

Maryland Office of the Public Defender for Baltimore City
Comments on Lesser Offenses Policies
October 2020

While rarely scrutinized as much as felony offenses, police responses to lesser offenses play an important role in police culture and community trust. Aggressive response strategies to minor crimes results in the dangerous escalation of interactions, sometimes with fatal consequences. Eric Garner, Michael Brown, and George Floyd are just a few high profile examples where the police response to a minor allegations resulted in an unjustifiable killing.

Responses to lesser offenses are also rife with racial disparities, with Black and Brown individuals far more likely to be arrested or otherwise treated more harshly than their white counterparts. Subjective criteria for responses to lesser offenses routinize these disparities, whether they are due to implicit biases or overt racial animus.

As a second round comment period, our recommendations focus on these higher level concerns, particularly to remove subjective criteria for stops and arrests, increase accountability of members who violate these policies, and ensure that alternatives to arrest are adopted consistently, fairly and without sweeping exceptions.

Policy 812, Misdemeanor Theft Procedures

Recommendation 1: In the policy section, highlight the importance of a least restrictive approach for misdemeanor theft, in light of the risk of escalation and related community issues resulting from an aggressive approach.

The risk of escalation for lesser offenses is especially high for minor theft. While Maryland law generally prohibits members from effectuating an arrest for a misdemeanor committed outside their presence, the misdemeanor theft policy allows members to rely heavily on information received by another. To ensure that the least restrictive approach is applied in these cases, the policy should acknowledge these concerns and explicitly reaffirm the priority of applying the least restrictive approach.

Suggested action: Add the following to the end of the policy section:

Responses to misdemeanor theft are especially prone to escalation, particularly when the member is relying on information from a witness. Allegiance to the least restrictive approach is especially important to further the priorities of non-discrimination, constitutional enforcement, and community partnerships.

Recommendation 2: Provide clearer guidance to prevent improper stops for misdemeanor theft, in accordance with established law and other BPD policies.

The constitutionality of stops has been the subject of significant litigation and the legality of an individual stop is based on a highly fact-intensive analysis. Improper stops, particularly for minor charges such as misdemeanor theft, are often the start of escalating events and must be affirmatively prevented.

This policy minimizes the limitations generally required for lesser offenses, to justify and focus upon stops and arrests based on information beyond the direct observation of the member. The policy should be clearer that this is a very narrow exception to a strong constitutional principle, and detail the requirements needed for its application.

In Directive ¶ 1, uses conclusory language to justify a stop without providing sufficient definitions and detail to determine that this critical step is only happening when appropriate prior to discussing the steps after the stop that may be taken.

Suggested actions: Revise Directive ¶1 as follows:

Maryland law limits the actions a member can take in response to misdemeanor allegations based on events that they did not observe. A narrow exception allows for members to stop an individual for misdemeanor theft based on the direct observations of a credible witness (e.g., security guard, shop employee, or business owner), and a totality of circumstances supporting probable cause exists that the individual has committed the Misdemeanor Theft violation, In these circumstances, the members shall may stop the individual and shall investigate the call for service by: ...

Add to the policies' definitions section:

Probable Cause – Where facts and circumstances taken as a whole, known to the member at the time, would lead a reasonable member to believe that a particular person has committed or is committing a crime.

In Directive ¶ 3, the policy authorizes a stop based solely on matching a description, without any clarification of the level of detail and reliability that must be included in this description. Thus, a member relying on a vague description, such as “black man in a gray hoodie,” may stop a large number of residents who meet this overly inclusive description, in clear violation of the law.

Suggested action: Remove Directive ¶ 3 (“If the individual is no longer on scene, but the member encounters an individual matching the appropriate suspect description provided by a credible witness, the member may stop that individual and follow the above procedures.”)

Recommendation 3: Make clear that violations of this policy may result in discipline.

The Required Action, Supervisor Responsibilities section lists key concerns that a supervisor must review and that “corrective action” must be taken. While language deficiencies in the report may be able to be corrected, unjustified stops and arrests lacking probable cause cannot be and require a stronger response to prevent such actions in the future. Disciplinary measures, additional training, and/or increased supervisory oversight are needed and the policy should make clear that such responses are needed.

Suggested action: Revise Supervisor Responsibilities ¶ 13 as follows:

13. Supervisors shall review each arrest report of members under their supervision for completeness and adherence to law and policy. Supervisors shall memorialize their review in writing, indicating any need for corrective action, **additional training, and/or disciplinary measures** within 72 hours of when the arrest occurs, absent exceptional circumstances.

13.1. If exceptional circumstances do exist, the supervisor shall document what the exceptional circumstances are.

13.2. If the supervisor identifies deficiencies through the review, additional investigation or corrective action may require more than 72 hours to complete the review. **The basis for this additional time should still be documented, along with the training, disciplinary measures, or other actions to be taken.**

Policy 1018, Lesser Offenses and Alternatives to Arrest

While this policy generally focuses on the reliance on citations for lesser offenses, its discussion of exceptions that can justify an arrest are often too broad. In some instances, these exceptions may potentially result in violations of the law. In others, they promote bad policing and counteract the BPD’s other efforts under the consent decree.

Recommendation 1: In the Aggravating Factors definition, require a verbal warning, rather than justifying an arrest based on the “indication” that person will not comply.

Among the aggravating factors that can justify a more intrusive enforcement action are both “[m]ultiple, prior, individual warnings and attempts to counsel without resolution” and “[b]ehavior indicating the person will not comply with a verbal warning.” The member should always be required to issue a warning and attempt to counsel, rather than presume the person would not comply. Determining whether behavior indicates that a person will not comply is subjective and encourages implicit bias. Increasing enforcement action before the person has actually refused to comply with also violates the de-escalation policy and its mandates to reduce confrontation.

Suggested action: Delete the final bullet under the Aggravating Factors definition (“Behavior indicating the person will not comply with a verbal warning”).

Recommendation 2: Do not allow for arrest without supervisor permission.

While the policy generally requires supervisor permission to issue an arrest for a lesser offense, it allows for an exception “[i]f specific, time-sensitive circumstances make it not practicable to obtain permission.” Given that these are minor offenses, that implicate no threat of violence or damage, it is unclear what time sensitive circumstances could arise that would justify an arrest without supervisor permission. At a minimum, this exception should be defined and narrowly tailored. More appropriately, it should be removed entirely.

Suggested action: Remove the time-sensitive circumstances exception in General ¶ 3.

Recommendation 3: Prohibit pretextual stops for any misdemeanor.

Pretextual stops are racially biased and inconsistent with the goal of community trust. They also increase the likelihood of an escalating situation, and contradict the least restrictive approach required for minor offenses. While the policy prohibits pretextual stops for loitering and misdemeanor theft, it should be prohibited for all lesser offenses.

Suggested action: Revise General ¶ 13 as follows:

Members shall not conduct Pretext Stops in which the “pretext” justification for the stop is **a lesser offense as defined by the policy (citation-eligible misdemeanor offenses that carry fines or maximum penalties of imprisonment up to 90 days)**~~loitering or misdemeanor trespass~~. This does not prohibit stops that are not pretextual, such as a stop in response to a call for service concerning loitering or misdemeanor trespass.

Recommendation 4: Ensure that the Special Considerations for Lesser Offenses consistently include all requirements for responding to these offenses.

While the loitering section requires the member to inform the person of the violation prior to enforcement, it does not explicitly require allowing the person to comply.

Suggested action: Revise the second sentence of ¶19 as follows:

In order for loitering to be enforced, members must **(1)** advise the individuals that they are interfering with the free flow of pedestrian or vehicular traffic, and that continuing to do so may result in a citation or arrest; **and (2) provide the individuals with the opportunity to comply.**

The disorderly conduct section should likewise be clearer that cease and desist efforts were taken but unsuccessful prior to enforcement.

Suggested action: Revise ¶22 as follows:

In order to cite an individual for Disorderly Conduct, members must **(1)** possess specific, articulable facts that support exactly how the public is disturbed if the individual were to be allowed to continue their actions; **(2) advise the individual that their actions are disturbing the public and that continuing to do so may result in a citation or arrest;** and **(3) fail to cease and desist the violation despite a provide an opportunity for the individual to comply with the** member's warning or counseling.

The section on hindering relies solely on the impact on the police action, without any consideration of intent or knowledge, as required by law. *Titus v. State*, 423 Md. 548, 32 A.3d 44 (2011). The provision should make clear that the member has probable cause to believe that the person knowingly and intentionally is obstructing the performance of a police duty.

Suggested action: Revise ¶ 25.2 as follows:

There exist specific, articulable facts to support a conclusion that the actions of the hinderer are **knowingly and intentionally obstructing or hindering directly related to** the member's enforcement actions in the furtherance of their duties.

Policy 803, Criminal Citation Procedures

Recommendation 1: In Eligibility Requirements (under definitions), reiterate that probable cause to believe an offense occurred is needed.

While the policy generally notes that probable cause is needed for a citation, it is a sufficiently fundamental component that it is worth reiterating at each relevant point. The eligibility requirements in the definitions section only goes to the factors considered afterward.

Suggested language: In the Definitions section, amend Eligibility Requirements as follows:

Eligibility Requirements – In order to find someone eligible for a Criminal Citation, a member must:

- **Have probable cause to believe that a person has committed or is committing a criminal infraction or citable offense.**
- [Factors currently listed remain here]

Recommendation 2: Clarify that a citation cannot be issued if the subject is also being arrested for the same incident.

As currently worded, the eligibility requirements suggest that the mere availability of arrest may make someone ineligible for a citation. The wording should be clarified to make clear that an individual cannot be both arrested and issued a citation for the same incident.

Suggested language: Revise the final bullet under Eligibility Requirements as follows:

- Ensure that the person **is not also is-not-subject-to** arrested **ed** for a non-Citation-Eligible Offense arising out of the same incident.

Recommendation 3: In the Excluded Offenses, define electronic control device (CEW). While the list of excluded offenses appears to be narrowly tailored, the reference to CEWs is quite specific, and is not an issue that we at the Public Defender's Office have encountered. For greater comprehension, we suggest incorporating the more common terminology for these devices.

Suggested language: Amend the fourth bullet point under Excluded Offenses as follows:

- Possession of an electronic control device (CEW) **(i.e. Taser)** after conviction of a drug felony or crime of violence under §4-109(b) of the Criminal Law Article.

Recommendation 4: Require supervisor follow-up and potential consequences for inappropriate arrests when citation would be sufficient

The citations policies and other provisions that mandate the most effective, least intrusive response are only as impactful as they are followed. Accountability structures are needed to ensure their proper implementation. Beyond merely reviewing arrests on citation-eligible offenses, the policy should specify the actions that the supervisor and higher officials must take when a member effectuates an arrest in violation of this policy,

Suggested language: In the Required Action, Supervisor section add the following:

19A. If a supervisor determines that an arrest was issued in violation of this policy, they shall document the violation, instruct the arresting member of the error, and consider further action appropriate to the circumstances, including additional training and/or disciplinary measures.

19A.1 If a member violates this policy on more than one occasion in a one month period, or three times over any period, the supervisor shall inform the PIB for consideration of further discipline.

Recommendation 6: In the Performance Standard Section, require audit reviews to assess for racial bias and other trends that may require further attention.

The policy rightfully includes oversight through random audits. Beyond just reviewing whether the policy is followed, these audits should look for trends in noncompliance, with particular attention toward racial disparities that suggest either implicit bias or over animus at play.

Suggested action: Revise ¶ 27 as follows:

Conduct quarterly, random audits of arrests made for Criminal Citation-eligible offenses. **In addition to ensure ensuring general compliance with this policy, these audits should review racial and other demographics to assess for biases and other trends that may require additional training or other attention.**

Policy 808, Civil Citation Procedures

As civil citations do not impact our practice, we have no comment on them. However, many of our recommendations for criminal citations can equally apply here.

Policy 1014, Video Surveillance Procedures

Policy 1014 suggests Evidence.com is being used as central repository for CCTV video evidence, which is a different protocol than has previously been instituted. However, there are no protocols for the video once it is entered into evidene.com. In particular, since this software has editing privileges, BPD needs to establish by policy who will have access to the video, who is able to edit videos, and what are the limits and accountability measures for how these videos can be manipulated.

Our office is regularly entitled to the videos obtained by BPD as part of our discovery in resulting prosecutions. If the process for storage and maintaining these videos has or will be changing, we should be provided with notice of these changes.