



## **OMBUDSMAN'S REPORT**

### **Complaint Investigation & Findings**

*OMB06/0096 - February 9, 2007*

#### ***THE SITUATION***

This case involves a situation in which a Boise Police Department (BPD) officer riding a motorcycle hit an object being carried by a pedestrian. The Complainant is an employee of a company that specializes in providing traffic control for road construction projects and special events. On July 22, 2006, he and a co-worker, Witness #1, were setting up traffic cones to close two lanes of Capitol Boulevard, which, at the point the incident occurred, is a one-way street that is four lanes wide. The two right lanes of traffic were being closed; and the two left lanes were being directed to turn west onto Front Street. Capitol Boulevard was being partially closed in preparation for a cycling event.

Officer #1 was working on two special events assignments that day, a parade and the downtown cycling event. Immediately before the incident occurred, Officer #1 was traveling north on Capitol Boulevard toward the road crew. He was "white-lining," or, in other words, driving his motorcycle in the space between the traffic and the closed lane. As the Complainant was stepping out from in front of a company truck to set an eighteen-pound traffic cone on the white line, Officer #1 was coming through on his motorcycle. The motorcycle hit the traffic cone, which landed some distance away. The Complainant had no visible injuries, nor was he, in fact, injured.

Officer #1 stopped for a traffic control device at the intersection of Capitol Boulevard and Front Street, which was a short distance from the site of the collision. Officer #1 saw the Complainant walking toward him, and proceeded through the intersection when the traffic was released. The Complainant reported the incident to Officer #1's supervisor. Supervisor

#1 spoke to Officer #1 and declined to issue a citation to Officer #1, as requested by the Complainant.

### ***THE COMPLAINT***

The Complainant submitted a complaint via e-mail to the Office of the Community Ombudsman on July 22, 2006. He stated that he was closing two northbound lanes on the right-hand side of Capitol Boulevard in preparation for the cycling event. The Complainant was in the process of setting traffic cones on the white "skip lines," which are the lines that divide lanes of traffic traveling in the same direction. A police officer on a motorcycle went past him just as he was stepping out from behind his co-worker's truck. The Complainant alleged that the motorcycle grazed his chest and hit his right hand. The cone went flying and landed some distance away. The Complainant stated that he had been injured but did not seek medical treatment.

The Complainant alleged that the officer did not stop until he reached the intersection of Front Street and Capitol Boulevard. The Complainant ran toward the intersection but did not speak with the officer. The Complainant told a co-worker, Witness #2, that he had been hit. The Complainant said that the officer smiled at him and drove away. The Complainant located Officer #1's supervisor and explained the incident. Supervisor #1 spoke to Officer #1 and called the Complainant back. Supervisor #1 explained that he would not issue a citation to one of his officers. The Complainant then contacted the Office of the Community Ombudsman and filed a complaint. He was concerned that he could have been gravely injured. The Complainant's allegation that Officer #1 operated his motorcycle in an unsafe manner, if proven true, would be a violation of the Boise Police Department's Policy § 7.02.00 Employee-Involved Vehicle Collisions.

## ***THE COMPLAINT INVESTIGATION***

The investigation into this complaint included interviews of the following persons: the Complainant; Witness #1, who worked with the Complainant and was driving the company truck; Witness #2, who also worked with the Complainant and was directing traffic at the intersection of Capitol Boulevard and Front Street; Witness #3, who was the Complainant's supervisor; Supervisor #1, who supervises Officer #1 and was also working on the special events the day the incident occurred; and, finally, Officer #1.

## ***WHAT THE COMPLAINT INVESTIGATION FOUND***

Based on the preponderance of the evidence obtained and reviewed in the course of this investigation, I issued the following findings of fact.

1. The Complainant's employer is a company that specializes in providing traffic control for road construction and special events.
2. On the afternoon of July 22, 2006, the Complainant and Witness #1 were setting up traffic control devices on Capitol Boulevard in preparation for a cycling event.
3. Witness #2, a co-worker employed by the same company, was directing traffic at the intersection of Capitol Boulevard and Front Street.
4. Shortly after 2:00 p.m., a parade passed through the intersection of Capitol Boulevard and Front Street.
5. After the parade passed through the intersection and continued south on Capitol Boulevard, barricades were placed at the north end of the intersection of Capitol Boulevard and Front Street.
6. After the parade passed through the intersection, the Complainant began setting up large traffic cones, which are referred to as "candles" by the people in the trade, to close a portion of Capitol Boulevard in preparation for the cycling event.
7. The large traffic cones, or candles, are 48 inches high and weigh 18 pounds.

8. The Complainant first closed the far right lane of Capitol Boulevard, and then angled the line of cones out to close the second lane from the right.
9. Witness #1 was operating a company truck, with an arrow board mounted on an attached trailer.
10. The company truck had a flashing light bar mounted on top of a large metal rack, referred to as a "headache rack," behind the cab of the truck.
11. The flashing light bar on top of the truck was turned on.
12. Witness #1 stopped the truck, with the arrow board, approximately 150 feet south of the intersection of Capitol Boulevard and Front Street in a position to indicate that the two right lanes were closed. The arrow board directed all traffic into the two left lanes of Capitol Boulevard.
13. The traffic in the two left lanes was stopped.
14. The Complainant stepped out from in front of the truck, into the space between the stopped traffic and the closed lane, to set a candle on the skip line.
15. The Complainant did not look before he stepped out from in front of the truck.
16. The Complainant was swinging the candle; and the candle was extended away from the Complainant's body.
17. Officer #1 was traveling down the space between the skip line and the stopped traffic.
18. Officer #1 was traveling at a speed of 15 to 30 miles per hour.
19. Officer #1 was operating his motorcycle with his emergency lights flashing, but with no audible siren or signal.
20. Officer #1 was not engaged in an emergency response at the time.
21. As Officer #1 passed the company truck with the flashing light bar, his motorcycle struck the large traffic cone, or candle, knocking it from the Complainant's hand and causing it to land some distance away.
22. Officer #1 continued on his motorcycle toward the intersection of Capitol Boulevard and Front Street.

23. Officer #1 stopped at the intersection.
24. The Complainant walked toward the intersection and told Witness #2, who had been directing traffic, that he had just been hit by a police officer.
25. The Complainant did not talk to Officer #1 while they were both at the intersection.
26. Officer #1 did not ask the Complainant if he had been injured.
27. Shortly after the incident occurred, the Complainant found Supervisor #1, who was also working the special events assignment, and reported the collision.
28. Supervisor #1 informally looked into the matter, talked to Officer #1, and told the Complainant that he would not issue Officer #1 a citation.
29. During their conversation, the Complainant raised additional issues regarding the interaction between the police and traffic control crews; and Supervisor #1 invited the Complainant to contact him the following week to discuss the situation in more depth.
30. The following week, both Supervisor #1 and the Complainant tried to contact each other.
31. Supervisor #1 did not pursue the matter further after the Complainant filed a complaint with the Office of the Community Ombudsman.
32. The Complainant did not report a physical injury to his employer, to his co-workers, or to Supervisor #1.

### ***OMBUDSMAN'S ANALYSIS AND FINDINGS***

Officer #1 was legally operating his motorcycle on a roadway. He expressed concern that the Complainant had violated the law by stepping out in front of his motorcycle. Idaho Code § 49-708(4) states:

Except as otherwise provided in this title, any pedestrian upon a roadway shall yield the right-of-way to all vehicles upon the roadway.

The Complainant was on the roadway and did not look for oncoming traffic. The Complainant had an obligation to check for oncoming vehicles and to yield to those vehicles. A civilian on a motorcycle or a person on a bicycle could have been traveling in the unoccupied road space between the closed lane and the stopped traffic, and could have just as easily collided with the Complainant. Under Idaho Code § 49-708, the Complainant had an obligation to look before stepping into the roadway in front of moving traffic.

The analysis does not end with the fact that the Complainant did not look for on-coming traffic before stepping out from behind the truck. The Boise Police Department's policy (§ 07.02.00) Employee-Involved Vehicle Collisions states:

*An employee shall operate Department vehicles, as well as personal vehicles while on-duty, in a safe and prudent manner. Involvement in a vehicle collision in which the employee is at fault is evidence of a violation of policy. Vehicle collisions involving an employee will be investigated in the following sections. An employee involved in a vehicle collision may also be subject to testing for alcohol and illegal drugs, as required by City policy.*

This policy section requires that Boise Police Department employees operate department vehicles in a safe and prudent manner. To determine whether a policy violation occurred, it must be determined whether Officer #1 was operating his vehicle in a safe and prudent manner.

It should be noted at the outset that Officer #1 was not engaged in a response to an emergency call. Officer #1 was driving with his emergency lights flashing but was not engaged in an emergency response. Boise Police Department Policy § 3.02.02A defines an emergency response as an "expeditious response of an officer to any emergency situation in which the officer utilizes the emergency lights or lights and siren to facilitate a quick and safe arrival." Under Boise Police Department Policy § 3.02.02B, an emergency response is authorized only under certain circumstances including situations in which someone is in imminent danger of injury or death, or situations in which an officer must attempt to prevent or stop a violent crime.

Silent Code Three is defined by Boise Police Department Policy 3.02.02H, as an emergency response in which the emergency lights, and not the siren, are used to facilitate a quick and safe response. In this case, there was no situation in which an emergency response is authorized. Officer #1 was not operating his vehicle in a Silent Code Three response. For this reason, the question is not whether Officer #1 was in compliance with Boise Police Department Policy § 3.02.02C, but whether he violated Boise Police Department Policy § 7.02.00.

As noted above, Boise Police Department Policy § 7.02.00 requires that an officer operate his or her vehicle in a safe and prudent manner. The Complainant alleges that Officer #1 was driving up the white line between stopped traffic and a lane that had already been closed. He alleges that Officer #1 hit him and then left the scene.

The first issue is whether Officer #1 was violating policy by “white-lining,” or operating his motorcycle in the unoccupied portion of a lane between the stopped traffic and the closed lane. There is nothing in Idaho law that prohibits a motorcyclist or bicyclist from driving in the unoccupied road space in the same lane as other traffic. Officer #1 was traveling in the unoccupied road space at the time the collision occurred and his actions were legal. Consequently, there was no policy violation, as long as he was operating his vehicle in a safe and prudent manner.

The Complainant also alleges that Officer #1 should have been charged with “hit and run.” Idaho Code § 18-8007 prohibits a person from leaving the scene of an accident that results in injury or death. The violation of this code section is a felony, for which the maximum punishment is a term of five years in prison, a \$5,000 fine, or both. The Complainant stated that Officer #1’s motorcycle grazed his chest and hit his hand. While it may have struck him, there was apparently no injury. Witness #1 said that he did not see any injuries. The Complainant did not tell Witness #2 he had been injured. The Complainant did not file a Notice of Injury or any other paperwork that would indicate he intended to file a workers’

compensation claim, even though it was an on-the-job accident. He did not tell Witness #3, his supervisor, that he had been injured; and he did not tell Supervisor #1 that he had been injured. Moreover, after the collision, the Complainant either ran or walked to the intersection.

It would have been a preferable course of conduct for Officer #1 to have stopped to make sure that there was no injury. He said in his interview that he would have stopped if he had thought the Complainant had been injured. Officer #1's decision not to stop met the requirements of the statute because there neither was nor appeared to be a physical injury. Weighing all the facts in the balance, the preponderance of the evidence indicates that Officer #1 did not leave the scene of an accident in which an injury occurred.

The last issue to consider is whether Officer #1 was operating his vehicle in a safe and prudent manner. Those who were in a position to observe Officer #1's motorcycle as it traveled along the skip line, (the Complainant, Officer #1, and Witness#1), provided various estimates of the speed, ranging from 15 to 35 miles per hour. Looking at the slowest speed estimates, it seems reasonable to conclude that Officer #1 was going between 15 and 30 miles per hour when he hit the traffic cone.

The finding that the speed was between 15 and 30 miles per hour is supported by the fact that the motorcycle hit the cone and caused it to land some distance away. Though there has been no calculation of the speed at which a large motorcycle would have to be going in order to knock an eighteen-pound traffic cone an estimated distance of ten to twelve feet, there would have to be some force behind such an impact. This would be true even if the cone had landed a shorter distance away. In addition, Witness #1 also noted that the collision caused Officer #1 to wobble on his motorcycle.


Idaho Code § 49-615, which requires that drivers exercise due care to avoid colliding with a pedestrian, gives some guidance in determining the question presented. It states:

DRIVERS TO EXERCISE DUE CARE. Notwithstanding other provisions of this title or the provisions of any local ordinance, every driver of a vehicle shall exercise due care to avoid colliding with any pedestrian or any person propelling a human-powered vehicle and shall give an audible signal when necessary.

One of the important obligations of this statute is the requirement that a driver give an audible signal, if necessary, to avoid colliding with a pedestrian. Not only must a driver use due care to avoid hitting a pedestrian, a driver must use an audible signal to provide warning to a pedestrian to avoid a collision. It is undisputed that Officer #1 gave no audible signal as he approached a road crew that was working around a large company truck with caution lights flashing.

This leads to the question whether it would be safe and prudent for an officer, traveling in a narrow space next to a stopped lane of traffic, approaching a road crew, to travel at a speed of 15 to 30 miles per hour. The road crew indicated its presence by the use of amber and white caution lights mounted above the cab of a large pick-up truck. The lights were on and were visible. The road crew also had an arrow board, which was turned on, mounted in a trailer behind the truck. It is without question that the caution lights indicated a possibility that there would be road crew workers in or around the truck. Even assuming that Officer #1 was going only 15 miles per hour, he did not exhibit due regard for the possibility that there could be road crew workers in an area where caution lights were flashing.

For this reason, with respect to the allegation that Officer #1 violated Boise Police Department Policy § 07.02.00, I have issued a finding that the alleged violation be sustained.



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