



**PROPOSED RESOLUTION REPORT
MNCO D2021-005**

I. Allegations of Misconduct

Against Officer 1

1. **Deficient or Inefficient Performance of Duties; to wit, Juvenile Custodial Interrogation**
2. **Honesty and Truthfulness**
3. **Discourtesy**
4. **Self-Control**
5. **Determining “Reasonableness” of Force**
6. **Adherence to Rules and Policy; to wit, Prior to Taking Juveniles into Custody**

II. Summary of Complaint Allegations

On March 28, 2021, Officer-1 observed three minor children panhandling. Officer-1, along with other Officers, engaged in a pursuit of the minor children. After a foot chase of Child-3, Officer-1 handcuffed him and observed the smell of marijuana. Officer-1 walked Child-3 to a patrol car, where Officer-1 began to search the minor. Officer-1 used an “elbow pocket” technique to prevent the minor from moving during the search. A group of civilians watched the search of the minor. Officer-1 approached the group of civilians and informed them what was happening and why he had to search the minors and had them in the back of patrol vehicles. Officer-1 showed the civilians the marijuana he had found on Child-3. Officer-1 again approached the group of civilians where he began to apologize, called himself a “dick” and continued on in a disagreement with the civilian onlookers. MNPD’s Office of Professional Accountability initiated an investigation based on a social media post and other email’s alleged that Officer-1 wrongfully and unfairly arrested a juvenile for aggressive panhandling and used excessive force. The OPA cleared Officer-1 of any wrongdoing. MNCO initiated an audit of that office’s investigation.

III. Policy Violation

MNPD Manual 4.20.040 (A) Adherence to Policy & Rules of the Metropolitan Government

Employees shall adhere to all policies, procedures, rules, regulations, ethical codes, and administrative or executive orders as established by the department of Metropolitan Government (Category varies by corresponding violation but generally classified as Category D unless otherwise stated)

To Wit:

16.10.020 Prior to Taking Juveniles into Custody

A. An officer shall determine whether the juvenile is alleged to have engaged in criminal or non-criminal behavior (a status offense)

MNPD Manual 4.20.040 (H) Honesty & Truthfulness

Employees shall be honest and truthful. Truthfulness shall apply when an employee knowingly or intentionally makes a materially false statement. A statement is material when, irrespective of its admissibility under the rules of evidence, it could have affected the course or outcome of an investigation, an official proceeding, or any inquiry regarding employment or job-related duties or responsibilities. (*Category AA*)

MNPD Manual 4.20.040 (O) Self-Control

Employees shall not argue unnecessarily with any person or otherwise show a lack of self-control. (Generally, a Category D but may vary by severity of violation).

MNPD Manual 4.20.040 (J) Profanity

Employees, in the performance of their duties and in the presence of members of the public, shall avoid the use of indecent or profane language or gestures and will maintain objective attitudes regardless of any provocation. (Category F)

MNPD Manual 4.20.040 (G) Courtesy

Employees shall be courteous, civil, and respectful toward all persons and shall make every effort to meet the needs of citizens requesting assistance. (*Category F*)

MNPD Manual 4.20.050 (F) Deficient or Inefficient Performance of Duties

Employees shall be efficient, productive, and competent in the performance of their duties. Deficient or inefficient performance is generally corrected through the daily interaction of an employee and his/her supervisor. Such actions may include guidance, training, and/or formal or informal counseling. However, those occasions that represent a documented pattern of deficient or inefficient performance, or a significant occurrence, that has not been previously addressed or documented, may be grounds for corrective/disciplinary action.

Examples include, but are not limited to, the following: 1. Demonstrated inefficiency, negligence, or incompetence in the performance of duties; 2. Unsatisfactory quality of work; ... 6. Faulty decision making or poor judgment; 7. Inaccuracy of work; ... (Category varies by severity of violation)

To wit:

15.30.040 (B) Custodial Interrogation of Juveniles

1. Whenever an officer is investigating a criminal offense involving a juvenile in custody, the officer shall advise the juvenile of his constitutional rights prior to interrogating them. MNPD Form 266, Rights Waiver Form, shall be completed.

2. The officer shall exercise special care in advising a juvenile of their rights. Factors to consider when determining whether the juvenile sufficiently understands and can voluntarily waive their rights include, but may not be limited to:

- a. age of the juvenile;
- b. consideration of all circumstances surrounding the interrogation including the juvenile's experience, education, and intelligence;
- c. the juvenile's capacity to understand the Miranda warnings and the consequences of the waiver;
- d. the juvenile's familiarity with Miranda warnings or the ability to read and write in the language used to give the warnings;
- e. whether the defendant is suffering from any injury or pain at the time the statement is given;
- f. the duration of the questioning;
- g. time of day;
- h. length of confinement;
- i. whether defendant was cuffed or threatened;
- j. whether defendant was refused the use of bathroom, food, or drink;
- k. whether there was a promise of leniency;
- l. familiarity with English or the official language;
- m. any intoxication;
- n. any mental disease, disorder, or retardation;
- o. the presence of a parent, guardian, or interested adult; and
- p. whether the police prevented a concerned adult from speaking with the juvenile, which is a significant factor.

3. The officer will give consideration to conferring with parents or guardians prior to conducting the interrogation, particularly in the case of younger or mentally delayed juveniles.

4. The number of officers involved in the custodial interrogation of a juvenile should be limited to two when possible and practical. The juvenile should not be interrogated for any extended period of time.

MNPD Manual 11.10.030(A) Determining "Reasonableness" of Force

1. Pursuant to the opinion issued by the United States Supreme Court in *Graham v. Connor*, the reasonableness of any particular force used shall be examined from the perspective of a reasonable MNPD Officer, with similar training and experience, based on the same facts and circumstances.

2. Factors used to determine "reasonableness" may include, but are not limited to:

- a. The feasibility of using de-escalation tactics, crisis intervention or other alternatives to force;
- b. The seriousness of the crime or suspected offense;
- c. The level of threat or resistance presented by the subject;

- d. Whether the subject was posing an immediate threat to officers or a danger to the community;
- e. The potential for injury to citizens, officers or subjects;
- f. The risk or apparent attempt by the subject to escape;
- g. The conduct of the subject being confronted (as reasonably perceived by the officer at the time);
- h. The amount of time and any changing circumstances during which the officer had to determine the type and amount of force that appeared to be reasonable;
- i. The availability of other resources;
- j. The training and experience of the officer;
- k. The proximity or access of weapons to the subject;
- l. Officer versus subject factors such as age, size, relative strength, skill level, injury/exhaustion and number of officers versus subjects; and
- m. The environmental factors and/or other exigent circumstances.

IV. Timeline

Complaint Received	March 29, 2021
Complaint Assigned	March 29, 2021
Witness Statement Received	March 29, 2021
Records Requested	Not recorded
Notices of Complaint Sent to MNPD employees	March 30, 2021
Personnel files and Incident Report received	August 5, 2021
BWC Received	April 12, 2021
Complainant Interviewed	September 15, 2021,
OPA Report	April 20, 2022
Draft Investigative Report Submitted	August 4, 2023
Final Investigative Report Approved	August 4, 2023
Draft Proposed Resolution Report Submitted	August 21, 2023
Proposed Resolution Report Submitted	August 21, 2023
Presented to Board	August 28, 2023

V. Executive Director Review

Executive Director Fitchard received the Investigative file, and it contained the following information, which was carefully reviewed:

1. BWC Officer-1
2. OPA Summary of Interview with Officer-1
3. OPA Conclusions
4. Supplement Report
5. Incident Detailed Report

6. Email to MNP
7. Instagram Screenshots
8. Complaint Email from OPA Director
9. Officer-1 OPA Interview
10. Officer-1 MNCO Interview
11. Anonymous Witness MNCO Interview

VI. Findings of Fact

1. On March 28, 2021, Officer-1 was traveling near 21st Avenue South when he and another officer observed three male juveniles with signs requesting donations for fictitious sports teams.¹
2. Officer-1 and other officers attempted to make contact with the juveniles and all three fled. Child-1 stopped running and was cooperative with Officer-1. He was not handcuffed and was ultimately driven to and released to his grandmother.
3. After Officer-1 handed Child-1 to another officer to obtain contact information for a parent or guardian, Officer-1 left to pursue the other two minors.
4. Body Worn Camera shows Officer-1 spot Child-3 and engage in a foot chase. Officer-1 apprehended Child-3 and immediately notes the smell of marijuana upon apprehension.
5. Body Worn Camera shows Officer-1 place Child-3 in handcuffs and walk Child-3 back to the patrol car.
6. Body Worn Camera shows Officer-1 ask Child-3 “[w]here’s the weed?” to which Child-3 responds that it is in his pocket. Officer-1 rotates Child-3 so his chest is facing the patrol car as Officer-1 continues to ask which pocket the marijuana is located. Officer-1 and Child-3 go back and forth on which pocket the marijuana is located as Officer-1 searches the minor. Child-3 turns to present a pant pocket saying “[t]his one. I’m trying to turn so you can get it bro.”
7. Body Worn Camera shows Officer-1 engage in his “elbow pocket” tactic, where he faces the minor’s chest to the patrol car and puts his hand through the minor’s elbow pocket onto the patrol car, thus limiting Child-3s movement and putting his chest on the side of the patrol car. Child-3 does not appear to be resisting any of Officer-1’s commands.
8. Body Worn Camera shows Officer-1 pull out a bag of marijuana from Child-3’s pant pocket, along with other personal belongings. Officer-1 hands off the minor to another officer as he gets evidence bags from the back of his patrol car.
9. Body Worn Camera shows Officer-1 ask Child-3 his name and date of birth, which Child-3 gives. Officer-1 then instructs Child-3 that everything found in his pockets, except for the marijuana, will be returned to his parents, and tells Child-3 he will be charged with the marijuana.

¹MNPD OPA investigation confirms that MNPD has received numerous complaints in the area regarding aggressive panhandling in the area by juveniles and have confirmed that the sports teams they advertise they are raising money for are fictitious.

10. Officer-1 continues to check the back pockets of Child-3, tells Child-3 to turn, tells him to “spread ‘em” referring to the minor’s legs, as he continues to pat down Child-3.
11. Body Worn Camera shows Officer-1 observe a group of female civilians watching and filming. Officer-1 approaches the civilians, to which they ask Officer-1 if he read the two minor’s their rights. Officer-1 tells the civilians that he didn’t read Miranda warnings because “I haven’t asked him any questions.” Officer-1 and the group of civilians continue to engage, where Officer-1 states that Child-3 is “going to be taken to juvenile.” This conversation continues into an argument between the civilians and Officer-1. Officer-1 leaves to walk back towards the patrol car.
12. Body Worn Camera shows Officer-1 help Child-1 and Child-3 contact their parents and guardians to inform them of the incident and coordinates with the parents and guardians for officers to drop the minor’s off at their residences. Officer-1 call’s the mother of Child-3 “hon” when on the phone with her.
13. Body Worn Camera shows Officer-1 holding up the bag of marijuana confiscated from Child-3 to the group of civilians telling them that this was found in Child-3’s pocket.
14. Body Worn Camera Shows Officer-1 informing Child-1 he needs to search him before he rides in the back of the patrol car to make sure he doesn’t have any weapons. Officer-1 goes through Child-1’s pockets and pulls out a wad of bills and goes through them, he asks Child-1, “[y]ou don’t got no like dope wadded up in here. I’m not sayin that you do, I’m just asking you questions, a’ight? That’s all. Cause I don’t like surprises that’s all.”
15. Body Worn Camera shows Officer-1 approach the group of civilian women again and state “[s]o, ladies, I wanna start over. OK? First and foremost I wanna apologize for any misinformation y’all may have received if I came off as a dick earlier, I do wholeheartedly apologize. [Officer-1 detaches his BWC unit and turns it 180 degrees, toward his own face.] I’m apologizing, just letting you know.” Officer-1 then informs the group of civilians about the panhandling incidents and why the minors were apprehended, and that they were taking the minor’s home. The group of civilians and Officer-1 continue on in a disagreement over police interactions with the minors and why the civilians were concerned due to recent events of police brutality which were being publicized in the news at the time. Officer-1 ends the conversation, gets in the patrol car with another Officer and Child-1 and drives the minor home.
16. MNPDP OPA opened an investigation into Officer-1 after receiving emails and Instagram posts of Officer-1 engaging Child-3 in the elbow pocket tactic against a patrol car and alleging police misconduct in the arrest of the two juveniles. The OPA investigation was into MNPDP Policy 4.20.040 Department and Personal Appearance, Personal Behavior-Adherence to Policy and Rules of the Metropolitan Government, to wit, 16.10.020 Prior to Taking Juveniles into Custody.
17. MNPDP OPA conducted an interview with Officer-1 reviewing the body camera footage and reviewing the incident. Officer-1 stated that he probably should not have told Child-3 that he would be going to juvenile and admitted it as a mistake. Officer-1 stated in his OPA interview that he could have handled the interactions with the group of civilians

better, specifically that he shouldn't have shown them the bag of marijuana, shouldn't have used the word "dick" in describing his behavior to the civilians.

18. MNPDP OPA recommended that Officer-1 be exonerated for potential policy violations, stating that Officer-1's "actions were consistent with established policy, rules, and procedures."

Discussion/Analysis

A. Adherence to Policy and Rules of the Metropolitan Government

Under MNPDP Policy 4.20.040(A), employees shall adhere to all policies, procedures, rules, regulations, ethical codes and administrative or executive orders established by Metropolitan Government. Relevant to this is MNPDP Policy 16.10.020 Prior to Taking Juveniles into Custody, which states that an officer "shall determine whether the juvenile is alleged to have engaged in criminal or non-criminal behavior.

Here, prior to Officer-1 taking Child-3 into custody, Officer-1 had probable cause based on prior observations made that day, that Child-3 was engaging in panhandling. Further, upon apprehending Child-3 Officer-1 immediately noted the odor of marijuana coming from Child-3. This allowed Officer-1 to conduct a search of Child-3, which led to the discovery of a bag of marijuana on Child-3. Panhandling and possession of marijuana are both criminal, non-status offenses. Therefore, it was proper for Officer-1 to take Child-3 into custody.

B. Honesty and Truthfulness

MNPDP Policy 4.20.040(H) states that employees shall be honest and truthful. Truthfulness applies when an employee knowingly or intentionally makes a materially false statement. A statement is material when, irrespective of its admissibility under the rules of evidence, it could have affected the outcome of an investigation, official proceeding, or an inquiry regarding employment or job-related duties or responsibilities.

Here, Officer-1 tells the civilians that he has not asked Child-3 any questions that would warrant the use of Miranda Warnings. However, Body Worn Camera shows that Officer-1 did ask Child-3 about where the marijuana was located, the name of the minor, his date of birth, and whether the minor was ever arrested before. These questions were investigatory in nature. These assertions to the civilian onlookers, while they were false, are not material as they would have no bearing on the outcome of a court proceeding or investigation involving the juvenile. Whether Officer-1 should have engaged in a conversation with the group of civilians about Mirandizing the minor or what questions were or were not asked is, rather, a discourtesy and will be addressed in Section C.

Further, Officer-1 states to the minor that “[y]ou’re thirteen, you don’t have legal possessions until you turn 18” referring to the cash that was confiscated from Child-3’s pocket. Officer-1 also tells the minor that he is going to “juvenile.” While Officer-1 does not take Child-3 to juvenile detention, it appears that if Officer-3 was not able to have a parent or guardian pick up Child-3, he could have taken Child-3 to juvenile detention center. These statements to Child-3 do not appear to be material within MNPDP policy and do not give rise to a violation of MNPDP Policy for Honesty and Truthfulness.

C. Courtesy, Profanity, and Self-Control

MNPDP Policy 4.20.040(G) states that employees shall be courteous, civil, and respectful to all persons. Here, Officer-1 used language inappropriate for use with a thirteen-year-old child. Specifically, telling the child to “smile” because he was on camera and telling the child to “spread ‘em” when conducting a pat-down is discourteous. Officer-1 also asks Child-1 if he has dope hidden in his pocket. Further, Officer-1 took the bag of marijuana found on Child-3 and waived it at the group of civilians, telling them that it was found in Child-3’s pocket, trying to justify the incident to the group of civilian onlookers. The marijuana was evidence of a juvenile offense, and it was extremely inappropriate for it to be waived around to civilians as proof that the events for that day were justified, or in an attempt to prove the civilians wrong in how they felt about officer’s handling of the juveniles.

The subsequent conversation that Officer-1 has with the group of civilians, where he gets into a disagreement with them and asks if they are aware of the minor’s juvenile criminal history and stating to them that the minor isn’t traumatized by being handcuffed and put into a patrol car because he has a criminal history is extremely inappropriate. It is both discourteous and disrespectful for an officer to disclose to a group of civilian onlookers a juvenile’s arrest history and criminal record, alluding to the extensiveness of it.

The disagreement Officer-1 has with the group of civilians is a further violation of MNPDP Policy 4.20.040(O) Self Control, which states that employees shall not argue unnecessarily with any person or show a lack of self-control. While Officer-1 never yelled or used an aggressive tone with the group of civilians, it was inappropriate for him to argue with the civilians on two separate occasions when it was clear that the nature of the conversation was one of disagreement. Officer-1 arguing with the group of civilians about Miranda warnings and whether they were appropriate in this situation, arguing about whether police traumatized the minor’s by handcuffing them and leaving them in patrol cars, and police misconduct within Nashville was inappropriate and a clear violation of MNPDP Policy for Courtesy and Self- Control. Officer-1 admits that he should have handled the conversations with the civilians differently in his interview with OPA.

Lastly, MNPDP 4.20.040(J) states that employees, in the performance of their duties and in the presence of the public, shall avoid the use of indecent or profane language or gestures. Here, Officer-1 referred to himself as a “dick” when talking to the group of civilians. The use of this

sexual term by a male officer to a group of female onlookers was inappropriate and constituted profanity. Officer-1 admits in his interview with OPA that the use of the word “dick” was inappropriate and that a different word or phrasing should have been used. While Officer-1 did refer to the mother of Child-3 as “Hon”, this does not give rise to a violation for use of profanity, but should be noted as disrespectful, discourteous, and inappropriate.

D. Deficient or Inefficient Performance of Duties

Under MNPD Policy 4.20.050(F) deficient or inefficient performance of duties is when an officer demonstrates negligence or incompetence in the performance of his or her duties. Relevant to whether officers were deficient or inefficient in the performance of their duties is MNPD Policy 15.30.040 (B), Custodial Interrogation of Juveniles. Here, Officer-1 engaged in questioning of Child-3, asking him his name, date of birth, whether he was arrested before, and asking him where the marijuana was located on him. This line of questioning occurred while Child-3 was handcuffed. Policy directs that officers “shall” get a Form 266 signed and “shall” consider the listed factors before questioning a juvenile. These are mandates, not recommendations. Because the questioning was limited, the violation amounts to a Deficient Performance of Duties, rather than an Obstruction of Rights as to Child 3’s rights under the Fifth Amendment. The questioning of Child-3 by Officer-1 was inappropriate without a Form 266 form completed, and therefore constitutes a violation of policy.

E. Determining Reasonableness of Force

MNPD Policy 11.10.030(A) outlines the determination in the reasonableness of force used by officers. Here, there are two instances of force used by Officer-1 on Child-3: handcuffing and the elbow-pocket technique. First, the handcuffing of Child-3 was appropriate and reasonable under MNPD policy. While panhandling is not itself a serious crime under the factors used to evaluate “reasonableness,” Child-3 did run from officers after receiving multiple verbal commands to stop. One of Child-3’s co-defendants had already fled the scene and Officer-1 viewed Child-3 as a “flight risk” within factor (f). Comparatively, Officer-1 did not handcuff Child-1 due to Child-1 listening to officer commands to stop and cooperation. This shows Officer-1 appropriately applying the factors laid out in MNPD 11.10.030(A)(2).

Second, the elbow pocket technique used by Officer-1 appeared to be within policy. The assertion in the OPA interviews and findings that the elbow pocket technique is not a use of force is inaccurate, as elbow pocket technique is a use of physical leverage, applied by Officer-1’s body to limit the motion of Child-3’s body. Under the factors for reasonableness, Officer-1’s assessment that Child-3 was a flight risk and use of the elbow pocket technique was, from the position of a reasonable officer, an appropriate and minimal application of force to ensure Child-3 was compliant without causing harm. The other physical contact discussed in the OPA file, Officer-1 pulling up the minor’s pants, was not concerning, as Child-3’s pants were worn low and

the effort to pull them up as they continued to fall lower does not appear to be inappropriate but helpful, which can be seen in the Body Camera Footage of Officer-1.

F. MNCO's Conclusion of OPA's Investigation

MNCO reviewed the OPA Investigation and found it to be severely deficient. The investigation minimized and misstated the allegations of the original complaint, failed to interview key witnesses, and contained evidence of bias.

First, the investigation itself distorted the statements of the complaint. The OPA Investigative Summary lists the "Statement of Complaint," as follows: "The Office of Professional Accountability was directed to look into a social media post which alleged Officer- 1 handcuffed and arrested an eight-year-old boy after he was trying to raise money for his basketball team." The actual social media post did allege that the child "was arrested for trying to raise money for their basketball team" but also reported accurately that the arrest was for panhandling. OPA's Statement of Complaint neglects the serious concerns raised: the arrest and use of force on two juveniles by police.

Similarly, an email within the OPA investigation file shows the OPA Director's minimizing the seriousness of potential use of force by Officer-1 stating that the photograph of Officer-1 using the elbow pocket technique with Child-3 against the patrol vehicle "[l]ooks Photoshop to me." The Sergeant who lead the OPA investigation attempted to speak with minor- 3's mother, but she failed to show up. The OPA Director report notes that "none of the [female civilian onlookers] involved have voiced any concerns with the Office of Professional Accountability" and notes the e-mail received voicing concerns about the incident, however the report does not reflect any attempts by OPA to identify or contact the women to be interviewed, nor to contact the author of the Instagram post or author of the email. Instagram has a messaging feature which could easily have been utilized to attempt contact with the individual who posted the photos.

Additionally, OPA did not interview any officers who were with Officer-1 during the incident. Three other officers were present during the incident and could have offered valuable observations and insights, whether they agreed or disagreed with his actions. Their input is especially valuable because Officer-1 was an FTO, and apparently therefore the highest-ranking officer present.

OPA's deficient investigation yielded deficient conclusions. By misstating the concerns raised in the Instagram post, OPA narrowed their inquiry only to whether Officer-1 appropriately determined if Child-3 "engaged in criminal or non-criminal behavior (a status offense)." That conclusion may be an accurate statement in isolation, but it, like the investigation supporting it, were inadequate to address the myriad concerning elements of the encounter. We recommend the OPA investigation be determined to be DEFICIENT.

VII. Mediation

Mediation was not offered due to the nature of the complaint.

VIII. Conclusion

By a preponderance of the evidence reviewed, the Executive Director concludes the allegation of Discourtesy, Self-Control, Profanity, and Deficient or Inefficient Performance of Duties against Officer-1 **sustained**.

By a preponderance of the evidence reviewed, the Executive Director concludes the allegation of Adherence to rules and Policy to wit Prior to taking Juveniles into Custody and Use of Force against, and Honesty and Truthfulness Officer-1 **not sustained**.

IX. Recommended Action

Officer-1 has sustained violations for Discourtesy (a category F offense), Deficient or Inefficient Performance of Duties (category varies by severity of offense), Self-Control (generally a category D offense, but may vary depending on severity), Profanity (a category F offense). A review of Officer-1’s disciplinary file reveals no relevant disciplinary violations within the retention period. A Category F offense is generally disciplined with formal counseling or verbal reprimand. A category D offense is generally disciplined with a 1–4-day suspension. The Executive Director recommends formal counseling for the Discourtesy and Profanity, and a 4-day suspension for the Self-Control.

Submitted to the Community Oversight Board for Approval on Monday August 28, 2023

Jill Fitchard, Executive Director

Date

Board Recommendations:

_____ Accept/Send to MNPD Chief of Police

_____ Accept, but Modify

_____ Reject

_____ Return to MNCO Staff

BOARD RECOMMENDED MODIFICATION:

Alisha Haddock, Chair

Date