

SUMMARY REPORT OF INVESTIGATION

I. EXECUTIVE SUMMARY

Date / Time of Incident:	October 2, 2018, approximately 8:30 p.m.
Location of Incident:	730 West 59th Street, Chicago, Illinois
Date / Time of COPA Notification:	October 4, 2018 approximately 5:33 p.m.

A civilian complained about his arrest by on-duty, uniformed CPD officers, which arose out of a traffic stop. Though the civilian stated that he believed that one of his headlights was not in fact working at the time of the stop, which was the officers' stated reason for the stop, he nevertheless alleged that the stop violated his claimed "right to travel freely," which he claimed was guaranteed by the Fourth Amendment to the U. S. Constitution. The civilian asserted numerous other complaints, including that the CPD broke a car window to remove him from his vehicle against his will, that CPD officers then unnecessarily roughed him up in placing him up against his vehicle to search him, and that a female CPD officer then conducted an over-the-clothes search of his body near his buttocks. [REDACTED] also complained that the CPD refused to provide him with bottled water and that the CPD did not return a cell phone to him.

COPA viewed video footage recorded by officers at the scene with body worn cameras. That footage confirms that a number of CPD officers, both male and female, did indeed arrest the civilian after breaking a window to extract the civilian from his car, but only after the civilian had refused numerous requests to produce his driver's license and proof of insurance and only after a CPD supervisor had warned the civilian that the CPD would break his window and forcibly remove him from his car if he persisted in his refusal. That footage also appeared to confirm the civilian's claim that a female officer had conducted an over-the-clothes search of the civilian's body near his buttocks, but it disproved the civilian's claim that CPD officers had otherwise used excessive force in arresting him.

COPA accordingly served allegations upon the searching officer, alleging that she committed misconduct by searching an arrestee of the opposite gender when male officers were readily available in violation of a CPD directive and further alleging that she then touched that arrestee's body, over his clothing and near his buttocks, without justification. During the officer's statement, she allowed that she might have touched the arrestee's body over-his-clothes during her search of him, and she admitted that male officers were then readily available. However, the officer contended that the search was not misconduct because it was a "pat down" conducted in accordance with her training.

COPA has sustained the allegations, finding that the officer's search of the civilian's body was impermissible, regardless of whether it could or could not be considered to be a pat down, because, like the directive governing custodial searches, the CPD directive governing pat downs also prohibits CPD members from conducting pat downs on persons of the opposite gender, except under exigent circumstances not presented here.

V. INVESTIGATION¹

a. Interviews

██████████ gave a recorded interview on October 4, 2018.² In material summary, ██████████ then described the incident under review, as follows:

██████████ had been driving westbound on West 59th Street near its intersection with South Halsted Street when he observed a police vehicle make a u-turn and pull behind him. He stopped his car, and two uniformed female officers then approached his vehicle, one to the driver side and one to the passenger side. The officers then informed ██████████ that his front light was out. The officers then told ██████████ to produce a license and proof of insurance; ██████████ refused, telling the officers that he did not want to give them a license or proof of insurance, that they should let him go, and that he would get the light fixed. The officers then called for a supervisor, who arrived at the scene and threatened to break ██████████ car window. ██████████ then demanded that the supervisor show him “three forms” of identification “for [him] to go under [the officers’] jurisdiction. ██████████ driver’s side window was open slightly, about six inches wide, but not enough so that the officers could reach in and unlock his door. The supervisor again demanded production of ██████████ license and proof of insurance; ██████████ again refused. The supervisor then called for backup and more officers arrived. ██████████ said to the supervisor, “Don’t break into my car, let me go,” and ██████████ cited the Fourth Amendment, saying that he knew that if he was in his house or his car the police could not break in. Backup officers then arrived and the supervisor asked if any of them wanted to break ██████████ window. One of the officers then stepped forward and broke a car window. ██████████ then unlocked his car and stepped out. The officers then took ██████████ to the back of his car, they placed him against the car, and they searched his person. During that search, a female officer touched ██████████ over his clothes, reaching her hand “between [his] butt area ... trying to force her finger in between [his] butt cheeks.”

██████████ tacitly acknowledged that one of his headlights was in fact broken at the time.³ ██████████ nevertheless claimed that his detention and arrest violated his constitutional right to “travel freely” without having to identify himself to anybody. In addition to the above, ██████████ also complained that the CPD refused to provide him with bottled water and that the CPD did not return a cell phone to him

Officer Bernadette T. Kelly gave a Statement on February 9, 2021.⁴ COPA permitted Officer Kelly to review body-worn camera [“BWC”] footage that she recorded during the incident under review, as well BWC footage then recorded by Officer Nunez.⁵ The following is a material summary (non-verbatim except where otherwise indicated) of that statement.

¹ COPA conducted a thorough and complete investigation. The following is a summary of the material evidence gathered and relied upon in our analysis.

² Attachment #13 is an audio recording of that interview.

³ *Id.*, 5:55 – 6:03. More specifically, ██████████ said, “They said it was not working so I believe it was not working.”

⁴ Attachments ##22 and 23 comprise an audio recording of that statement; Attachment #24 is a transcription of that recording.

⁵ See Attachment #24, p. 18, lines 23 - 24.

Officer Kelly characterized her search of [REDACTED] as a protective pat down. She said, “[s]o the way I was trained and the way to do a protective pat down is to put your hand up as far as it can go to search for hard objects. If ... my hand touches part of his skin through his clothing while I’m doing that job, that’s how you do a protective pat down.”⁶ Officer Kelly allowed that part of her hand “may have” touched through clothes part of [REDACTED] sex organs, his anus, or his buttocks while she conducted what she called a pat down.⁷ COPA then played part of the BWC footage recorded by Officer Nunez during the incident, and COPA directed Officer Kelly’s attention to [REDACTED] reaction (see Figure 2 below) as he was searched.⁸ In response to questions from COPA, Officer Kelly then allowed that she had no explanation as to why [REDACTED] gave that reaction.⁹ Officer Kelly also then allowed that she and [REDACTED] were of opposite genders and that male CPD officers had then been immediately available.¹⁰ Officer Kelly denied that her actions constituted a custodial search, and she gave the following explanation of her understanding of the difference between a pat down and a custodial search: “A pat down is an immediate search for weapons for officer safety and that’s what I did. ... A pat down is for feeling for weapons outside of the clothing. ... It’s used in emergency situations and for officer safety. Custodial search is going through pockets. It is taking off a sweatshirt or socks, things like that. That is not what I did out there.”¹¹

b. Digital Evidence

COPA accessed and reviewed **BWC-recorded video footage**¹² which shows, in material summary, that Officer Kelly and Officer Gloria Nunez initiated the traffic stop in question on October 2, 2018, at approximately 8:22 p.m.; that the officers radioed for a supervisor after [REDACTED] refused to provide a driver’s license or proof of insurance; that CPD Sgt Ryan P. Brown arrived at the scene and then he proceeded to repeatedly direct [REDACTED] to produce a driver’s license and proof of insurance; that Sgt. Brown warned [REDACTED] that his failure to comply would lead to his arrest and that officers would break a car window if necessary to effect that arrest; that Sgt. Brown then radioed for further assistance; that Officer Nunez then pleaded with [REDACTED] at length to comply; that, at Sgt. Brown’s direction, one of the responding officers used an expandable baton to break the car’s driver’s side rear window; that [REDACTED] then exited the car under his own power; that a number of officers, including Officer Kelly and male officers, then escorted [REDACTED] to the rear of his car; that the officers then placed [REDACTED] against the trunk of his car, facing away from the officers in a standing position, leaning towards the car, with his legs spread apart and with his hands on the trunk; and that Officer Kelly then searched [REDACTED] as four male officers held him or stood closely by.

The footage further shows that as Officer Kelly searched [REDACTED] she apparently placed her right arm between [REDACTED] legs and reached upward. (See Figure 1 below.) The footage also shows that [REDACTED] looks back quickly and audibly reacts (see Figure 2 below).

⁶ See *id.*, p. 19, line 22, through p. 20, line 3.

⁷ See *id.*, p. 20, lines 7 - 23.

⁸ See *id.*, p. 21, lines 3 - 23.

⁹ See *id.*, p. 22, line 1, through p. 23, line 19.

¹⁰ See *id.*, p. 25, line 6, through p. 26, line 1.

¹¹ See *id.*, p. 26, line 3, through p. 28, line 15.

¹² Attachment #5.

Figure 1¹³Figure 2¹⁴

c. Documentary Evidence

The **Arrest Report** and **Original Incident Case Report** associated with the incident indicate that the CPD charged [REDACTED] with various traffic offenses and with the criminal offense of resisting or obstructing a police officer.¹⁵

VI. LEGAL STANDARD

For each Allegation, COPA must make one of the following findings:

- 1.- Sustained - where it is determined the allegation is supported by a preponderance of the evidence;
2. Not Sustained - where it is determined there is insufficient evidence to prove the allegations by a preponderance of the evidence;
3. Unfounded - where it is determined by clear and convincing evidence that an allegation is false or not factual; or
4. Exonerated - where it is determined by clear and convincing evidence that the conduct described in the allegation occurred, but it is lawful and proper.

A **preponderance of evidence** can be described as evidence indicating that it is **more likely than not** that the conduct reviewed complied with 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). If the evidence gathered in an investigation establishes that it is more likely that the conduct complied with Department policy than that it did not, even if by a narrow margin, then the preponderance of the evidence standard is met.

¹³ *Id.*, Nunez BWC footage at approximately 01:31:37Z. (Because video footage recorded by CPD body-worn cameras is time-marked using Greenwich Mean Time (or “Zulu Time”) styled designations, COPA here uses those same designations throughout.)

¹⁴ *Id.*, Nunez BWC footage at approximately 01:31:38Z.

¹⁵ Attachments ## 8 and 9.

Clear and convincing evidence is a higher standard than a preponderance of the evidence but lower than the “beyond-a-reasonable doubt” standard required to convict a person of a criminal offense. See *e.g. People v. Coan*, 2016 IL App (2d) 151036 (2016). Clear and convincing can be defined as a “degree of proof, which, considering all the evidence in the case, produces the firm and abiding belief that it is highly probable that the proposition . . . is true.” *Id.* at ¶ 28.

VII. ANALYSIS

1. Allegation #1

The applicable CPD directive provides, in part

Custodial searches will be conducted by a member who is the same gender as the arrestee; however, if a member of the same gender is not immediately available and officer or citizen safety is compromised absent an immediate search, members will not endanger themselves or the public to comply with this requirement.¹⁶

The evidence shows that Officer Kelly violated that part of the directive when she searched ██████████ at the arrest scene. Officer Kelly has acknowledged that she is not of the same gender as ██████████. Officer Kelly has also admitted (and video evidence shows) that CPD members who were of the same gender as ██████████ were immediately available. Indeed, video evidence shows that at least four male officers participated in the search under review, either by holding ██████████ or by standing close by. Due to the presence of those officers, COPA finds that Officer Kelly would not have endangered herself or the public if she had refrained from participating in the search.

Officer Kelly is incorrect to claim that her search of ██████████ was a pat down, not a custodial search, and that the search was therefore permissible. The search was in fact impermissible, regardless of whether it should be considered to be a pat down, because, like the directive governing custodial searches, the CPD directive governing pat downs also prohibits CPD members from conducting pat downs on persons of the opposite gender, except under extraordinary circumstances not presented here.¹⁷

Officer Kelly’s search of ██████████ therefore constituted a violation of multiple CPD Rules of Conduct. Allegation #1 is accordingly SUSTAINED.

2. Allegation #2

The preponderance of the evidence supports the allegation. ██████████ has claimed that Officer Kelly touched him over his clothes and near his buttocks, and Officer Kelly does not deny

¹⁶ See G06-01-02 *Restraining Arrestees* (effective December 8, 2017), Section IV.C. The directive defines “custodial search” as “a warrantless search of a person under arrest with or without probable cause to believe there is any contraband or evidence subject to seizure on the person.” See *id.*, at Section IV.A.

¹⁷ See S04-13-09 *Investigatory Stop System* (effective July 10, 2017), Section VI.A.2. That directive defines a protective pat down as “A limited search during an Investigatory Stop which the sworn member conducts a pat down of the outer clothing of a person for weapons for the protection of the sworn member or others in the area.” See *id.* at Section II.B.

the allegation. Instead, she has allowed that she may have touched (through clothes) part of [REDACTED] sex organs, his anus, or his buttocks. [REDACTED] reaction, depicted by bwc-recorded video, shows that she probably did. Officer Kelly’s search of [REDACTED] therefore violated Rule 8 of the CPD Rules of Conduct, which prohibits maltreatment. Allegation #2 is accordingly SUSTAINED.

VIII. CONCLUSION

Based on the analysis set forth above, COPA makes the following findings:

Officer	Allegation	Finding / Recommendation
Officer Kelly	<p>On October 2, 2018, at approximately 8:32 p.m., at or near 730 W. 59th Street, Chicago, Illinois, Officer Bernadette T. Kelly committed misconduct through the following acts or omissions:</p> <ol style="list-style-type: none"> Officer Kelly conducted or participated in the conduct of a custodial search of the person of [REDACTED] notwithstanding that Officer Kelly was not of the same gender as [REDACTED] when one or more CPD members of the same gender as [REDACTED] were immediately available, in violation of certain provisions of CPD General Order G06-01-02 Restraining Arrestees (effective December 8, 2017). During the course of a custodial search of the person of [REDACTED] Officer Kelly touched (through clothing) [REDACTED] sex organs, anus, buttocks, and/or an area of [REDACTED] body immediately adjacent to his sex organs, anus and buttocks, without justification. 	<p>SUSTAINED</p> <p>SUSTAINED</p>

IX. RECOMMENDED DISCIPLINE FOR SUSTAINED ALLEGATIONS

a. Officer Bernadette T. Kelly

In considering disciplinary recommendations for sustained findings, COPA reviewed Officer Kelly’s disciplinary and complimentary histories. Officer Kelly has no sustained complaints and two SPARS for failure to perform assigned tasks in February 2021. She received reprimands as a result of both incidents. Officer Kelly has received 63 awards, including one life saving award, three Department commendations, four complimentary letters, and 50 honorable mentions.

i. Recommended Penalty

COPA has found that Officer Kelly violated Rules 2, 3, 6, 8, and 11 when she searched a person of the opposite gender absent any exigent circumstance.

CPD policy generally requires that any search of an individual to be performed by officers of the same gender, in order to prevent sexual abuse, gender-based humiliation, and other indignities. Officer Kelly’s flagrant violation of CPD policy is further aggravated by Officer Kelly choice to search ██████ despite multiple male officers being present and available to perform the search. Furthermore, Kelly did not deny touched (through clothes) part of ██████ sex organs, his anus, or his buttocks, unnecessary steps that made the search more intrusive. In sum, Officer Kelly’s actions violated the Department’s rules and directives and constituted a gross breach of public trust that citizens will not be exposed to indignity or abuse at the hands of Chicago police officers. For all these reasons, COPA recommends that Officer Kelly be **separated** from the Chicago Police Department.

X. CONCLUSION

Based on the analysis set forth above, COPA makes the following findings:

Officer	Allegation	Finding / Recommendation
Officer Kelly	<p>On October 2, 2018, at approximately 8:32 p.m., at or near 730 W. 59th Street, Chicago, Illinois, Officer Bernadette T. Kelly committed misconduct through the following acts or omissions:</p> <ol style="list-style-type: none"> Officer Kelly conducted or participated in the conduct of a custodial search of the person of ██████ notwithstanding that Officer Kelly was not of the same gender as ██████ when one or more CPD members of the same gender as ██████ were immediately available, in violation of certain provisions of CPD General Order G06-01-02 Restraining Arrestees (effective December 8, 2017). During the course of a custodial search of the person of ██████ Officer Kelly touched (through clothing) ██████ sex organs, anus, buttocks, and/or an area of ██████ body immediately adjacent to his sex organs, anus and buttocks, without justification. 	<p>SUSTAINED</p> <p>SUSTAINED</p>

Approved:



2/24/2022

Matthew Haynam
Deputy Chief Investigator

Date