  
30 North LaSalle Street, Suite 1220  
Chicago, Illinois 60602

**VIA Email and U.S. mail**

RE: Request for Review, Log No. 1089206

Dear Executive Director Caproni:

Pursuant to Municipal Code of Chicago Section 2-78-130 and Police Board Rules of Procedures Section VI, please consider this letter a Request for Review of a non-concurrence between the Civilian Office of Police Accountability (COPA) and the Superintendent in the above captioned investigation.<sup>1</sup>

The factual dispute and legal analysis are set forth below. The Department bears the affirmative burden of proof in overcoming COPA's recommendation. In this case, the Department fails to meet its burden. COPA therefore respectfully requests the Chicago Police Board reject the Department's non-concurrence and accept COPA's recommendation.

**I. BACKGROUND**

**A. Relevant Factual Background**

On April 23, 2018, Officers Steven Nisivaco and Leon Howard conducted a traffic stop on complainant [REDACTED] for failing to use a turn signal. Officers Nisivaco and Howard discovered [REDACTED] had a suspended license and issued him a ticket. During the pendency of the traffic stop, Officers Nisivaco and Howard detained two passengers of [REDACTED] vehicle in handcuffs for approximately 30 minutes. At the conclusion of the stop, Officers Nisivaco and Howard permitted [REDACTED] and his passengers to drive away from the scene.

**B. Disputed Findings & Recommendation**

COPA sustained four allegations against Officers Nisivaco and Howard, that on April 23, 2018 they: (a) detained [REDACTED] passengers in handcuffs without justification, in violation of Rule 6 (Allegation #3); (b) failed to complete ISRs for all three civilians stopped, in violation of

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<sup>1</sup> As required by the Police Board Rules of Procedure, enclosed are copies of COPA's Final Summary Report, the Department's April 8, 2019, non-concurrence letter, and a certificate that the parties met and conferred.

Rule 6 (Allegation #9); (c) failed to give all passengers ISR receipts, in violation of Rule 6 (Allegation #10); (d) allowed ██████████ to drive on a suspended license, in violation of Rule 2 (Allegation #11). COPA recommended a three-day suspension and training for Allegations #3 and #11 and one-day suspensions for Allegations #9 and #10.

The Department does not concur with COPA's sustained finding for Allegation #3 and believes it should be classified as "Unfounded." Furthermore, the Department does not concur with a recommended penalty of a three-day suspension for Allegations #3 and #11 and a one-day suspension for Allegations #9 and #10. The Department believes a "Violation Noted" is the appropriate penalty for each sustained allegation.

## C. Legal Background

### 1. Applicable Rules and Directives

Rule 2 prohibits any action or conduct which impedes the Department's efforts to achieve its policy and goals or brings discredit upon the Department.

Rule 6 prohibits disobedience of an order or directive, whether written or oral.

### 2. Legal Standard

The applicable legal standard is a **preponderance of evidence**, which can be described as evidence indicating that it is **more likely than not** that the conduct reviewed violated Department policy. *See Avery v. State Farm Mutual Automobile Insurance Co.*, 216 Ill. 2d 100, 191 (2005), (a proposition is proved by a preponderance of the evidence when it has found to be more probably true than not).

Officers may detain passengers of a vehicle during a valid traffic stop. *Brendlin v. California*, 551 U.S. 249, 251 (2007); *People v. Harris*, 228 Ill.2d 222, 248 (2008). However, officers may not handcuff vehicle occupants during every valid traffic stop. Courts have found that handcuffing is the type of action that may convert a valid investigatory stop or traffic stop into an unlawful arrest because it heightens the degree of intrusion and is not generally part of a stop. *See People v. Johnson*, 408 Ill. App. 3d 107, 113 (1st Dist. 2010) (citations omitted); *United States v. Glenna*, 878 F.2d 967, 971, 972 (7th Cir. 1989) (noting that the use of handcuffs "substantially aggravates the intrusiveness of a Terry stop" and finding the concept of officers handcuffing citizens without probable cause "troubling.") The use of handcuffs to restrain the person being detained is an indication that the detention is an arrest rather than a Terry stop." *People v. Arnold*, 394 Ill. App. 3d 63, 71 (2009). While courts recognize "[t]here are situations in which concerns for the safety of the police officer or the public justify handcuffing the detainee for the brief duration of an investigatory stop," officers may not handcuff vehicle occupants during every valid traffic stop. *Id.* The critical question is whether "the use of such restraints is [] reasonably necessary for safety under the specific facts of the case." *People v. Arnold*, 394 Ill. App. 3d 63, 71 (2d Dist. 2009).

## II. ANALYSIS

### A. Officers Nisivaco and Howard Handcuffed the Passengers Without Justification

The circumstances of the traffic stop did not justify Officers Nisivaco and Howard handcuffing the vehicle passengers for approximately thirty minutes.<sup>2</sup>

Neither Department nor Officers Nisivaco or Howard articulated any reasonable basis for believing the passengers in [REDACTED] vehicle posed a threat. Furthermore, Officers Nisivaco and Howard did not possess probable cause or reasonable, articulable suspicion to believe the passengers were involved in any criminal activity. The traffic stop, and associated investigative activity, related solely to [REDACTED]

The Department asserts handcuffing the passengers was justified because Officer Nisivaco was left alone with three adults while Officer Howard searched [REDACTED] vehicle. The Department's justification is incorrect.

There is **no** evidence that the passengers were hostile or were refusing to comply with lawful police officers. In fact, the Department identifies nine factors it contends justify the handcuffing of the passengers, but none of those factors relate to the passengers. Furthermore, [REDACTED] himself (the driver and only person suspected of criminal activity<sup>3</sup>) was lawfully handcuffed and therefore did not pose a reasonable threat to the officers. Under the circumstances, a reasonable officer with police training would have simply requested backup from other police officers in the area rather than unnecessarily handcuffing the passengers.<sup>4</sup> Furthermore, and of particular importance to the analysis of reasonableness, Officers Nisivaco and Howard had already conducted a pat-down of [REDACTED] and the passengers, and therefore knew that none of the vehicle occupants possessed any weapons. To permit the handcuffing of passengers under these circumstances – that the number of passengers outnumbered the officers – would essentially permit officers to handcuff all occupants of a vehicle during any traffic stop. This is entirely inconsistent with Illinois and Federal case-law. Consistent with case law, under the totality of the circumstances, Officers Nisivaco's and Howard's decision to place the passengers in handcuffs and restrain them for approximately thirty minutes was not reasonably necessary for their safety.<sup>5</sup>

### B. A Three (3) Day Suspension is Appropriate

A three-day concurrent suspension and training is appropriate for the four sustained allegations.

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<sup>2</sup> Not only were the passengers handcuffed, they were handcuffed to each other.

<sup>3</sup> Officers Nisivaco and Howard did not have any basis to believe [REDACTED] was involved with violent crime. The traffic stop related to [REDACTED] failure to use a turn signal, driving on a suspended license, and cannabis possession.

<sup>4</sup> Officers Nisivaco and Howard only requested a sergeant respond to the area with a citation for [REDACTED] cannabis possession.

<sup>5</sup> See *People v. Arnold*, 394 Ill. App. 3d 63, 71 (2d Dist. 2009).

Both Sustained Allegation #3 and Allegation #11 constitute misconduct which require actual discipline. Officers Nisivaco and Howard substantially – and unnecessarily – aggravated the intrusiveness of the detention by placing the passengers in handcuffs and demonstrated extremely poor judgment by permitting [REDACTED] to drive a vehicle when they knew he had a suspended license.

### III. CONCLUSION

For the reasons stated above, COPA concludes Officers Nisivaco and Howard handcuffed the passengers of [REDACTED] vehicle without justification. Accordingly, COPA respectfully requests that the Police Board reject the Department's non-concurrence and accept COPA's recommendations.

Respectfully,

[REDACTED]

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Sydney R. Roberts  
Chief Administrator  
Civilian Office of Police Accountability