

## **OTHER MISCONDUCT—CATEGORIES, PLEADING LANGUAGE, AND APPLICABLE PATROL GUIDE PROCEDURES AND OTHER LEGAL STANDARDS**

### **Failure to prepare memo book entries**

#### **Pleading language**

“OFFICER failed to prepare a memo book entry as required by [PATROL GUIDE PROCEDURE].”

#### **Applicable Patrol Guide procedure(s) and other legal standards**

The applicable Patrol Guide procedure is 212-08 (activity logs).

### **Failure to prepare a stop and frisk report**

#### **Pleading language**

“OFFICER failed to prepare a stop and frisk report as required by [PATROL GUIDE PROCEDURE].”

#### **Applicable Patrol Guide procedure(s) and other legal standards**

The applicable Patrol Guide procedure is 212-11 (stop and frisk).

#### **When this OMN should be pleaded**

When the investigator determines that the police took action that required the preparation of a stop and frisk report and generally when there is no other documentation of the stop (e.g., by virtue of a summons or arrest), the investigator should consider making this recommendation.

### **False official statement**

#### **Pleading language**

There is evidence suggesting OFFICER provided a false official statement in violation of PG 203-08.

#### **Applicable Patrol Guide procedure(s) and other legal standards**

During the course of an investigation, an investigator may gather evidence indicating that an officer has made a false official statement. In all cases where a false official statement may be present, investigators should consult with their Manager and the DCI or DQAQI as they analyze this issue.

The applicable Patrol Guide procedure is 203-08 (making false statements), which states in part: “The intentional making of a false statement is prohibited, and will be subject to disciplinary action, up to and including dismissal. Intentionally making a false official statement regarding a material matter will result in dismissal from the Department, absent exceptional circumstances.” Prior to the start of every interview with an officer, investigators ask the officers to acknowledge that they have read and understand section 203-08, and that the penalty for making a false official statement can include termination.

Proving a false official statement requires a showing of three elements by a preponderance of the evidence: (1) that the officer made a statement; (2) that the statement was material; and (3) that the statement was intentionally false. *See Dep’t of Correction v. Centeno*, OATH Index No. 2031/04 (2005). With respect to the first element, officer testimony in CCRB interviews, officer statements in official NYPD documents (such as memo books, UF-250 forms, arrest reports, etc.), and officer affidavits in

criminal court complaints and other sworn court documents, all constitute “statements,” as well as “official statements.” With respect to the second element, an officer’s statements are “material” if they relate to his or a fellow officer’s actions or justifications in an incident, and affect the outcome of the investigator’s finding.

A statement is “intentionally false” if it consists of a specific factual claim that is knowingly false, not simply inadvertently inaccurate. Examples of specific factual claims include instances where an officer denies or claims doing something; where an officer denies or claims to have seen something; and certain instances where an officer’s account dramatically differs from the reliable accounts of fellow officers and/or civilians. In assessing “intent,” investigators should focus on whether the officer has something to gain by making the false statement or something to lose by reporting that fact truthfully, including minimizing culpability or involvement by himself or fellow officers, or enhancing his justification for an action.

In certain circumstances, an officer’s failure to recall events may suggest that the officer is providing a false official statement. Factors to review in “failure to recall” situations include, but are not limited to: the proximity in time between the incident and the officer’s interview; whether the officer’s reflection can be refreshed using documents or video and audio evidence; whether the nature of the incident would be one that the officer would reasonably be expected to remember; and whether the officer’s lack of memory regarding portions of an incident is credible in light of what the officer does remember about the incident. Simply because the investigator has found one account more credible than the subject officer’s account does not mean that the investigator should recommend that the board note other misconduct.

Examples of cases where false official statements have been noted include: (1) situations where an officer’s statements in CCRB interview contradict video or audio evidence; (2) situations where an officer’s statements in CCRB interview contradict NYPD documents (memo books, command logs, UF-250s, SPRINT reports); (3) situations where an officer’s statements contradict the officer’s statements in IAB interview; (4) situations where an officer’s statements in CCRB interview contradict officer’s sworn criminal court complaint or other sworn court applications (e.g. warrant affidavits); (5) situations where an officer’s statements in CCRB interview contradict reliable statements by fellow officers or civilian witnesses; and (6) situations where an officer claims in CCRB interview not to recall the incident, but other evidence confirms the officer’s involvement and CCRB interview is close-in-time to incident.

During interviews of officers, investigators should ask questions to ensure that they have a clear answer by an officer with respect to a particular issue. Investigators should follow up with additional questions if an officer provides an equivocal or ambivalent response. Wherever possible, after providing the officer with an opportunity to describe the incident in detail, investigators should present the officer with any discrepancies between that description and other accounts of the incident (whether in video, documents, or other officer or witness statements) in order to provide the officer with an opportunity to explain the discrepancy.

Within the body of the closing report, investigators should note each relevant and material assertion of fact that the evidence indicates is false. For each fact, the investigator must discuss: 1) the evidence that indicates that the assertion of fact is false; and 2) the evidence that indicates that the false statement was made intentionally, i.e., not a justifiable failure of memory or unintentional mistake. Where the false statement is made in a CCRB interview, the question(s) posed to the subject and the answer(s) embodying the allegedly false statement(s) of fact should be quoted directly. Investigators

should explain their basis for inferring that the officer made the statement “intentionally,” such as including an explanation of what the officer has to gain or lose from the false statement.

While administrative case law does not require that the testimony of a single witness in a false statement case be corroborated, investigators should understand that in a criminal context, perjury in most cases cannot be proven based on the testimony of a single witness. Since administrative law courts often look to the criminal law for guidance in assessing evidence, there should generally be strong corroborative evidence to support a recommendation that the officer intentionally made a false statement.

If an investigator encounters a situation where he or she believes that an officer intentionally made a material omission in a statement, the investigator should speak to a Squad supervisor and the DCI or DQAQI.

#### **Other: Failure to document preferred name**

##### **Pleading language**

“OFFICER failed to document the preferred name of VICTIM.”

##### **When this OMN should be pleaded**

This OMN should be pleaded in any instance where it is alleged that an arrestee provided an officer with their preferred name and the officer does not document this name on the OLBS Arrest Report, Prisoner Pedigree Card, and the Prisoner Movement Slip.

##### **Applicable Patrol Guide procedure(s) and other legal standards**

Patrol Guide Procedure 208-03 requires that officers in-put a person’s preferred name on the *Prisoner Pedigree Card*, *Prisoner Movement Slip*, and the *On Line Booking System (OLBS) Arrest Report* under “Nickname/ Alias/ Maiden Name” prefaced by “P-.”

#### **Other: Failure to properly document a search**

##### **Pleading language**

“OFFICER failed to properly document a search.”

##### **When this OMN should be pleaded**

This OMN should be pleaded in any instance where it is alleged that an arrestee requested to be searched by an officer of a specific gender, this request was not honored, or there was no notation in the command log as to why this request was not honored or who conducted the search.

##### **Applicable Patrol Guide procedure(s) and other legal standards**

Patrol Guide procedure 208-05 states that arrestees are to be searched by an officer of the gender of the arrestee’s preference unless to do so is not possible. If it is not possible, the desk sergeant must provide a detailed note in the command log as to why it was not possible and the name of the officer who searched the individual.

#### **Other: Failure to prepare a Threat, Resistance, Injury Report**

##### **Pleading language**

“OFFICER failed to prepare a Threat, Resistance, or Injury Report.”



**Applicable Patrol Guide procedure(s) and other legal standards**

Patrol Guide procedure 221-03 (reporting and investigation of force incident or injury to persons during police action.)

**Other: Failure to prepare an AIDED report**

**Pleading language**

OFFICER failed to prepare an AIDED Report.

**Applicable Patrol Guide procedure(s) and other legal standards**

216-01 (aided cases general procedure)

**Other: Failure to document force**

**Pleading language**

“OFFICER failed to document the use of force on the arrest report as required by [PATROL GUIDE PROCEDURE].”

**Applicable Patrol Guide procedure(s) and other legal standards**

Patrol Guide procedure 208-15 (Arrest Report Preparation at Stationhouse).

**Other: Failure to properly document a strip-search**

**Pleading language**

OFFICER failed to properly document a strip-search.

**When to plead**

This OMN should be pleaded in any instance where the approving supervisor or designee did not properly document a strip-search in the command log. Additionally, this should be pleaded in any instance where the arresting officer failed to notate that a strip-search was conducted in the arrest report, prisoner movement slip, and their memo book.

**Applicable Patrol Guide procedure(s) and other legal standards**

Patrol Guide procedure 208-03 (arrest—general processing) discusses the documentation required after a strip-search is authorized.

**Improper use of body-worn cameras**

**Pleading Language**

“OFFICER improperly used his/her body-worn camera.”

**Applicable Patrol Guide procedure(s) and other legal standards**

The applicable guidelines are Patrol Guide Section 212-123 (Use of Body-Worn Cameras).

**When this OMN should be pleaded**

When the investigator determines that an officer who has been issued a body-worn camera (BWC) for at least 90 days failed to turn on the device at the start of the tour, and/or failed to activate the BWC during a mandatory event when it was feasible and safe to do so, and/or terminated the activation

before such an incident has concluded, **the investigator should make this recommendation.**

When determining if recording terminated prematurely, the following issues should be kept in mind:

- MOS must stop recording if a victim/witness requests anonymity provided that an offender is not present or there is a conflict with the prohibited recording list.
- MOS may stop recording if the recording commenced due to the nature of a radio run but the MOS determined that there was no crime, no offender was present, and the matter involved sensitive or personal information.
- MOS may stop recording if the original reason for the recording terminated, there are no alleged offenders still at the location, and the MOS is still on the scene tertiary police activity, such as crime scene security or traffic control, etc.

**Other: Failure to document consent**

**Pleading Language**

OFFICER failed to properly document a consent to search as required by Patrol Guide procedure 212-11.

**When should this recommendation be made**

This recommendation should be made in any instance where an officer asserts that consent was obtained to search an individual's person, vehicle, or home but failed to document the consent.

**Other: Failure to properly document a strip-search**

**Pleading language**

OFFICER failed to properly document a strip-search.

**When to plead**

This OMN should be pleaded in any instance where the approving supervisor or designee did not properly document a strip-search in the command log. Additionally, this should be pleaded in any instance where the arresting officer failed to notate that a strip-search was conducted in the arrest report, prisoner movement slip, and their memo book.

**Applicable Patrol Guide procedure(s) and other legal standards**

Patrol Guide procedure 208-03 (arrest—general processing) discusses the documentation required after a strip-search is authorized.

**Other: Failure to supervise**

**Pleading language**

OFFICER failed to supervise ALLEGATION

**When to plead**

This OMN should be pleaded in any instance where the investigation determined that a supervisor had a duty to supervise officers, where misconduct occurred, and where the supervisor did not participate nor intervene. This does not cover instances where a supervising officer tacitly approved the action by being present for the entirety of the incident while not necessarily participating, but instances where a supervising officer had an affirmative duty to supervise and failed to supervise (see above under "Supervisors and subordinates").

## **Other**

For any other non-FADO misconduct not covered by the above allegations, the investigator should, in consultation with their Manager and the DCI or DQAQI, pick “other” from the drop-down menu and prepare pleading language consistent with the style used in other allegations.

While not offered in the drop-down menu within the CTS, investigators should be aware of some other theories under which officers can be charged with other misconduct.

Under Patrol Guide procedure 207-21, officers have an absolute duty to report corruption or serious misconduct, including the use of excessive force, that is committed by a member of the service whether on or off-duty. The officer who observes or becomes aware of such use of force and fails to make a report, (either anonymously or by identifying him/herself), can be cited for other misconduct under Patrol Guide procedure 207-21. Citing an officer for failure to report serious misconduct should be used sparingly and only after consulting with supervisors. Supervisors are advised to consult with the DCI, DQAQI, and/or the Chiefs of Investigation.

With respect to the use of force, Patrol Guide procedure 203-11 states that officers present at, though not directly involved in, a police action are required to maintain control or intervene if the use of force against a subject clearly becomes excessive. Where there is strong evidence that misconduct occurred, in unusual cases it may be appropriate to cite supervisors or nonparticipating officers for other misconduct under Patrol Guide procedure 203-11. Again, this section should be used only after consultation with supervisors, who are advised to consult with the DCI, DQAQI, and/or the Chiefs of Investigation.