City of Cleveland Memorandum
Frank G. Jackson, Mayor

TO: Jason Goodrick, Executive Director
Cleveland Police Commission

FROM: Calvin D. Williams, Chief
Cleveland Division of Police CDW

SUBJECT: CPC Policy Recommendations

DATE: October 20, 2021

I have reviewed the policy recommendations from the Cleveland Police Commission for Strip Searches & Body Cavity Searches, the Miranda Warning and Waiver, Investigatory Stops, Probable Cause/Warrantless Arrest and Search and Seizure. Please refer to the individual annual reviews from the Bureau of Compliance for Cleveland Division of Police acceptance or declination of the policy changes. Thank you for the Cleveland Police Commission's effort in making positive changes to Division policy for continuous improvement

BC

Division of Police

Cleveland, Ohio

Departmental Information

Dist. **Zone**

October 11

Examined by BPS 6127 **Rank** Cmdr 10-20, 2021

From: Robert Simon, Captain **To:** Brian Carney, Commander

Subject: CPC Recommendations c/w Annual Review of Strip Searches & Body Cavity Searches

Copies to: Chief's Office, Unit Files

Sir:

As part of the annual review of Settlement Agreement policies the Division of Police solicited recommendations from the Cleveland Police Commission (CPC) as we reviewed the Strip Searches & Body Cavity Searches policy during the month of September.

The CPC provided recommendations on September 14, 2021 for revision of the Strip Searches & Body Cavity Searches policy from their Search and Seizure workgroup.

The Office of Compliance has carefully reviewed the recommendations of the CPC Search and Seizure workgroup as part of the annual research and review of the Strip Searches & Body Cavity Searches policy which is a review to ensure the policy remains consistent with the Settlement Agreement and current law, while providing effective direction to the members of the Cleveland Division of Police (CDP).

The CPC recommendations and the outcome of the research and review of the recommendations for the Miranda Warning and Waiver policy are as follows:

1.) Retitle the definition of Juvenile to Youth/Juvenile.

Revising/Retitling this definition will utilize the same title used in the Interactions with Youth policy. CDP accepts this recommendation.

2.) Revision of Procedures, I., A. - Recommendation to add the word "only" to the section.

Section I. A. was drafted based on the requirements of O.R.C. Section 2933.32 and approved by the Federal Court. The word "only" is not included in the O.R.C section. CDP declines this recommendation.

3.) Revision of Procedures, I., B. - Recommendation to revise the section by changing "articulable facts" to "probable cause".

The recommended language revision by the CPC, reduces the clarity of the policy for officers. Section I. A. of the policy states there must be probable cause to perform a strip search or body cavity search. This section is noting that the factors used develop probable cause need to be supported by articulable facts. Changing the language to "probable cause" is repetitive and does not fit the meaning of the section. CDP declines this recommendation.

4.) Revision of Procedures, I., C. - Recommendation to add "in an age appropriate manner."

CDP accepts this recommended revision.

Division of Police

Cleveland, Ohio

Departmental Information

Dist. **Zone**

October 11

Examined by_____ **Rank**_____ _____, 2021

From: Robert Simon, Captain **To:** Brian Carney, Commander

Subject: CPC Recommendations c/w Annual Review of Strip Searches & Body Cavity Searches

Copies to: Chief's Office, Unit Files

5.) Revision of Procedures, II., D. - Recommendation to revise the section by changing **"make a reasonable effort to"** notify a parent/guardian and "shall document **such efforts"** to "**immediately"** notify a parent/guardian and "shall document **time of notification"**

This recommendation from the CPC was made during discussions prior to the approval of the search and seizure policies by the Federal Court. During those discussions the CDP explained why this language was not included. CDP declines this recommendation.

6.) Revision of Procedures, III., B., 2. - Recommendation to add "and age appropriate manner."

Section III. B. of this policy provides the requirements that apply to all strip searches and 2. specifically states they shall be conducted in a professional manner. Subsection 3. states officers shall use appropriate methods when conducting strip searches. CDP is uncertain how a strip search can be conducted in an age appropriate manner. CDP declines this recommendation.

7.) Revision of Procedures, III., B., 2. – Recommendation to add new subsections:

b. Officers shall not stop, detain, frisk, search, or strip search a person in whole or part for the purpose of determining that person's gender or in order to call attention to the person's gender expression.
and
c. If an individual is transgender, intersex, or gender non-conforming is searched it shall be conducted by: 1) a medical provider, 2) an officer of the gender of which the individual is most comfortable, or 3) a female officer.

The recommended language revision by the CPC for a new subsection b. is taken directly from the Interaction With Transgender, Intersex and Gender Non-Conforming Individuals therefore does not need to be repeated in this policy. This additional sentence also does not address strip searches or body cavity searches in any way so would be out of place if added to this policy. The additional recommended language for new subsection c. was a recommendation from the CPC during discussions prior to the approval of the search and seizure policies by the Federal Court. During those discussions the CDP explained why this language was not included. CDP declines the recommendation for new subsections b. and c.

8.) Revision of Procedures, III., B., 4. - Recommendation to revise the sentence, changing "shall include **the least number of personnel necessary.**" to "shall include **only one additional witness.**"

BC

Division of Police
Cleveland, Ohio
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October 11
Examined by_____ **Rank**_____ _____, 2021
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This section of the policy requires officers to take all reasonable steps to minimize the potential embarrassment or discomfort to the party being searched. If it is reasonable for only one additional witness, that would be the proper course of action. However, there are numerous scenarios in which one additional witness would not be reasonable for the party or officers safety. Just one example would be, officers have probable cause to believe the party to be searched has a weapon and the party to be searched is being uncooperative. This section was also drafted using the phrase "the least number of personnel necessary" and not "witnesses" because the personnel necessary may not only serve as witnesses dependent upon the situation. The recommendation of the CPC is declined.

9.) Add Procedures, VI. – The Division shall provide officers with annual in-service training on search and seizure that is adequate in quality, quantity, type, and scope. Training on the policies shall be given in-person by a J.D. with subject matter expertise, given the policies' importance and complex nature (per Cleveland City Ordinance § 135.37).

While CDP agrees that strip searches or body cavity searches are an important matter which is related to the Search and Seizure requirements of the Settlement agreement. The CDP has maintained that we will continue to update officers of legal changes, which will be trained in an appropriate manner. CDP continues to seek the input of the City Law/Prosecutor's office as we develop training for search and seizure related training and when able have the prosecutors assist with training. Members of the Prosecutor's office have been attending training sessions to assist in teaching the material, as well as providing clarification if there are questions regarding case law. However, the Cleveland Codified Ordinance, the Settlement Agreement nor best practice requires training in the area of search and seizure to be completed by a person with a J.D.

10.) Add Procedures, VII. – Supervisors shall take appropriate action to address all apparent violations or deficiencies in arrests. Appropriate action may include recommending non-disciplinary corrective action for the involved officer and documenting such action in the tracking software, or referring the incident for administrative or criminal investigation.

The recommended language revision by the CPC for a new section VII. is taken directly from the Search and Seizure policy, the policy generally covering requirements for all searches and seizures so does not need to be repeated in this policy. This additional section also does not address strip searches or body cavity searches in any way so would be out of place if added to this policy.

Reviewed & concur
BPC 6127

Respectfully,
#6566
Robert Simon #6566
Captain, Office of Compliance

BC

Division of Police

Cleveland, Ohio

Departmental Information

Dist. **Zone**

Examined by BLS 627 **Rank** Cmdr October 5 10-20, 2021

From: Robert Simon, Captain **To:** Brian Carney, Commander

Subject: CPC Recommendations c/w Annual Review of Miranda Warning and Waiver

Copies to: Chief's Office, Unit Files

Sir:

As part of the annual review of Settlement Agreement policies the Division of Police solicited recommendations from the Cleveland Police Commission (CPC) as we reviewed the Miranda Warning and Waiver policy during the month of September.

The CPC provided recommendations on September 14, 2021 for revision of the Miranda Warning and Waiver policy from their Search and Seizure workgroup.

The Office of Compliance has carefully reviewed the recommendations of the CPC Search and Seizure workgroup as part of the annual research and review of the Miranda Warning and Waiver policy which is a review to ensure the policy remains consistent with the Settlement Agreement and current law, while providing effective direction to the members of the Cleveland Division of Police (CDP).

The CPC recommendations and the outcome of the research and review of the recommendations for the Miranda Warning and Waiver policy are as follows:

1.) Revision to the definition of Custody to include: "totality of circumstances a person would reasonably believe there is a significant restraint on their freedom of movement **or** ability to end the interaction (changing "and" to "or") and recommending "Questioning incident to a routine traffic stop is **not** considered custodial."

The definition of Seizure in the Search and Seizure policy is "When an officer's words or actions would make a reasonable person believe that he or she is not free to leave **or** terminate the encounter." Custody is a more restrictive restraint of a subject than a seizure, therefore "and" is used in the definition of Custody requiring both a significant restraint on their freedom of movement and ability to end the interaction. The use of "and" is appropriate in this definition. The recommendation concerning adding "is **not** considered custodial." is not necessary since the current policy is written with the word "not" included in the sentence.

2.) Revision to the definition of Interrogation to revise the words: "Any direct questioning or any words or actions (other than those normally attendant to **arrest** and custody)" to "Any direct questioning or any words or actions (other than those normally attendant to **booking** and custody)"

The booking of a suspect follows arresting the suspect and booking is only part of the arrest process. This language should not be limited to "booking". As written the definition includes the entire arrest process. CDP is not accepting this recommendation for revision.

BL

Division of Police
Cleveland, Ohio
Departmental Information

Dist. **Zone**

October 5
Examined by_____ **Rank**_____ _____, 2021
From: Robert Simon, Captain **To:** Brian Carney, Commander
Subject: CPC Recommendations c/w Annual Review of Miranda Warning and Waiver
Copies to: Chief's Office, Unit Files

3.) Retitle the definition of Juvenile to Youth/Juvenile.

Revising/Retitling this definition will utilize the same title used in the Interactions with Youth policy. CDP accepts this recommendation.

4.) Revision of Procedures, I., B., 1. And 2. - Recommendation to change "suspect" to "subject" in both 1. and 2.

Once a person is in custody they become suspects since their freedom of movement is restrained and they no longer have the ability to end the interaction. The term subject is used for those not in custody.

5.) Revision of Procedures, I., C. - Recommendation to remove the word "related" from the section.

This recommendation from the CPC received a great deal of attention and research during discussions prior to the approval of the search and seizure policies by the Federal Court. Miranda warnings are not required prior to any questioning, they are required when the questioning is "related" to any crime. Removing "related" would require officers to give Miranda warning anytime questions were asked. CDP declines this recommendation.

6.) Revision of Procedures, I., D. - Recommendation to remove the word "incriminating" from the section.

The CPC has not provided reasoning regarding why they think this word should be removed. The policy as written provides appropriate guidance to officers regarding spontaneous statements and has been approved by the Federal Court. CDP declines this recommendation.

7.) Revision of Procedures, II., C. – Recommendation to revise the section to: Officers shall stop questioning an individual when they have requested an attorney and may **not** resume questioning **until** an attorney is present. **Officers shall stop questioning when an individual indicates they do not want to answer questions.**

The recommended language revision by the CPC, adding "not" and changing "once" to "until" does not change the meaning or effect of the sentence that has been reviewed and approved by the Federal Court. The addition of the final sentence is out of place within the policy. The step by step style of this policy addresses this concern in Section V. Invocation of Miranda Rights, A. 1. Invoking their right to remain silent and B. If a subject waives their Miranda rights but subsequently states that he or she does not want to answer questions or wants an attorney present, all questioning shall cease immediately. CDP declines this recommendation.

BC

Division of Police

Cleveland, Ohio

Departmental Information

Dist. **Zone**

October 5

Examined by_____ **Rank**_____ _____, 2021

From: Robert Simon, Captain **To:** Brian Carney, Commander

Subject: CPC Recommendations c/w Annual Review of Miranda Warning and Waiver

Copies to: Chief's Office, Unit Files

8.) Revision of Procedures, III., A. - Recommendation to revise the sentence, changing "and" to "or"

The recommended language revision by the CPC provides clarity to the sentence so that all three groups are included individually. The recommendation of the CPC is accepted.

9.) Revision of Procedures, III., B. 1. – Recommendation to add language "shall conduct questioning consistent with guidance contained in GPO 5.12.01." and "intelligence, mental capacity, disability status, and physical condition"

The additional language recommended by the CPC is the same language contained in the Interactions with Youth GPO (5.12.01) and is unnecessary to repeat in this policy.

10.) Revision of Procedures, III., B. 3. – Recommendation to add language to subsections b. "This could be in juvenile court and adult court" and subsection e. "If you or your family cannot pay a lawyer, **we** will get you one **here** for free"

CDP agrees to adding the language to subsection b. "This could be in juvenile court and adult court", however the additional language in subsection e. "**we** will get you one **here** for free" is declined. CDP does not make arrangements for attorneys. If a suspect invokes their right to an attorney, the interrogation stops until the suspect can procure an attorney.

11.) Revision of Procedures, III., B. 5. – Recommendation to remove the words "parent, or guardian" from the section.

The recommended language revision by the CPC would unnecessarily create a CDP policy that is beyond what case law requires. The Ohio Supreme Court has recognized that a juvenile may waive their constitutional right to counsel, subject to certain standards, if they are counseled and advised by their parent, custodian, or guardian. The language in the current policy is correct in that officers may resume questioning when an attorney, parent, or guardian are present. CDP declines this recommendation.

12.) Revision of Procedures, IV., C., 1. – Recommendation to add language "to give up these rights"

The CDP agrees that adding the CPC recommended language provides clear reinforcement that the youth/juvenile is giving up their rights to speak with officers. CDP accepts the recommendation.

Division of Police
Cleveland, Ohio
Departmental Information

Dist. **Zone**

Examined by_____ **Rank**_____ October 5 _____, 2021
From: Robert Simon, Captain **To:** Brian Carney, Commander
Subject: CPC Recommendations c/w Annual Review of Miranda Warning and Waiver
Copies to: Chief's Office, Unit Files

13.) Revision of Procedures, IV., D. – Recommendation to add language Section D "In order to preserve the evidentiary value of a juvenile's confession, the officer taking that confession must act with great caution.",

add subsections to D. 1. -

a. All children are highly suggestible and significantly more likely than adults to falsely confess to a crime.

b. Children often innocently display behaviors that, in adults, are thought to indicate deception, such as lack of eye contact, fidgeting and slouching.

and D. 2. –

a. When possible, officers should avoid questioning a child in the middle of the night, and when the child had even a few hours of sleep deprivation.

b. Officers should not use the child's status as a juvenile to persuade him or her to cooperate, communicate that the child may avert or face reduced charges if the child cooperates, or use deception in any way to facilitate cooperation.

c. Officers shall follow the procedures described in GPO 5.12.01, Interactions with Youth. Section III.

and add a new section 3. - Whether or not the child had a meaningful opportunity to consult with an attorney or other trusted adult who does not have a conflict of interest and whether that attorney or trusted adult was present at the time of the waiver.

The concerns noted in the additional language of the CPC recommendation are addressed within the Miranda Warning and Waiver policy or the Interactions with Youth policy or are recommendations previously discussed and declined. As to the additional language added at the beginning of Section D., all Miranda interviews and confessions are taken using "great caution" to ensure they are constitutional and admissible in court, regardless of the suspects age. CDP declines the additional language recommended.

14.) Revision of Procedures, V., A., 1. – Recommendation to revise language "Invokes" to "Indicates"

The CPC has not provided reasoning regarding why they think this word should be changed. The dictionary definition of "Invoke" is to cite as an authorization and "Indicate" means to imply. The section as written is correct and provides accurate guidance to officers. CDP declines this recommendation.

BC

Division of Police

Cleveland, Ohio

Departmental Information

Dist. **Zone**

October 5

Examined by_____ **Rank**_____ _____, 2021

From: Robert Simon, Captain **To:** Brian Carney, Commander

Subject: CPC Recommendations c/w Annual Review of Miranda Warning and Waiver

Copies to: Chief's Office, Unit Files

15.) Revision of Procedures, V., A., 3. – Recommendation to revise language " Indicates he/she wants to have counsel, or if a juvenile indicates **he or she** wants to have"

As the policy is currently written "Indicates **they** want to have counsel, or if a juvenile indicates he or she wishes to have counsel, a parent, or guardian present before answering questions, or anytime during the interrogation; or. CDP will revise the second "he or she" to "they".

16.) Revision of Procedures, VI. – Recommendation to add Section D. "Juveniles may not be re- questioned without an attorney present."

The recommended language revision by the CPC would unnecessarily create a CDP policy that is beyond what case law requires. As noted in recommendation #11 above, the Ohio Supreme Court has recognized that a juvenile may waive their constitutional right to counsel, subject to certain standards, if they are counseled and advised by their parent, custodian, or guardian. This policy provides appropriate guidance regarding reinitiating questioning and that a youth/juvenile's parent, custodian, or guardian are sufficient counsel. CDP declines this recommendation.

17.) Add Procedures, IX. – The Division shall provide officers with annual in-service training on Miranda Warnings that is adequate in quality, quantity, type, and scope. Training on the policies shall be given in-person by a J.D., representing both the defense and prosecution, with subject matter expertise, given the policies' importance and complex nature (per Cleveland City Ordinance § 135.37).

While CDP agrees that Miranda Warnings can be a complex matter which is related to the Search and Seizure requirements of the Settlement agreement. The CDP has maintained that we will continue to update officers of legal changes, which will be trained in an appropriate manner. CDP continues to seek the input of the City Law/Prosecutor's office as we develop training for search and seizure related training and when able have the prosecutors assist with training. Members of the Prosecutor's office have been attending training sessions to assist in teaching the material, as well as providing clarification if there are questions regarding case law. However, the Cleveland Codified Ordinance, the Settlement Agreement nor best practice requires training in the area of search and seizure to be completed by a person with a J.D.

reviewed & concur
BPC 6.27

Respectfully,

#6566

Robert Simon #6566
Captain, Office of Compliance

Division of Police

Cleveland, Ohio

Departmental Information

Dist. **Zone**

Examined by BPG 6127 **Rank** Cmdr September 20 16-20, 2021

From: Robert Simon, Captain **To:** Brian Carney, Commander

Subject: CPC Recommendations c/w Annual Review of Investigatory Stops Policy

Copies to: Chief's Office, Unit Files

Sir:

As part of the annual review of Settlement Agreement policies the Division of Police solicited recommendations from the Cleveland Police Commission (CPC) as we reviewed the Investigatory Stops policy during the month of August.

The CPC provided recommendations on August 26, 2021 for revision of the Investigatory Stops policy from their Search and Seizure workgroup.

The Office of Compliance has carefully reviewed the recommendations of the CPC Search and Seizure workgroup as part of the annual research and review of the Investigatory Stops policy which is a review to ensure the policy remains consistent with the Settlement Agreement and current law, while providing effective direction to the members of the Cleveland Division of Police (CDP).

The CPC recommendations and the outcome of the research and review of the recommendations for the Investigatory Stops policy are as follows:

1.) Revision to the definition of Consensual Encounter to include: "in which the officer explains that the individual may decline any conversation, questions and/or is free to leave."

This recommendation from the CPC was made during discussions prior to the approval of the search and seizure policies by the Federal Court. During those discussions the CDP explained why this language was not included and that the language "A reasonable person in the individual's position would feel free to leave and/or decline any of the officer's requests at any point." included in the current definition addresses the concern raised by the CPC's recommendation.

2.) Revision to the definition of Pat Down/Frisk to include: "flathanded"

The current definition includes, "an officer may not manipulate objects that are discovered under clothing to determine whether they are contraband." There is not a legal requirement that a pat down/frisk must be with a "flat hand". CDP is not accepting this recommendation for revision.

3.) Revision to the definition of Seizure to include: "or application of physical force to the body of a subject with intent to restrain"

The current definition is "any instance or encounter where an officer's words or actions would make a reasonable individual believe that they are not free to leave or terminate the encounter." This definition provides for the CPC's concern regarding the Torres v. Madrid case in that it specifically states officers' actions would make a reasonable individual believe that they are not free to leave or terminate the encounter. CDP declines this recommendation.

BC

Division of Police
Cleveland, Ohio
Departmental Information

Dist. **Zone**

September 20
Examined by_____ **Rank**_____ _____, 2021
From: Robert Simon, Captain **To:** Brian Carney, Commander
Subject: CPC Recommendations c/w Annual Review of Investigatory Stops Policy
Copies to: Chief's Office, Unit Files

4.) Revision of Procedures, I., A., 1., b. - Recommendation to revise the language to add "Consensual"

Procedures, I., A., 1. states "There are two categories of voluntary contacts that do not constitute a seizure:" followed by a. Consensual Encounters and b. Non-Custodial Interviews. The addition of "Consensual" to b. does not add to the sentence as the two types of contacts are already noted to be voluntary. The current language provides appropriate direction for officer's to follow.

5.) Revision of Procedures, I., A., 2. – Recommendation to revise the language to add "temporary"

The CPC's recommendation to add the word "temporary" will make this sentence in line with the definition of Investigatory Stop (Terry Stop) in this policy. CDP accepts this recommended revision.

6.) Revision of Procedures, I., B., 2. – Recommendation to revise the language to add "And officers shall explain in an age appropriate manner the purpose of the stop.

This policy is the general policy addressing investigatory stops that apply to all subjects regardless of their age. Guidelines for conversing with youth in an age appropriate manner is outlined in GPO 5.12.01 Interactions with Youth.

7.) Revision of Procedures, II., B. – Recommendation to remove the word "sole"

The recommendation of the CPC to remove the word "sole" from this sentence will change the meaning of the entire sentence. As written officers cannot rely only on "An individual's unwillingness to engage or cooperate with the police, choosing not to answer questions, or ignore police" to establish reasonable suspicion, they must be able to articulate other reasons why they developed reasonable suspicion. Removing the word "sole" from the sentence would prohibit officer's use of the factors in the sentence to develop reasonable suspicion. While officers cannot only use these factors to develop reasonable suspicion, they can use them in conjunction with other factors to articulate reasonable suspicion. CDP declines this recommendation.

8.) Revision of Procedures, II., B., 1. – Recommendation to revise the language to add "but officers may engage in a consensual encounter.

CDP understands the thought in the CPC recommending the additional language, however officers can always engage in a consensual encounter with individuals. CDP does not believe the additional language adds to the section which currently provides officers with clear guidance. CDP declines this recommendation.

BL

Division of Police
Cleveland, Ohio
Departmental Information

Dist. **Zone**

September 20
Examined by_____ **Rank**_____ _____, 2021
From: Robert Simon, Captain **To:** Brian Carney, Commander
Subject: CPC Recommendations c/w Annual Review of Investigatory Stops Policy
Copies to: Chief's Office, Unit Files

9.) Revision of Procedures, III., B., 1., f. - Recommendation to remove language of section f. - Law Enforcement Training and Experience. Is the individual's appearance or demeanor consistent with specific criminal activity?

The CPC recommended removing this section during discussions prior to the approval of the search and seizure policies by the Federal Court. CDP declined the recommendation since "f." is part of a larger section providing guidance to officers on factors that can be considered when developing reasonable suspicion. An officer's training and experience when observing an individual's appearance or demeanor that may be consistent with specific criminal activity is a legitimate consideration for officers in developing reasonable suspicion. CDP declines this recommendation.

10.) Revision of Procedures, IV. – Recommendation to add a new section A. – "Officers shall not use a stop for a minor traffic violation as a basis to develop probable cause for an additional minor criminal violations unless there is evidence that an immediate threat to public safety exists or officers intent is to supplement an already open criminal investigation that he/she is aware of or made aware of in real time."

This recommendation from the CPC was made during discussions prior to the approval of the search and seizure policies by the Federal Court. During those discussions the CDP explained why this type of language was not included. CDP declines this recommendation.

11.) Revision of Procedures, IV. – Recommendation to add a new add new language. –"The purpose of an investigatory stop is only to confirm or dispel the reasonable suspicion. As soon as the officer dispels reasonable suspicion the stop shall end."

The additional language recommended by the CPC is unnecessary as IV., C., 1. states "Individuals may be stopped for only that period of time necessary to affect the purpose of the stop. Any delays in completing the necessary actions must be objectively reasonable and supplemented by additional reasonable suspicion or probable cause and specifically articulated in any applicable reports documenting the investigatory stop. The recommended additional language would be another way of saying the same thing and is declined.

12.) Revision of Procedures, IV., C., 2. – Recommendation to add new language. – "or canine unit."

The language noted in IV., C., 1. (noted above #11) would make it a violation of policy to extend a stop beyond the time necessary to affect the purpose of the stop to await a canine officer in line with the U.S. Supreme Court decision. Also noted in IV., C., 1. Any extension of the investigatory stop would require additional reasonable suspicion or probable cause to be justified. The current language provides appropriate direction for officer's to follow. CDP declines this recommendation.

Division of Police

Cleveland, Ohio

Departmental Information

Dist. **Zone**

September 20

Examined by_____ **Rank**_____ _____, 2021

From: Robert Simon, Captain **To:** Brian Carney, Commander

Subject: CPC Recommendations c/w Annual Review of Investigatory Stops Policy

Copies to: Chief's Office, Unit Files

13.) Revision of Procedures, IV. – Recommendation to add a new section E. – "Whenever the subject is a juvenile the officer shall explain in a calm manner and in age appropriate language the reason for the stop."

This policy is the general policy addressing investigatory stops that apply to all subjects regardless of their age. Guidelines for conversing with youth in an age appropriate manner is outlined in GPO 5.12.01 Interactions with Youth.

14.) Revision of Procedures, VIII., A. – Recommendation to add language "Training on the policies shall be given in person by a J.D. with subject matter expertise, given the policies' importance and complex nature. (per Cleveland City Ordinance § 135.37)."

This recommendation has been considered during the drafting process and subsequent conversations with the CPC. The CDP has maintained that we will continue to update officers of legal changes, which will be trained in an appropriate manner. CDP continues to seek the input of the City Law/Prosecutor's office as we develop training for search and seizure related training and when able have the prosecutors assist with training. Members of the Prosecutor's office have been attending training sessions to assist in teaching the material, as well as providing clarification if there are questions regarding case law. However, the Cleveland Codified Ordinance, the Settlement Agreement nor best practice requires training in the area of search and seizure to be completed by a person with a J.D.

reviewed & concurs
BPC 6127

Respectfully,

#6566

Robert Simon #6566
Captain, Office of Compliance

BC

Division of Police

Cleveland, Ohio

Departmental Information

Dist. **Zone**

Examined by BPC 6127 **Rank** Cmdr August 10 10-20, 2021

From: Robert Simon, Captain **To:** Brian Carney, Commander

Subject: CPC Recommendations c/w Annual Review of Probable Cause/ Warrantless Arrest Policy

Copies to: Chief's Office, Unit Files

Sir:

As part of the annual review of Settlement Agreement policies the Division of Police solicited recommendations from the Cleveland Police Commission (CPC) as we reviewed the Probable Cause/ Warrantless Arrest policy during the month of July.

The CPC provided recommendations on July 9, 2021 for revision of the Probable Cause/ Warrantless Arrest policy from their Search and Seizure workgroup.

The Office of Compliance has carefully reviewed the recommendations of the CPC Search and Seizure workgroup as part of the annual research and review of the Probable Cause/ Warrantless Arrest policy which is a review to ensure the policy remains consistent with the Settlement Agreement and current law, while providing effective direction to the members of the Cleveland Division of Police (CDP).

The CPC recommendations and the outcome of the research and review of the recommendations are as follows:

1.) Revision of the General Police Order (GPO) Purpose to substitute "protected by the United States and Ohio Constitutions and federal and state law." in place of "protected by Constitution and federal and state law."

Many of CDP's GPOs, commented on by the community, reviewed and approved by the Federal Monitoring Team (MT) and Department of Justice (DOJ) and approved by Judge Oliver contain the same language in the Purpose, each of which would need to be changed in order to be consistent throughout CDP's policies. The language, protected by.... state law, includes the State Constitution and therefore CDP is not accepting this recommendation for revision.

2.) Revision to the definition of arrest to include: submission of the person arrested to the *authority or* custody of the officer arresting him/her.

The definition of "Arrest" was taken from the Settlement Agreement (paragraph 406) and does not include the recommended language from the CPC. As noted above the Arrest definition is included in many of CDP's GPOs, each of which would need to be changed in order to be consistent throughout CDP's policies. CDP is not accepting this recommendation for revision.

3.) Addition of a definition for Juvenile Justice Center.

The term Juvenile Justice Center is only used once in this GPO, but as this GPO provides direction for all ages, the inclusion of a definition for Juvenile Justice Center is unnecessary.

Division of Police
Cleveland, Ohio
Departmental Information

Dist. **Zone**

August 10
Examined by_____ **Rank**_____ _____, 2021
From: Robert Simon, Captain **To:** Brian Carney, Commander
Subject: CPC Recommendations c/w Annual Review of Probable Cause/ Warrantless Arrest Policy
Copies to: Chief's Office, Unit Files

4.) Addition of a definition for Youth/Juvenile.

This GPO provides direction for all ages and Youth/Juvenile is not used in this GPO, the inclusion of a definition for Youth/Juvenile is unnecessary.

5.) Revision of Procedures, I., A., 2. – Recommendation to add language citing the O.R.C. code and misdemeanors not committed in the officer's presence.

It is the CDP's position that the additional language will cause confusion as opposed to clarity for officers. As the section is drafted in the Federal Court approved policy, if the officer has the requisite probable cause they can arrest without a warrant for 1) subject has committed or is committing a felony offense, 2) subject has committed or is committing certain misdemeanor offenses, 3) from the officer's own observation that the subject has committed or is committing any other misdemeanor offense. The section outlines when an officer's observation of the misdemeanor is required.

6.) Recommendation to add language "and for youth/juvenile arrestees refer to GPO 5.12.01, (Youth Interactions)"

The GPO referred to in the current policy (2.02.03 Miranda Warnings and Waiver) directs officers regarding the correct Miranda Warning procedures and includes a section that specifically covers Miranda Warnings for Juveniles. The youth policy also refers officers to GPO 2.02.03 when giving Miranda Warnings. The additional language is unnecessary.

7.) Revision of Procedures, II., A. – Recommendation to add "only" to the sentence.

The addition of the word "only" to this sentence does not add to the section as a whole. The following sub sections provide the appropriate guidance to officers as to the requirements to enter a residence/habitation without a warrant. CDP declines this recommendation.

8.) Revision of Procedures, II., A., 1. - Recommendation to add language to the GPO Reference (GPO 2.02.03 Search and Seizure) - "a) The officer shall inform the person that they have the right to refuse consent, and b) All consented to searches shall be recorded on the officer's WCS"

The recommendation to add language to the reference to another GPO is unnecessary. The recommended additional language is contained in the GPO being referenced.

Division of Police
Cleveland, Ohio
Departmental Information

Dist. **Zone**

August 10
Examined by_____ **Rank**_____ _____, 2021
From: Robert Simon, Captain **To:** Brian Carney, Commander
Subject: CPC Recommendations c/w Annual Review of Probable Cause/ Warrantless Arrest Policy
Copies to: Chief's Office, Unit Files

9.) Revision of Procedures, II., A., 2. - Recommendation to revise the language providing examples of when exigent circumstances exist from "prevention of a crime" to "prevention of imminent threat of death or serious injury" and to add language to the exigent circumstances section regarding new case law (Lange v. California, June 23, 2021).

CDP does not accept the first part of the recommendation to examples of when exigent circumstances exist. A legitimate exigent circumstance would be to prevent the destruction of evidence and the revision of language would unnecessarily limit CDP officer's legal authority to prevent crimes. CDP agrees with the CPC's recommendation to add language addressing Lange v. California. CDP is adding felony specific language to II., A., 2. and adding a new II., A., 3. with language addressing warrantless entry in hot pursuit of a misdemeanor.

10.) Revision of Procedures, IV., C. – Recommendation to add language to include "detainees to a diversion center" and "or the Juvenile Detention Center (JDC)"

The section referred to in the recommendations concerns Non-UTT/MMC Warrantless Arrests. Subjects taken to diversion centers are not arrested and therefore the "detainees to a diversion center" language is unnecessary. CDP agrees to the addition of "or the Juvenile Detention Center (JDC)" which will be added to Procedures, IV., C.

11.) Revision of Procedures, VIII., A. – Recommendation to add language "Training on the policies shall be given in person by a J.D. with subject matter expertise, given the policies' importance and complex nature."

This recommendation has been considered during the drafting process and subsequent conversations with the CPC. The CDP has maintained that we will continue to update officers of legal changes, which will be trained in an appropriate manner. CDP continues to seek the input of the City Law/Prosecutor's office as we develop training for search and seizure related training and when able have the prosecutors assist with training. Members of the Prosecutor's office have been attending training sessions to assist in teaching the material, as well as providing clarification if there are questions regarding case law. However, the Cleveland Codified Ordinance, the Settlement Agreement nor best practice requires training in the area of search and seizure to be completed by a person with a J.D.

Reviewed & Concur
BC 6127

Respectfully,
#6566
Robert Simon #6566
Captain, Office of Compliance

BL

Division of Police

Cleveland, Ohio

Departmental Information

Dist. **Zone**

Examined by BPG 6127 **Rank** Cmdr September 16 10-20, 2021

From: Robert Simon, Captain **To:** Brian Carney, Commander

Subject: CPC Recommendations c/w Annual Review of Search & Seizure Policy

Copies to: Chief's Office, Unit Files

Sir:

As part of the annual review of Settlement Agreement policies the Division of Police solicited recommendations from the Cleveland Police Commission (CPC) as we reviewed the Search & Seizure policy during the month of August.

The CPC provided recommendations on August 26, 2021 for revision of the Search & Seizure policy from their Search and Seizure workgroup.

The Office of Compliance has carefully reviewed the recommendations of the CPC Search and Seizure workgroup as part of the annual research and review of the Search & Seizure policy which is a review to ensure the policy remains consistent with the Settlement Agreement and current law, while providing effective direction to the members of the Cleveland Division of Police (CDP).

The CPC recommendations and the outcome of the research and review of the recommendations for the Search & Seizure policy are as follows:

1.) Revision to the definition of Consensual Encounter to include: "in which the officer explains that the individual may decline any conversation, questions and/or is free to leave."

This recommendation from the CPC was made during discussions prior to the approval of the search and seizure policies by the Federal Court. During those discussions the CDP explained why this language was not included and that the language "A reasonable person in the individual's position would feel free to leave and/or decline any of the officer's requests at any point." included in the current definition addresses the concern raised by the CPC's recommendation.

2.) Revision to the definition of Curtilage to include: "and land that is used for private purposes comparable to the home."

The definition of Curtilage found in several sources, including a Supreme Court decision, does not use the language recommended by the CPC. CDP is not accepting this recommendation for revision.

3.) Revision to the definition of Pat Down/Frisk to include: "flathanded"

The current definition includes, "an officer may not manipulate objects that are discovered under clothing to determine whether they are contraband." There is not a legal requirement that a pat down/frisk must be with a "flat hand". CDP is not accepting this recommendation for revision.

4.) Revision to the definition of Plain Feel Doctrine to include: "weapons"

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Division of Police
Cleveland, Ohio
Departmental Information

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September 16
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From: Robert Simon, Captain **To:** Brian Carney, Commander
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Copies to: Chief's Office, Unit Files

All researched sources concerning the plain feel doctrine, including a Supreme Court decision, do not include the word "weapons". The addition of "weapons" does not add to the definition and the current language provides appropriate direction for officer's to follow.

5.) Revision to the definition of Reasonable Suspicion to revise the words: "that justifies" to "to justify"

It is the CDP's position that the recommended revision does not change the meaning of the definition and due to the definition being included in multiple policies, CDP is declining this recommended revision.

6.) Revision to the definition of Search Incident to Arrest to include: "limited to"

All researched sources concerning the search incident to arrest, including a Supreme Court decision, do not include the words "limited to". The addition of "limited to" does not add to the definition and the current language provides appropriate direction for officer's to follow.

7.) Addition of a definition for Youth/Juvenile.

This GPO provides direction for all ages and Youth/Juvenile is not used in this GPO, the inclusion of a definition for Youth/Juvenile is unnecessary as youth is addressed in the Youth policy. CDP declines this recommendation.

8.) Revision of Procedures, I., B., 5. - Recommendation to remove language "Custodial searches and other" so that the section would read "Searches incident to arrest"

As Custodial Searches and Searches Incident to Arrest refer to the same type of search and the revision may reduce officer uncertainty, the recommendation of the CPC is accepted.

9.) Revision of Procedures, I., C., 2. - Recommendation to revise the language to add "and trauma informed manner"

This recommendation from the CPC was made during discussions prior to the approval of the search and seizure policies by the Federal Court. During those discussions the CDP explained why this language was not included. CDP declines this recommendation.

10.) Revision of Procedures, I., D., 1. - Recommendation to add a new section 1. "Use an individual's gender, race, ethnicity, national origin, age, or perceived sexual orientation as a factor in the decision to stop and search or seize unless such information is part of an actual and credible description of a specific subject in an investigation that includes other identifying factors."

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Division of Police

Cleveland, Ohio

Departmental Information

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September 16

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The CPCs requested language is virtually identical to the language in the second paragraph of the Policy section only changing "in establishing reasonable suspicion or probable cause" to "as a factor in the decision to stop and search or seize". The CPC's requested language is unnecessary as the language in the Policy section addresses their concern and reasonable suspicion or probable cause must be established before the decision to stop, search or seize.

11.) Revision of Procedures, I., D., 5. - Recommendation to add a new section 5. – "Rely on behavioral responses of youth/juveniles alone as the basis for probable cause, including fleeing, verbal exchanges, Freezing or unexpected non-responsiveness, Outright disregard for police directives, Presumption of mistreatment, (ref youth/juvenile policy)"

The additional language recommended by the CPC is the same language contained in the Interactions with Youth GPO, Section II. Investigative Stops. The Investigatory Stops GPO is prominently referenced in the Interactions with Youth GPO, Section II., the addition of the language in this policy is unnecessary.

12.) Revision of Procedures, II., A., 1. – Recommendation to add language "and it must be immediately apparent that the item is contraband or evidence of a crime."

The recommended additional language from the CPC provides clarity to the open view doctrine the recommendation of the CPC is accepted.

13.) Revision of Procedures, II., A., 2. – Recommendation to add language "and curtilage"

The addition of the recommended CPC language is appropriate in accordance with U.S Supreme Court case law and will provide appropriate guidance to officers. The recommended language is accepted.

14.) Revision of Procedures, II., B., 1. – Recommendation to add/revise language of the section to read "habitation, or curtilage. To seize the item, it must be immediately apparent that it is evidence or contraband."

The addition of the language recommended by the CPC is appropriate in accordance with U.S Supreme Court case law and will provide clear guidance to officers. The recommended language is accepted.

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Cleveland, Ohio
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Examined by_____ **Rank**_____ September 16 _____, 2021
From: Robert Simon, Captain **To:** Brian Carney, Commander
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15.) Revision of Procedures, III., D. – Recommendation to add language "Examples of coercion include but is not limited to:

1. Threatening to charge person with a crime such as obstruction or disorderly conduct.
2. Threatening a referral to Department of Children and Family Services.
3. Threatening to obtain a warrant as means of obtaining consent.
4. Threatening to use a K-9
5. Using an officer's physical proximity or the number of officers as a means of intimation.
6. Threatening to inconvenience or prolong the process."

This recommendation from the CPC was made during discussions prior to the approval of the search and seizure policies by the Federal Court. During those discussions the CDP explained why this language was not included. CDP declines this recommendation.

16.) Revision of Procedures, III., D., 3. – Recommendation to remove language "Parents may consent to search a child's living area if the parents have routine access to the area. (The child is not paying rent)."

The CPC has not provided reasoning regarding why they think this section should be deleted. The section as written is legally correct and provides accurate guidance to officers. CDP declines this recommendation.

17.) Revision of Procedures, III. – Recommendation to add a new section F. – "Officers shall not ask for consent to search the electronic devices of adults or youth/juveniles."

The CPC has not provided reasoning regarding why they think this section should be added. Requesting consent to search, whether it is consent to search a person, house, vehicle, is legally correct. The request to search electronic devices is not legally different than other consent searches. CDP declines this recommendation.

18.) Revision of Procedures, IV., A. – Recommendation to add language "...delay in getting a warrant would result in the loss of evidence for a serious offence or and offence of violence, escape of a felony subject, or physical harm to police or public."

The recommended language revision by the CPC would unnecessarily create a CDP policy that is beyond what case law requires. The case at hand, Lange v. California, does not categorically eliminate warrantless search or seizure under emergency conditions for misdemeanor arrests. Lange v. California held that the Fourth Amendment requires the presence of case-specific exigent circumstances in order for police officers to enter a home without a warrant to make an arrest. Attempting to complete a misdemeanor arrest does not categorically qualify as an "exigent circumstance" that allows for a warrantless home entry, but also does not prohibit exigent circumstances related to a misdemeanor arrest. CDP declines this recommendation.

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19.) Revision of Procedures, IV., C. – Recommendation to remove section – "In determining whether exigent circumstances exist, officers shall consider the following:
1. Is the offense serious or an offense of violence?
2. Is there a reasonable belief the subject was armed?
3. Is there probable cause to believe the subject committed a crime?
4. Is there probable cause to believe the subject was on the premises?
5. Did the police identify themselves and give the subject a chance to surrender prior to entry, if feasible?
6. Is there an ongoing investigation or decision to arrest prior to the subject fleeing into the premises?"

The recommendation to remove this section is reasonably tied to the previous recommendation (18.) which would limit searches based on exigent circumstances. CDP for the reasons stated in the response to recommendation 18. declined to limit searches based on exigent circumstances beyond what is required under the U.S. Supreme Court decision. This section of the policy provides officers with guidance to determine the existence of exigent circumstances. CDP declines this recommendation.

20.) Revision of Procedures, V., A. – Recommendation to add language "nor a search for evidence. Gender identity shall be respected (consistent with GPO 5.12.05)."

This section as written provides specifically that "The purpose and scope of the pat down/frisk is to discover weapons. It is not a generalized search of the entire person". This section as well as the following sections of "Pat Down/Frisks During Investigatory Stops" reinforce that a pat down/frisk is a search for weapons. Section V., B., 3 of the section also informs officers on the policy regarding discovery of potential contraband, referring officers to the "plain feel" section of the policy. In regard to the gender identity language, this policy is the general policy addressing searches and seizures that apply to all subjects regardless of their "identity". Guidelines for officers regarding gender identity are contained in GPO 5.12.05 Interaction with Transgender, Intersex, and Gender Non-Conforming (TIGN) Individuals. CDP declines this recommendation.

21.) Revision of Procedures, V., B., 1. – Recommendation to add language "flat hand"

Research of sources by CDP concerning "Terry" pat downs do not indicate a legal requirement that a pat down/frisk be conducted using a flat hand. Also, the definition of pat down/frisk in this policy states "an officer may not manipulate objects that are discovered under clothing to determine whether they are contraband." which would address the concern raised by this recommendation. The addition of "flat hand" is declined.

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22.) Revision of Procedures, V., D., 1. – Recommendation to add language "unlawfully"

The CPC's recommended additional language is in Section V. Pat Down/Frisks during Investigatory Stops. The definition of pat down/frisks and the section of the recommended change specifically includes that officers must have reasonable suspicion that the detained person may be armed and dangerous. Whether a subject is carrying a weapon lawfully or unlawfully does not change that the officer reasonably believes the subject is dangerous. The addition of "unlawfully" is declined.

23.) Revision of Procedures, V., D., 3. – Recommendation to remove section – Observations, such as weighted clothing, retention checks, and suspicious bulges, consistent with carrying a concealed weapon.

The CPC has not provided reasoning regarding why they think this section should be deleted. This entire section (V., D.) provides officers with guidance to determine whether reasonable suspicion exists that a person is armed and dangerous. Section V., D., 3. provides guidance for officers observations regarding whether a subject may be concealing a weapon. The techniques described are a best practice in law enforcement training. CDP declines this recommendation.

24.) Revision of Procedures, VI., A., 2. – Recommendation to add language "explained in an age appropriate manner (consistent with GPO 5.12.01),"

This policy is the general policy addressing searches and seizures that apply to all subjects regardless of their age. Guidelines for conversing with youth in an age appropriate manner is outlined in GPO 5.12.01 Interactions with Youth.

25.) Revision of Procedures, VI., A., 2., a. – Recommendation to add language "(consistent with GPO 5.12.05)."

The addition of the reference to GPO 5.12.05 is unnecessary. The language in VI., A., 2. is the same language that is in GPO 5.12.05, III., A., 3. CDP declines this recommendation.

26.) Revision of Procedures, VI., B., 1. – Recommendation to change the phrase immediate "control" to immediate "reach".

This recommendation from the CPC was made during discussions prior to final drafting and approval of the search and seizure policies by the Federal Court. During those discussions the CDP explained that "control" is the phrase used in court decisions when describing a search incident to arrest and is also the term used in the policies definition of search incident to arrest. CDP declines this recommendation.

Division of Police

Cleveland, Ohio

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September 16

Examined by_____ **Rank**_____ _____, 2021

From: Robert Simon, Captain **To:** Brian Carney, Commander

Subject: CPC Recommendations c/w Annual Review of Search & Seizure Policy

Copies to: Chief's Office, Unit Files

27.) Revision of Procedures, VIII. - Recommendation to change section title from "Open Fields" to "Open Fields and Curtilage"

The section which the CPC is making the recommendation to change specifically addresses the open field doctrine. Curtilage is a part of the analysis concerning open fields, but curtilage is also part of the analysis and is noted in other sections of the policy. Curtilage is also defined in the policy. To place curtilage in this sections title will make the policy less clear. CDP declines this recommendation.

28.) Revision of Procedures, IX., C. – Recommendation to change the language from "Within seven calendar days" to "Within three days (72 hours),".

The timeline for supervisors to document and report searches that may not be proper of "Within seven calendar days" is set by the Settlement Agreement between the City of Cleveland and the Department of Justice (paragraph #170). CDP declines this recommendation.

29.) Revision of Procedures, X., A. – Recommendation to add language "Training on the policies shall be given in person by a J.D. with subject matter expertise, given the policies' importance and complex nature. (per Cleveland City Ordinance § 135.37)."

This recommendation has been considered during the drafting process and subsequent conversations with the CPC. The CDP has maintained that we will continue to update officers of legal changes, which will be trained in an appropriate manner. CDP continues to seek the input of the City Law/Prosecutor's office as we develop training for search and seizure related training and when able have the prosecutors assist with training. Members of the Prosecutor's office have been attending training sessions to assist in teaching the material, as well as providing clarification if there are questions regarding case law. However, the Cleveland Codified Ordinance, the Settlement Agreement nor best practice requires training in the area of search and seizure to be completed by a person with a J.D.

Reviewed & concur
BPC 6127

Respectfully,

#6566

Robert Simon #6566
Captain, Office of Compliance