



U.S. Department of Justice

Office of Justice Programs

Office for Civil Rights

Washington, D.C. 20531

November 9, 2011

Harry T. Coleman
Law Office of Harry T. Coleman, Esquire
41 N. Main Street
3rd Floor, Suite 316
Carbondale, PA 18407

Re: Notice of Findings
[REDACTED] v. Pocono Mountain Regional Police Department (10-OCR-0663)

Dear Mr. Coleman:

Thank you for the documentation that you submitted to the Office for Civil Rights (OCR), Office of Justice Programs, U.S. Department of Justice (DOJ) on behalf of your client, the Pocono Mountain Regional Police Department (PMRPD), in connection with the administrative Complaint that [REDACTED] (Complainant) filed against the PMRPD. In his Complaint, the Complainant alleges that officers with the PMRPD discriminated against him based on race (Hispanic) and national origin (Puerto Rican). The Complainant further alleges that the PMRPD subsequently retaliated against him for filing his Complaint with the OCR.

The OCR has completed our review of the documentation provided by both the PMRPD and the Complainant and has determined that there is insufficient evidence of a violation of the civil rights laws that we enforce. Our findings are set forth below for your review.

Factual Background

The Complainant alleges that the following occurred:

In the early morning of February 8, 2010, the Complainant was driving his BMW on PA 196 toward PA 611 in the Borough of Mount Pocono when he was pulled over by [REDACTED] of the PMRPD. [REDACTED] told the Complainant that he had his vehicle's high beam headlights on. The Complainant disputes that he had the high beam headlights on, and notes that his vehicle has an indicator that lights up when the high beam headlights are on and that the indicator was not on. After asking for the Complainant's license and registration, [REDACTED] had the Complainant undergo a field sobriety test. [REDACTED] did not tell the Complainant whether he passed the field sobriety test, but put handcuffs on the Complainant and drove him to the hospital,

where [REDACTED] [REDACTED] instructed the nurses to take blood from the Complainant. [REDACTED] [REDACTED] did not ask the Complainant for consent to conduct a field sobriety test or to take blood from the Complainant.

After a nurse took some blood from the Complainant, [REDACTED] drove the Complainant to the police station, and the Complainant observed his BMW in the station's garage. [REDACTED] took the Complainant into the police station and conducted a strip search of the Complainant in the area where the officers enter the station. In conjunction with the search, [REDACTED] took the Complainant's cell phone and approximately \$776.00 that the Complainant was carrying. [REDACTED] then took the Complainant into a private room and asked the Complainant to tell him the names of the major drug dealers in the area; [REDACTED] did not read the Complainant his Miranda Rights. The Complainant told [REDACTED] that he did not know the names of any local drug dealers, and [REDACTED] told him to leave and to call [REDACTED] when he was ready to cooperate. [REDACTED] did not arrest the Complainant for anything and did not issue any tickets or citations, but would not return to the Complainant his car, cell phone, or cash. The Complainant went back to the police station on February 9, and [REDACTED] asked him if he was ready to cooperate and inquired where the button is for the "secret glove compartment" in the Complainant's car. The Complainant replied that he does not have a secret glove compartment in his car. [REDACTED] told the Complainant that if he does not cooperate, [REDACTED] will tear his car apart. The Complainant then left the station without the PMRPD returning his car, cell phone, or cash. At some point during [REDACTED] interactions with the Complainant, [REDACTED] stated to the Complainant, "You Nuyoricans¹ think you can come up here and do anything you want."

Since February 8, 2010, the Complainant has called [REDACTED] or has gone to the police station on numerous occasions in an attempt to get his property back, but PMRPD employees always asserted that [REDACTED] was not there. The Complainant retained a lawyer to assist him in getting his property back, and the PMRPD returned his car in April 2010 and returned his cash and cell phone in March 2011. The Complainant's car had been damaged while in the possession of the PMRPD; there is a dent in the side of the car and the glove compartment is broken. On February 14, 2011, the PMRPD issued a criminal complaint against the Complainant, accusing the Complainant of driving under the influence of alcohol or controlled substance (DUI) in violation of 75 PA. CONS. STAT. §§ 3802(a)(1) and 3802(a)(2) (2011), of following another vehicle too closely in violation of 75 PA CSA § 3310(a) (2011), and of using multiple-beam road lighting in violation of 75 PA. CONS. STAT. § 4306 (2011). Since February 8, [REDACTED] has contacted the Complainant's barber shop on several occasions and has spoken to the Complainant's employees, alleging that the Complainant is involved in criminal activity. Additionally, over the past several months, officers with the PMRPD have spoken to owners of neighboring businesses inquiring whether the Complainant is involved in

¹ According to the web-based encyclopedia Wikipedia at <http://en.wikipedia.org>, the term "Nuyorican" refers to members of Puerto Rican culture located in the State of New York or other areas of the Northeast.

criminal activity, and the Complainant and clients of his [REDACTED] have observed members of the PMRPD watching the [REDACTED]. The Complainant believes that these actions have resulted in a loss of customers and damage to his reputation.

The Complainant asserts that [REDACTED] actions are based on his race and national origin. The Complainant also asserts that the PMRPD's issuance of a criminal citation over one year following the PMRPD's traffic stop of the Complainant, and shortly after the OCR notified the PMRPD of the Complainant's discrimination Complaint on February 1, 2011, constitutes retaliation for filing a Complaint with the OCR.

In the PMRPD's response to the OCR's data request (data response), the PMRPD disputed many of the facts asserted by the Complainant. The PMRPD attached [REDACTED] [REDACTED] incident report regarding his February 8, 2010, traffic stop of the Complainant and follow up investigation, which sets forth the PMRPD's version of what occurred.

According to the incident report, [REDACTED] stopped the Complainant's vehicle after he observed the Complainant failing to dim his headlights for oncoming traffic and also following another vehicle too closely. [REDACTED] noted in his incident report that he showed the Complainant that the Complainant's indicator light revealed that the Complainant's high beam headlights were on, and the Complainant acknowledged the violation. [REDACTED] wrote that he detected a strong odor of alcohol on the Complainant's breath and observed that the Complainant had watery eyes and slowed speech, and that Complainant told [REDACTED] that he had been drinking at a local bar.

[REDACTED] conducted a driver's license, registration, and criminal history check of the Complainant, and discovered that the Complainant has an extensive criminal history for drug trafficking offenses and that the PMRPD has an ongoing drug trafficking investigation which identifies the Complainant as a local drug dealer. According to the incident report and to the PMRPD's data response, the Complainant failed the field sobriety tests, and [REDACTED] told the Complainant that he was under arrest for DUI. [REDACTED] also informed the Complainant of the Pennsylvania law stating that a person driving in Pennsylvania is deemed to have given consent to undergo tests of the person's breath, blood, or urine for the purposes of determining the alcohol level, and that he would be taking the Complainant to the Pocono Medical Center for a blood test.

[REDACTED] wrote in the incident report that the Complainant said that he understood this and willing to go. The results of the blood test revealed that the Complainant's blood alcohol level was .085%.²

According to the incident report, [REDACTED] searched the Complainant incident to his arrest and found \$762.00 in the Complainant's pocket consisting primarily of twenty dollar bills, which is a denomination consistent with drug dealing. [REDACTED] wrote that the Complainant's vehicle also had an overwhelming odor of cologne coming from the passenger compartment, which is a common agent used to mask the odor of drugs; that the Complainant had just left a bar that is known to law enforcement to be utilized

² Pursuant to Pennsylvania law, a blood alcohol concentration level of .08% or higher constitutes a criminal violation of DUI. See 75 PA. CONS. STAT. ANN. § 3802(a)(2) (2011).

for the trafficking of drugs; and that the Complainant had numerous air fresheners stuffed into the air vents in his vehicle, which is indicative of narcotics transport. Based on his suspicion that the Complainant had narcotics in his vehicle, [REDACTED] contacted [REDACTED] of the PMRPD to come to the scene with a police dog trained in the detection of narcotics. The police dog conducted an exterior sweep of the Complainant's vehicle and alerted to the presence of narcotics. Based on all of this information, [REDACTED] applied for and received a search warrant on February 8 to search the Complainant's vehicle, cellular phones, and any other communication devices, and to seize all property that is consistent with the illegal trafficking of narcotics. The PMRPD and the Complainant both provided the OCR with a copy of this search warrant, which discusses the above-referenced information as probable cause for the search warrant. According to the incident report, the PMRPD searched the Complainant's vehicle on February 9, 2010, and seized two cellular phones and two pill bottles containing unknown capsules, and also discovered a hidden glove compartment in the dashboard.

In regard to the Complainant's allegation that [REDACTED] strip searched him at the police station and questioned him regarding local drug trafficking activities, [REDACTED] [REDACTED] wrote in his incident report that once he took the Complainant to the police station, he notified the Complainant that he suspected that the Complainant was involved in the illegal trafficking of drugs and that he was going to be applying for a search warrant for the Complainant's vehicle. [REDACTED] wrote that he read the Complainant his Miranda Rights and that the Complainant agreed to answer [REDACTED] questions. According to the incident report, when [REDACTED] asked the Complainant if he had any narcotics on his person, the Complainant said that he did not and he offered to strip down to prove this. In the PMRPD's data response, the PMRPD said that [REDACTED] and [REDACTED] of the PMRPD (both male) conducted a visual strip search of the Complainant in a private temporary holding cell area. According to the incident report, following this search, [REDACTED] of the PMRPD booked the Complainant for the DUI offense. In regard to the Complainant's assertions that [REDACTED] kept questioning him regarding a secret glove compartment, the PMRPD said that during the execution of the search warrant, two police dogs trained in the detection of narcotics initially went through the Complainant's car and alerted to the odor of narcotics near the vehicle's dashboard, and that [REDACTED] was attempting to provide the Complainant with the opportunity to cooperate and make the search less intrusive. According to the PMRPD's data response, [REDACTED] denies ever calling the Complainant a "Nuyorican" during his interviews of the Complainant, and says that he is not even familiar with this term.

As for the Complainant's allegations that the PMRPD would not immediately return his property, and did not issue a criminal citation in connection with the traffic stop and DUI arrest until February 14, 2011, in the PMRPD's response to the OCR's supplemental data request, the PMRPD said that following the February 8, 2010, arrest, the PMRPD continued to investigate the Complainant for drug trafficking and for insurance fraud (see below). The PMRPD said that it initially kept the DUI charge together with these investigations as one ongoing case. According to the PMRPD, irrespective of the

Complaint filed with the OCR, the PMRPD decided this year to file charges regarding the DUI and to separate this charge from the drug trafficking and insurance fraud investigations. In regard to the return of the Complainant's vehicle, the PMRPD said that following the Complainant's February 8, 2010, arrest, a credit union contacted the PMRPD and asserted a claim to the Complainant's vehicle, and that due to the civil dispute as to the owner of the vehicle and the ongoing narcotics investigation of the Complainant, the PMRPD did not release the vehicle until April 2010. As for the Complainant's allegations that the PMRPD damaged the Complainant's vehicle, the PMRPD said that photographs demonstrate that the damage was pre-existing, and that the PMRPD has referred the case to the Northeast Pennsylvania Insurance Fraud Task Force for investigation. The PMRPD stated that it seized the Complainant's cell phone and cash pursuant to the search warrant and kept these items as evidence during its ongoing investigations of the Complainant, and ultimately returned the Complainant's cell phone and cash during a March 2011 preliminary hearing on the DUI charge.

Lastly, in regard to the Complainant's allegations that [REDACTED] has been contacting his workplace and alleging to the Complainant's employees that the Complainant is involved in criminal activity, the PMRPD said in its data response that [REDACTED] only phoned the Complainant's workplace for the purposes of returning the Complainant's messages. The PMRPD said that all of [REDACTED] actions appear to be in compliance with PMRPD policies and procedures.

Policies and Procedures Relevant to the Allegations

The PMRPD provided the OCR with several internal policies and procedures relevant to the Complainant's allegations. The PMRPD provided the OCR with PMRPD General Order No. 8-3, "Vehicle Enforcement Action" (adopted September 8, 2009), which states that officers may arrest an individual who is in violation of the traffic laws pertaining to driving under the influence of drugs or alcohol. Additionally, PMRPD General Order No. 8-4, "Legal Process" (adopted January 12, 2010), authorizes officers to make warrantless arrests when an individual commits an offense in the presence of an officer or when officers have probable cause that an individual committed a felony. The PMRPD also provided PMRPD General Order No. 9-2, "Strip and Body Cavity Searches" (adopted April 14, 2009), which states that officers shall not strip search an individual unless there is probable cause to believe that the individual is concealing a weapon, a controlled substance, or other contraband, and that strip searches shall only be conducted by and in the presence of officers of the same sex as the individual being searched and where the search cannot be observed by others. General Order No. 9-2 further states that officers shall document all strip searches on an incident report. In regard to search and seizure, General Order No. 8-4 states that officers may apply for a search warrant to search for and seize contraband, and that the application should specify the area and items to be searched and the probable cause to believe that the identified items are located in the place to be searched. The PMRPD also provided General Order No. 17-1, "K-9 Policy" (adopted December 12, 2007), which says that officers may use K-9 teams for the search and detection of narcotics. Lastly, the PMRPD submitted General Order

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No. 10-1, “In Custody Requirements” (adopted July 14, 2009), which requires officers to administer Miranda Warnings prior to any custodial interrogation and states that officers may interrogate an individual only if the individual knowingly and willingly waived his or her rights.

Legal Analysis

Title VI of the Civil Rights Act of 1964 (Title VI) provides that “[n]o person in the United States shall, on the grounds of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.” 42 U.S.C. § 2000d.

Additionally, the Omnibus Crime Control and Safe Streets Act of 1968 (Safe Streets Act), under which the PMRPD receives DOJ funding, contains a discrimination provision modeled after Title VI that prohibits funding recipients from discriminating on the basis of race, color, national origin, sex, and religion. 42 U.S.C. § 3789d(c)(1). To prove discrimination under these statutory provisions, the evidence must establish an intent to discriminate. Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 265 (1977). Discriminatory intent may be shown by such factors as substantial disparate impact, a history of discriminatory actions, procedural and substantive departures from the norms generally followed by the decisionmaker, and discriminatory statements. Id. at 265.

The DOJ regulations implementing Title VI further prohibit funding recipients from retaliating against individuals for filing a complaint of discrimination or otherwise engaging in protected activity under Title VI. 28 C.F.R. § 42.107(e). To establish retaliation under Title VI, the evidence must demonstrate the following: 1) the complainant engaged in a protected activity; 2) the funding recipient subjected the complainant to an adverse action after or contemporaneously with the protected activity; and 3) a causal link exists between the adverse action and the protected activity.

Whitfield v. Notre Dame Middle Sch., No. 09-2649, 2011 WL 94735, at *4 (3rd Cir. Jan. 12, 2011).

Based on the OCR’s review of the information that has been submitted by both the Complainant and the PMRPD, the OCR finds that the evidence is insufficient to demonstrate that the PMRPD discriminated against the Complainant based on race or national origin, or retaliated against the Complainant for filing a Complaint with the OCR. As for the allegations of discrimination, according to the information that is before the OCR, it does not appear that any of [REDACTED] actions were departures from established norms or procedures. As for the Complainant’s arrest for DUI, [REDACTED] noted in the incident report that he detected a strong odor of alcohol on the Complainant’s breath and observed that the Complainant had watery eyes and slowed speech, that the Complainant admitted that he had been drinking, and that the Complainant failed the field sobriety tests. Accordingly, it appears that [REDACTED] had probable cause to believe that the Complainant violated state laws prohibiting DUI and was authorized to arrest the Complainant pursuant to General Orders 8-3 and 8-4.

Furthermore, it appears that [REDACTED] initial stop of the Complainant's vehicle complied with federal law, as the decision to stop a vehicle is reasonable where an officer has probable cause that a traffic violation has occurred. Whren v. United States, 517 U.S. 806, 810 (1996). According to the incident report, [REDACTED] stopped the Complainant's vehicle after he observed the Complainant failing to dim his headlights for oncoming traffic and following another vehicle too closely, and [REDACTED] showed the Complainant that his high beam headlight indicator light was on.

It also appears that [REDACTED] searches of the Complainant and his vehicle complied with established norms and procedures. [REDACTED] initially searched the Complainant's person immediately upon his arrest and located currency in suspicious denominations; under federal law, a search incident to a lawful arrest is an exception to the general requirement that an officer obtain a warrant for a search. United States v. Robinson, 414 U.S. 218, 224 (1973). Following the Complainant's arrest, [REDACTED] also had a K-9 unit trained in the detection of narcotics circle the exterior of the Complainant's vehicle upon his suspicion that the vehicle contained narcotics; according to General Order 17-1, officers may use K-9 teams to detect narcotics. Additionally, under federal law, the use of a well-trained drug detection dog to sniff the exterior of a vehicle is not a "search" within the meaning of the Fourth Amendment. Illinois v. Caballes, 543 U.S. 405, 409 (2005). [REDACTED] then applied for and received a search warrant in accordance with General Order 8-4 to search the Complainant's vehicle and cellular phones, and to seize all property that is consistent with the illegal trafficking of narcotics. As for [REDACTED] strip search of the Complainant, [REDACTED] and another male officer conducted the strip search in a private area after the Complainant voluntarily offered to undergo a strip search in response to [REDACTED] concerns that the Complainant had narcotics on his person. [REDACTED] then documented the strip search in his incident report. Accordingly, it appears that [REDACTED] strip search of the Complainant complied with General Order No. 9-2.

In regard to [REDACTED] questioning of the Complainant at the police station, the Complainant alleges that [REDACTED] did not read him his Miranda Rights, while [REDACTED] noted in his incident report that he did advise the Complainant of his Miranda Rights and that the Complainant agreed to answer [REDACTED] questions. Based on the lack of definitive proof as to what actually occurred and the lack of evidence casting doubt on [REDACTED] credibility, the OCR is presuming that [REDACTED] contemporaneous written account of his encounter with the Complainant is a truthful, accurate statement of what occurred. Therefore, the evidence is insufficient to demonstrate that [REDACTED] questioning of the Complainant did not comply with General Order No. 10-1.

The evidence before the OCR is also insufficient to demonstrate that [REDACTED] made discriminatory statements about the Complainant's race or national origin. While the Complainant alleges that [REDACTED] called him a "Nuyorican," [REDACTED] denied using this term, and said that he is not even familiar with this term. Moreover, even if

[REDACTED] did use this term, the term by itself does not necessarily display racial animus.

Additionally, it does not appear that the PMRPD has a history of discrimination on the basis of race or national origin. According to the PMRPD's data response, since January 1, 2008, the PMRPD received one complaint from a member of the public alleging race or national origin discrimination. In this complainant, the complainant alleged that a traffic stop by a PMRPD officer was racially motivated; the PMRPD's Internal Investigations Unit investigated the complaint and found that the officer's actions complied with PMRPD policy and local, state, and federal law. The PMRPD reported that since January 1, 2008, one lawsuit has been filed against the PMRPD alleging race discrimination. The plaintiffs in this lawsuit alleged that several PMRPD officers, including [REDACTED], discriminated against the plaintiffs based on race in connection with their arrests. In the PMRPD's data response, the PMRPD denied the allegations in the lawsuit and noted that the litigation is ongoing.

Also in the PMRPD's data response, the PMRPD provided the OCR with data on the race and ethnicity of the 581 individuals who were the subject of a DUI-related incident report from January 1, 2008 to February 23, 2011. This data indicates that of the 581 individuals, 109 (18%) were Hispanic. The OCR's investigation did not uncover any information on who uses the roads under the jurisdiction of the PMRPD. Available data from the U.S. Census Bureau demonstrates that between January 2005 and December 2009, on average, Hispanic individuals comprised 20% of the total population within the service jurisdiction of the PMRPD.³ U.S. Census Bureau, American FactFinder, 2005-2009 American Community Survey 5-Year Estimates for Mount Pocono Borough, Tobyhanna Township, Coolbaugh Township, and Tunkhannock Township, at <http://factfinder.census.gov>. A comparison of the percentage of DUI-related incident reports involving Hispanic individuals with the percentage of Hispanic individuals residing within the PMRPD's service jurisdiction does not indicate a history of discrimination, particularly in light of the fact that the U.S. Census Bureau fails to count everyone, and the undercount is greatest in certain subgroups of the populations including Hispanics.⁴ See Dep't of Commerce v. U.S. House of Representatives, 525 U.S. 316, 322-23 (1999).

³ Based on information contained on the PMRPD's website at www.pmrpd.com, the OCR understands that the PMRPD's service jurisdiction includes the communities of Coolbaugh Township, Mount Pocono Borough, Tobyhanna Township, and Tunkhannock Township. The U.S. Census Bureau Data indicates that between January 2005 and December 2009, on average, the total population of Coolbaugh Township, Mount Pocono Borough, Tobyhanna Township, and Tunkhannock Township was 34,750 individuals, and a total of 6,969 (20%) of these individuals were Hispanic.

⁴ The OCR acknowledges that a statistical analysis comparing these particular data sets does not provide a complete analysis of whether discrimination is occurring, as the percentage of Hispanic individuals residing within the service area does not represent the percentage of Hispanic individuals driving on the roads within the service area and thus subject to the PMRPD's jurisdiction. See Chavez v. Illinois State Police, 251 F.3d 612, 644 (7th Cir. 2001). However, the U.S. Census Bureau data is the best data available at this time, and the OCR is not heavily relying upon this analysis in reaching our overall determination.

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In the absence of any racial demographic data on the drivers who use the roads within the PMRPD's jurisdiction, and based on the foregoing, the evidence is insufficient to demonstrate that the PMRPD acted with discriminatory intent toward the Complainant. The evidence is also insufficient to demonstrate that the PMRPD acted with the intent to retaliate against the Complainant when the PMRPD issued a criminal complaint against the Complainant shortly after the Complainant filed his Complaint with the OCR. The blood test taken at the time of the Complainant's traffic stop revealed that the Complainant had a blood alcohol concentration which was over the legal limit, which appears to justify the issuance of a criminal complaint. According to the PMRPD, it delayed filing the criminal complaint regarding the DUI and other traffic violations due to other ongoing investigations concerning the Complainant. The evidence is insufficient to demonstrate a causal link between the Complainant's filing of his discrimination Complaint with the OCR and the issuance of the criminal complaint.

Additionally, as for the Complainant's allegations that members of the PMRPD recently have been speaking to the Complainant's neighboring shop owners and have been watching his [REDACTED], even if these allegations are true, it appears that these actions are part of the PMRPD's ongoing investigations of the Complainant and the evidence is insufficient to demonstrate discrimination or retaliation.

Based on all of the information discussed above, the OCR has determined that the evidence is insufficient to demonstrate a violation of Title VI and the Safe Streets Act and their implementing regulations. Accordingly, we are closing the administrative Complaint filed by the Complainant.

Sincerely,

/s/

Michael L. Alston
Director