NEW YORK STATE OFFICE OF THE ATTORNEY GENERAL
LAW ENFORCEMENT MISCONDUCT INVESTIGATIVE OFFICE

REPORT AND FINDINGS PURSUANT TO EXECUTIVE LAW 75(5)(b) REGARDING SAUGERTIES POLICE DEPARTMENT OFFICER DION JOHNSON

July 7, 2023

I. EXECUTIVE SUMMARY

New York Executive Law § 75 establishes the Law Enforcement Misconduct Investigative Office within the Office of the Attorney General ("OAG"). Under Executive Law 75(5)(b), covered agencies are required to refer to the OAG instances in which the agency has "receiv[ed] at least five complaints from five or more individuals relating to at least five separate instances involving a certain officer or employee within two years." Upon receiving a such referral, the OAG is required to "investigate [the] complaints to determine whether the subject officer has engaged in a pattern or practice of misconduct, use of excessive force, or acts of dishonesty."

On January 4, 2022, the Saugerties Police Department ("SPD"), based in the town of Saugerties in Ulster County, referred a series of complaints against Police Officer Dion Johnson to the OAG for review pursuant to Executive Law 75(5)(b).

This report sets forth the OAG's findings and concludes that Officer Johnson engaged in a pattern of misconduct involving inappropriate behavior of a sexual nature towards a member of the public and two other SPD officers. He also demonstrated a lack of truthfulness in connection with the investigation of one of these incidents and an earlier incident while employed by the Albany Police Department.

Section II of this report provides an overview of the referral and the OAG's investigation. Section III describes the OAG's findings. Section IV concludes that Officer Johnson engaged in a pattern of misconduct and sets forth recommendations pursuant to Executive Law 75(5)(c).

II. OVERVIEW OF INVESTIGATION

The January 4, 2022 referral was based on a series of complaints relating to allegations of harassment and sexual assault from a member of the public, sexual harassment allegations from co-workers, and an incident in which Officer Johnson allegedly ran a red light in an SPD vehicle.

Following receipt of the referral, OAG personnel spoke with SPD's chief and other command personnel. We also reviewed the SPD's internal investigative files associated with the complaints and disciplinary outcomes, policies that governed the alleged misconduct, Officer Johnson's personnel file and officer training history, and internal correspondence and forms related to Officer Johnson's transfer to SPD from the Albany Police Department (APD), his prior employer. We also reviewed materials obtained directly from APD and from the New York City Department of Correction, another of Officer Johnson's prior employers. During the course of the investigation, we interviewed three women who made complaints involving Officer Johnson and Officer Johnson's former supervisor at APD. Officer Johnson declined to speak with the OAG in connection with this investigation.

III. FINDINGS

The findings of fact described below are based on an evaluation of the evidentiary record using a preponderance of the evidence standard.

A. Allegations of Untruthfulness at the Albany Police Department

Officer Johnson was employed at APD from October 2018 until May 2020. APD records indicate that Officer Johnson resigned shortly after his supervisor recommended to APD's Office of Professional Standards that Officer Johnson face administrative charges for repeatedly making untruthful statements to that supervisor regarding his eligibility for overtime in January and February 2020. The narrative that follows is based on our interview of Officer Johnson's former supervisor and a review of APD records, including two formal Intra-Departmental Correspondences ("IDCs") dated February 14, 2020 and April 16, 2020 that were submitted by the former supervisor to APD's Office of Professional Standards, as well as hiring materials provided by SPD.

1. False Statements Regarding Overtime Shifts

In January 2020, Officer Johnson falsely told his supervising sergeant that he was not eligible to work an overtime shift even though he was, in fact, eligible. Officer Johnson repeated similar falsehoods regarding his purported ineligibility to work overtime on two subsequent occasions in February 2020, despite the sergeant having "counseled" him on APD's rules on overtime eligibility following the January 2020 incident.[1] On February 14, 2020, the sergeant sent an IDC to his supervisors requesting that charges be "preferred" against Officer Johnson for violating a departmental rule requiring truthfulness. The sergeant subsequently sent a second IDC on April 16, 2020 documenting another instance of dishonesty. According to the sergeant, Officer Johnson not only lied about his eligibility for overtime, but also sought to enlist other officers to lie on his behalf. The former supervisor told OAG personnel that in his sixteen-year career at APD, Officer Johnson is the only officer that this former supervisor has recommended for charges.

2. Albany PD Did Not Inform Saugerties PD About the False Statements

On March 22, 2020, Officer Johnson completed SPD's application for employment and two days later completed SPD's background investigation worksheet. On March 26, 2020, SPD assigned one of its detectives to conduct a background investigation. The SPD detective contacted Officer Johnson's APD supervisor via email on April 20, 2020—the same APD supervisor that submitted two IDCs to APD's Office of Professional Standards based on Officer Johnson's untruthfulness. The SPD detective informed the APD supervisor that he was "checking to see how [Officer Johnson] is as an officer, does he follow direction, has he ever received any communications, has he ever been written up" and indicated that he wanted "to hear both the positives and negatives."

On April 24, 2020, eight days after the APD supervisor had written his second IDC documenting an instance of untruthfulness by Officer Johnson, the APD supervisor emailed the SPD detective stating that he "wholeheartedly" recommended Officer Johnson and that he "never had a problem with him following orders or completing tasks in a timely manner." The APD

[1] According to Albany Police Department's General Order No. 2.2.20 on Disciplinary Measures, oral or written counseling is considered a non-punitive corrective disciplinary action. It is designed to correct minor acts of employee misconduct and/or work performance deficiencies through positive methods.

supervisor did not disclose that he recently had counseled Officer Johnson for untruthfulness and written two IDCs recommending disciplinary charges based on untruthfulness.[2]

B. Employment at Saugerties Police Department

On March 22, 2020, Officer Johnson completed SPD's application for employment. The Town of Saugerties Supervisor consented to Officer Johnson's transfer on March 30, 2020. The Ulster County Personnel Officer approved his transfer to SPD on May 11, 2020 and on May 14, 2020, SPD's Chief acknowledged in a departmental memo that Officer Johnson would be a "lateral transfer coming into the department as a Step 1 employee." He began working at SPD on June 1, 2020 as a patrol officer.

Based on our review of Officer Johnson's personnel file at SPD, including the email described above, and our discussions with SPD command staff, it does not appear that SPD was aware that Officer Johnson's supervisor had recommended that he face administrative charges based on repeated acts of untruthfulness.

C. Allegations of Sexual Misconduct Involving Complainant #1

Within four months of Officer Johnson's initial employment at SPD, he was the subject of an allegation of sexual misconduct from a female member of the public (Complainant #1).

On August 31, 2020, the chief of SPD received an anonymous voicemail from a woman alleging that "Officer Johnson keeps being all over in the news about what a great officer he is, and I beg to differ, considering I have pictures of him in my apartment at 2 o'clock in the morning, when's he's supposed to be working, in uniform on my cameras. So, I think its best if you spoke to him about harassing females in the community and stop glorifying him on the internet." A senior SPD officer was assigned to review these allegations and through a diligent investigation was able to identify Complainant #1. On September 8, 2020, the officer contacted her via telephone and she described multiple interactions with Officer Johnson, including an alleged incident of sexual assault.

The narrative that follows is based on the OAG's telephone conversations with Complainant #1, video recordings and screenshots provided to OAG by Complainant #1 that show Officer Johnson near or inside her home, and materials compiled during SPD's internal investigation including interviews with Officer Johnson and Complainant #1, materials provided to SPD by Complainant #1, and SPD records. Where there are discrepancies among the various accounts, we have noted those discrepancies and evaluated their credibility in light of all the available evidence.

1. July-September 2020 Interactions with Complainant #1

Complainant #1 met Officer Johnson in late June 2020 as she was leaving a bar with a friend. At the time, he was uniformed and on foot patrol. Their conversation ended with Complainant #1 giving him a hug.

On the night of July 4, 2020, Complainant #1 called SPD to report fireworks landing near her home. She asked for Officer Johnson by name. Officer Johnson was dispatched to

[2] The OAG did not question Officer Johnson's former APD supervisor about the email exchange with the SPD detective because we did not receive documentation of the email exchange until after the interview.

Complainant #1's home. As he arrived, Complainant #1 observed him turn off his body worn camera. SPD's internal investigation confirmed that Officer Johnson turned off his body worn camera after exiting his police vehicle, although it unclear whether he was aware that the camera was already on, such that he may have believed he was turning the camera on rather than off.

After the July 4, 2020 interaction, Complainant #1 and Officer Johnson communicated by phone and via Facebook. Officer Johnson also visited Complainant #1's home on several occasions while on duty from July 4 through early September 2020. Some of these stops were unannounced. For example, on one occasion in late July or early August, Officer Johnson admitted going to Complainant #1's home at night, but a friend of Complainant #1 answered the door and informed Officer Johnson that she was asleep. According to Complainant #1, she was not asleep but did not want to speak with Officer Johnson. She stated that she was concerned that he would come to her house uninvited.

At some point in July or August 2020, Officer Johnson sent Complainant #1 a message via Facebook that included a photo of her face with the superimposed words "the face she makes when you pull it out and its more than she expected," a reference to a meme in which "it" refers to a penis. Complainant #1 provided a copy of this image to SPD during its internal investigation. When interviewed by SPD, Officer Johnson acknowledged creating and sending this image, which he described as a joke.

Complainant #1 alleged that Officer Johnson came to her house on the evening of August 27. She stated that while they were outside her apartment, he "forcefully pushed" her against a wall. He executed a "military grip where [she] could not move." He bit her neck, applied pressure to her carotid artery with his hand, and "shoved his fingers inside of [her] vagina."

Complainant #1 also alleged that Officer Johnson returned to and entered her home in the early morning hours of August 28 while she was asleep. She provided SPD and the OAG with images taken from a motion-triggered camera inside her kitchen that shows a man in a police uniform who appears to be Officer Johnson. The images are time-stamped 1:30:27, 1:34:05, and 1:34:08. SPD records indicate that Officer Johnson was on duty from 11 pm on August 27 until August 28 at 7 am, and that his patrol car was parked outside of Complainant #1's house from 1:12 a.m. to 1:45 a.m. Complainant #1 stated that she was asleep at this time and that she did not know how Officer Johnson gained entry to her home.

When interviewed by SPD about Complainant #1's allegations, Officer Johnson initially characterized their relationship as, "we used to talk a little bit and that's really about it." He denied having a "relationship" with Complainant #1 and said that it was "strictly friendship" with flirtation. After *Garrity* warnings were read to Officer Johnson, he acknowledged that their friendship was not limited to flirtation but also included a physical encounter that occurred in late August 2020.

Officer Johnson's account differs significantly from Complainant #1's account. According to Officer Johnson, Complainant #1 called and invited him to her home because she wanted him "to stop by to see [her] before work." While on her porch, Complainant #1 made physical advances towards him but he passively resisted. He remained there for approximately fifteen to twenty minutes but their physical encounter lasted approximately two minutes. During that time, they kissed, he "felt her chest," "wrapped her," and "grabbed her butt." He further stated that Complainant #1 slid his hand "around her front" but that he did not put his hands

inside of her clothing. He admitted that he went to Complainant #1's home twice that night but claimed that he never went without her permission. Officer Johnson also told the SPD investigator that he told Complainant #1 at a later point that he did not wish to pursue a relationship with her.

Complainant #1 left a voicemail for the SPD Chief on August 31 alleging that Officer Johnson was "in my apartment at 2 o'clock in the morning, when's he's supposed to be working, in uniform on my cameras … I think its best if you spoke to him about harassing females in the community[.]"

Several days later, in the early morning hours of September 2, Officer Johnson parked his patrol car outside of Complainant #1's house. She approached him and asked why he was at her home. He told her that he was "doing a stakeout for across the street."

Complainant #1 videorecorded the ensuing conversation with Officer Johnson and provided a copy to SPD. In the recording, Complainant #1 is clearly upset. She said, in sum and substance, "why am I so mad at you because you are fucking lying bro. You know exactly what the fuck you did and you need to leave me the fuck alone, get off my fucking property and step on my property again and [the Chief of Police] is going to get a fucking phone call and stay the fuck away from me."

SPD documents indicate that, on September 2, 2020, Officer Johnson responded to a complaint involving a vehicle near Complainant #1's home. Officer Johnson was assigned to the complaint at 12:54 a.m. He acknowledged the assignment at 12:55 a.m. and informed the dispatcher that he was in the area. At 1:01am, he reported "no results" and did not provide dispatch with further updates on his location. Officer Johnson subsequently informed the SPD investigator that he went to Complainant #1's driveway because he "was doing patrol looking for a stolen vehicle."

2. The Agency's Determination

Upon receiving Complainant #1's anonymous voicemail on August 31, SPD commenced its investigation into the allegations. By cross-checking various records, the SPD investigator was able to identify Complainant #1. The SPD investigator spoke with Complainant #1 via telephone and corresponded with her via email on several occasions throughout September. She relayed her allegations regarding Officer Johnson and provided images showing Officer Johnson in her apartment, the lewd image created by Officer Johnson, and a video of her encounter with Officer Johnson on the morning of September 2. However, she ultimately declined to come the SPD station to provide a statement in person.

On October 15, 2020, the investigator interviewed Officer Johnson concerning Complainant #1's allegations and a separate allegation of sexual harassment involving Officer 1 (discussed below).

On November 5, 2020, the investigator completed his investigation into Complainant #1's allegations and submitted his report to the chief of police on November 13, 2020.

In a report dated November 13, 2020, the SPD investigator found that Officer Johnson committed three "rule violations" pursuant to the agency's Standard of Procedure (hereinafter, SOP). All of the investigator's findings were approved by the chief of police.

First, the chief of police found that Officer Johnson acted in violation SOP §330.2 (Unbecoming Conduct) because he "carried on a tryst while on Department time, and this violation was substantiated by his own admissions that he was at her residence on more than one occasion for social calls on duty, and one of these social calls evolved into an instance of kissing, petting, and groping each other; again, according to PO Johnson's own testimony."

Second, the chief of police found that he acted in violation of SOP §330.6 (Neglect of Duty) because he "was at [Complainant #1's] residence at least seven times between July 4, 2020 and August 28, 2020" for stops that were "purely social in nature, and were conducted as a result of his ongoing, self-admitted flirtation with [Complainant #1]."

Third, the chief of police found that he acted in violation SOP §500.12 (Leaving Post) because Officer Johnson admitted that he did not "call out" while at her residence or "notify his supervisor that he would be out of service" and thus "vacated his post without permission from supervisor in all those instances."

However, SPD concluded that there was insufficient evidence to sustain Complainant's 1 allegations that Officer Johnson committed the crimes of Stalking in the Third Degree, Forcible Touching, Criminal Obstruction of Breathing and Blood Circulation, or Official Misconduct.

On November 10, 2020, Officer Johnson signed a Stipulation of Settlement in which he agreed to forfeit ten vacation accruals due to "issues that arose out of the performance of his duties as a police officer with respect to his interactions with the public." The Stipulation of Settlement mandated that for the period of twelve months, commencing on November 10, 2020 and ending on November 10, 2021, Officer Johnson could be terminated if he continued to have the same or similar performance issues because it would be a violation of the settlement. According to the SPD Chief, this settlement was a "last chance offer" that covered the sustained allegations involving both Complainant #1 and Officer #1 (described in more detail below).

3. OAG Conclusions Regarding Complainant #1

Officer Johnson's conduct with respect to Complainant #1 is extremely troubling. As an initial matter, we concur with the SPD's determination that his admitted actions violated SPD policies on Unbecoming Conduct, Neglect of Duty, and Leaving Post.

We also conclude that it is more likely than not that Officer Johnson engaged in non-consensual physical contact with Complainant #1 and that he was not truthful during his sworn interview with the SPD investigator.

While it is difficult to determine with certainty exactly what transpired between Officer Johnson and Complainant #1, particularly given her decision not to provide an in-person statement to either the SPD or the OAG, we found the telephonic and email statements that she made both to the OAG and SPD to be credible, consistent over time, and supported by the video and images that she provided.

Officer Johnson's statements to SPD, on the other hand, changed as the SPD investigator revealed the nature of and evidentiary backup for Complainant #1's assertions. In addition, several aspects of Officer Johnson's account are not credible given his own admitted conduct. For example, Officer Johnson's claim that he "passively resisted" Complaint 1's advances on the evening of August 27 and broke off their encounter is belied by the fact that several hours later, he inexplicably entered Complainant #1's home in the middle of the night, apparently without her consent, as documented by her home surveillance. Likewise, Officer Johnson' statement that he "broke off everything" with Complainant #1 at some point in late August is not consistent with his decision to use her driveway for a "stakeout" in the early morning hours of September 2.

With respect to SPD's internal investigation, while the SPD investigator's diligent attempts to identify Complainant #1 are commendable, the agency's disciplinary actions did not match the gravity of the misconduct. For example, according to the recent Disciplinary Matrix applied to members of the New York City Police Department, the presumptive penalty for sexually motivated enforcement action, sexual touching, and sexual solicitation is termination. Termination is the presumptive penalty for "any sexual behavior that a reasonable person would consider to be an abuse of authority."[3] The International Association of Chiefs of Police also takes the position that termination may be the most appropriate action because "confidence in the officer may have been severely compromised" and "sanctions should be severe enough to reinforce a zero-tolerance position."[4]

It bears noting that at the same time that SPD investigated Officer Johnson's conduct with respect to Complainant #1, it was simultaneously investigating his contemporaneous and substantiated sexual harassment of a female SPD officer, as discussed below.

Finally, given the nature of the allegations, the determination as to whether to proceed with a criminal investigation should have been discussed with the Ulster County District Attorney's office, rather than resolved in the context of SPD's internal investigation.

D. Harassment of Officer #1

In late September 2020, as SPD's investigation of Complaint #1's allegations was ongoing, Officer Johnson was the subject of allegations from a fellow SPD officer (hereinafter, Officer #1) that he had touched her in a sexual manner while on duty and previously had sent her an inappropriate and unwelcome message via a social media service. These allegations were substantiated by the SPD, and we agree with the SPD's conclusion that Officer Johnson's actions with respect to Officer #1 constituted sexual harassment. The account that follows is drawn from records of SPD's investigation as well as from OAG's interview with Officer #1.

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[3] *See New York City Police Department Disciplinary System Penalty Guidelines*, New York City Police Dep't, Jan. 15, 2021, at 26, https://www.nyc.gov/assets/nypd/downloads/pdf/public_information/disciplinary-system-penalty-guidelines-effective-01- 15-2021-compete-.pdf.

[4] *See Addressing Sexual Offenses and Misconduct by Law Enforcement: Executive Guide*, Int'l Ass'n of Chiefs of Police, June 3, 2011, https://www.theiacp.org/resources/document/addressing-sexual-offenses-and-misconduct-by-law-enforcement-executive-guide.

1. September 24, 2020 Incident

On September 24, 2020, at approximately 10:30pm, Officer #1 was sitting at a desk inside SPD's squad room with another officer. Officer Johnson walked into the squad room and stood approximately five feet from where she sat. As he walked inside the squad room, she turned toward him and lifted her arms to show her new ballistic vest. According to Officer #1, Officer Johnson walked over, placed his hand on the area beneath her nametag, and said, "I touched your boob" and "how did they feel?" Officer #1 told him that she felt uncomfortable and pushed his hand away.

Officer #1 left the squad room and entered the nearby locker room. Shortly thereafter, she told an SPD sergeant about Officer Johnson's actions in the squad room and also stated that he had sent her an inappropriate message on Snapchat in July 2020 (as discussed below). The sergeant reported both incidents to a supervisor and an internal investigation commenced into Officer #1's sexual harassment allegations.

During SPD's investigation, the other officer present in the room confirmed that he observed Officer Johnson touch Officer #1 on the "badge spot" of her ballistic vest, near her shoulder. Afterward, Officer Johnson said to Officer #1, "oops, sorry…didn't mean to touch you there, didn't mean to touch your boobie." He then walked over to the other officer and touched him in the chest area, saying something to the effect of "Oh, I can touch *you* there." The other officer also stated two to three days later, Officer Johnson told him that he had gotten in trouble for touching Officer #1 and that he didn't mean it in a "sexual way" but was "joking around."

Officer Johnson was interviewed about this encounter with Officer #1 on September 24, 2020. He acknowledged that he had touched the "outer part" of Officer #1's ballistic vest, near her shoulder, and stated that afterward he had turned to the other officer and said, "oh I can grab your boobie." Officer Johnson further stated that he did not realize that Officer #1 was (or would be) uncomfortable because they had "that type of relationship where [they] can joke around," although he also conceded that she had previously told him that she had been made uncomfortable by a sexually-charged message on social media that he had sent her several months earlier.

2. July 6, 2020 Social Media Message

After the incident that occurred on September 24, 2020, Officer #1 reported to SPD that on July 6, 2020, Officer Johnson had sent her a lewd message on Snapchat that she viewed as inappropriate. In short, this message suggested that Officer #1 engage in a sexual act involving Officer Johnson and another SPD officer. After she received the message, Officer #1 confronted Officer Johnson and told him not to make comments like that to her.

During the investigation of this complaint, Officer Johnson acknowledged that he had sent such a message and that shortly afterward Officer #1 had told him "going forward … you can't say stuff like [that]."

3. The Agency's Determination

The internal investigation into Officer #1's allegations of sexual harassment concluded

on November 5, 2020 and sustained Officer #1's allegations pursuant to Standard of Procedure §3000.1(B)(1) and §3000.1(B)(6), which memorialize SPD's sexual harassment policies. These two sections establish that under §(B)(1), sexual comments of a provocative or suggestive nature and, under §(B)(6), conduct of a sexual nature that has the purpose or effect of unreasonably interfering with an individual's work performance are forms of employee misconduct. The investigator recommended further disciplinary action be taken at the level of the chief of police. The chief of police approved the investigator's factual findings and recommendation.

4. OAG Conclusions Regarding Officer #1

We concur with the SPD's conclusion that Officer Johnson's conduct was sexual harassment in violation of SPD policy. His conduct also implicates the New York State Human Rights Law and Title VII of the federal Civil Rights Act of 1964, which prohibit gender-based harassment in the workplace and provide another source of standards for acceptable workplace conduct, though we reference those statutes solely for their relevance in evaluating Officer Johnson's conduct rather than SPD's actions as an employer. *See Fish v 1295 Aroxy Cleaners*, 2017 US Dist LEXIS 63036, at *8 [NDNY Apr. 26, 2017, No. 1:15-CV-102 (MAD/TWD)]); *Stathatos v Gala Resources, LLC*, 2010 US Dist LEXIS 50511, at *15 [SDNY May 20, 2010].

Officer Johnson's conduct and his explanation that he was "joking around" are particularly problematic given that Officer #1 previously had asked him not to make sexual comments to her.

E. Harassment of Officer #2

In October 2021, a second female SPD officer reported that Officer Johnson had embraced in her an inappropriate manner while at work. SPD investigated this incident and concluded that the incident did not constitute sexual harassment. Based on our review, we conclude that the incident was sexual harassment, as described below. The account that follows is drawn from records of SPD's investigation as well as from OAG's interview with Officer #1.

1. The October 18, 2021 Incident

On October 18, 2021, between 2:00p.m. and 3:00p.m., Officer #2 and Officer Johnson were inside of the station's squad room. Officer Johnson and Officer #2 provided differing accounts of what transpired.

According to Officer #2, they sat at adjoining desks while completing casework on their computers. In her account, she stood up and walked over to a candy box to take a piece of candy. When she turned around, Officer Johnson was standing "extremely close to [her], probably like, within an inch and a half" and positioned himself "right in her face." He placed his right hand on her lower waist and moved it inside of her belt in between her taser and baton, and then placed his other hand on her shoulder. Officer #2 stated that she felt as though they remained in this position for thirty to forty seconds and that she completely "froze" as they stood face to face. During that time, Officer #2 felt "extremely uncomfortable" and described that she "didn't say anything, he didn't move, and it surprised [her]. After about 30 seconds, I moved because he wasn't." At that point, according to Officer #2, an SPD sergeant walked "out of the opposite door of the squad room" and turned to look at them. She "pulled away," threw the

candy on a desk, and walked out of the squad room into the locker room, where she remained for approximately 10 minutes.

When Officer #2 returned to the squad room, Officer Johnson jokingly told another officer who was now present in the squad room that Officer #2 was "hitting on him" and "trying to be his work wife." She responded emphatically "no" and walked away.

Officer #2 reported the incident via text message to her field training officer who advised her to inform a sergeant. Officer #2 informed a sergeant about what happened in the squad room. He told her that he had observed her and Officer Johnson face to face and wondered what had occurred.

On October 19, 2021, the sergeant informed the chief of police about the incident, which led to an internal investigation. On October 20, 2021, the sergeant completed a "personnel complaint/commendation form" and provided an account of his observations. He stated that he observed Officer Johnson enter the squad room followed by Officer #2. Officer Johnson turned around and the two officers collided. According to the sergeant, he "looked over his shoulder and observed [Officer] Johnson with his right hand on her abdomen as if to steady her" and then the "officers separated and went their separate ways."

On November 1, 2021, another officer, who was in the squad room shortly after the encounter, submitted a memorandum to the chief of police describing what they observed on October 18, 2021. They informed the chief that on the afternoon of October 18, they spoke with Officer Johnson in the squad room. As Officer #2 entered the squad room, Officer Johnson said that Officer #2 "was flirting with him and trying to be his work wife." They further stated that Officer #2 heard Officer Johnson and appeared to be "visibly repulsed" by his statement and responded by saying, "no."

On November 8, 2021, Officer Johnson was interviewed by the chief of police and SPD's chaplain as part of the internal investigation. According to Officer Johnson, he and Officer #2 bumped into each other when he walked into the squad room as she walked out. He said that they accidently collided, he apologized, and then they moved out of the other's way. Later in the interview, he changed his version of their encounter and said that he bumped into Officer #2 after he turned around while already inside the squad room. He told the chief, "I remember putting my hands up […] right when I turned around and that's where they are […] I remember I did turn around like, of excuse me, that's all I remember." Besides putting his hands up, he stated that he could not remember where he placed his hands of Officer #2's body.

2. The Agency's Determination

SPD's internal investigation was conducted by the chief of police, a member of the agency's Police Chaplain Program, and the then Ulster County Human Rights Commissioner. At the conclusion of the internal investigation, they credited Officer Johnson's statement and found that the encounter was "accidental in nature and that there was no compelling testimony or evidence to suggest otherwise," though they also found that Officer #2 genuinely believed that "her personal space was violated." They concluded that Officer #2's statement that she and Officer Johnson remained face-to-face for 30-40 seconds was not plausible.

During Officer #2's interview, the then Ulster County Human Rights Commissioner asked Officer #2 to demonstrate on him where Officer Johnson touched her. Officer #2 told the investigator, "no, I am not getting that close to you" in response to his request. Instead, she pointed to where Officer Johnson touched her without touching the investigator. Officer #2 subsequently stated that the investigator's request made her feel uncomfortable and as if she was "reliving the whole thing again because […] you're not touching me, but I don't want to touch you."

3. OAG Conclusions Regarding Officer #2

We conclude that Officer Johnson's actions with respect to Officer #2 did constitute sexual harassment. We found Officer #2's description of the incident to be credible and plausible, including that she understood Officer Johnson's embrace to have been intentional and intended in a sexual manner.

Officer #2's perception is supported by Officer Johnson's subsequent comment to another officer, in Officer #2's presence, that Officer #2 "was flirting with him and trying to be his work wife." This statement indicates that Officer Johnson understood that the encounter was, at the very least, perceived by Officer 2 to have had sexual and gender-based implications, and that rather than apologize, he subsequently sought to ridicule her in front of another officer on that basis.

Finally, it bears noting that Officer Johnson's alleged conduct in this instance is consistent with his substantiated misconduct with respect to Complainant #1 and Officer #1.

IV. CONCLUSIONS AND RECOMMENDATIONS

A. Officer Johnson Engaged in a Pattern of Misconduct

Executive Law 75(5)(b) requires that the OAG "determine whether the subject officer … has engaged in a pattern or practice of misconduct, use of excessive force, or acts of dishonesty."

To identify a pattern of misconduct for purposes of Executive Law 75(5)(b), we look to whether the subject officer engaged in multiple acts of similar misconduct. Here, Officer Johnson engaged in repeated acts of inappropriate conduct while on duty:

- With respect to Complainant #1, Officer Johnson admitted that he made several visits to her home while on duty without notifying superiors and sent a sexually inappropriate message via a social media service. We also conclude that he engaged in unwanted sexual contact with Complainant #1 on the evening of August 27, 2020, subsequently entered Complainant #1's home later that night without permission while on duty, and then returned to her home under the guise of conducting a stakeout on at least one occasion thereafter at approximately 1 am on September 2, 2020.
- With respect to Officer #1, Officer Johnson sent an inappropriate and unwanted message of a sexual nature on July 6, 2020 and then, despite her request that he

not make sexual comments to her, he touched her breast without her consent on September 24, 2020.

- With respect to Officer #2, Officer Johnson engaged in nonconsensual physical contact on October 18, 2021, which at the very least, he was cognizant that Officer #2 perceived as sexual in nature, and then subsequently told another officer in her presence that she was flirting with him and attempting to be his work wife.

Based on these acts, we conclude that Officer Johnson engaged in a pattern of misconduct with respect to Complainant #1, Officer #1, and Officer #2 in violation of SPD policies prohibiting sexual harassment, unbecoming conduct, neglect of duty, and leaving post. The gravity of this conduct is underscored by civil law standards for sexual harassment under Title VII of the 1964 Civil Rights Act and the New York State Human Rights Law.

In addition to the misconduct identified above, we also note Officer Johnson's prior departure from APD after his supervisor recommended that he face administrative charges of untruthfulness and his shifting answers and apparent untruthfulness when interviewed by the SPD investigator in connection with Complainant #1's allegations, both of which shed light on his lack of credibility.

B. Recommendations

Law enforcement agencies have a duty to prevent sexual victimization, to ensure that it is not perpetrated by their officers, and to help protect the safety and dignity of everyone in the community.[5]

To that end, we recommend the following remedial actions pursuant to Executive Law 75(3)(f), with respect both to disciplinary action for Officer Johnson and to the prevention of harassment or misconduct at SPD. We request a response within ninety days as to the remedial action that SPD has taken in response to these recommendations, per Executive Law 75(5)(c).

1) Disciplinary Action

Given the pattern of misconduct regarding Complainant #1 and Officers #1 and #2, we recommend that Officer Johnson be subject to termination, which would be consistent with recommended sanctions at other agencies.

For example, the New York City Police Department's February 2022 Disciplinary Manual identifies termination as the presumptive penalty for sexual harassment involving overt sexual touching and sexual harassment involving habitual or predatory behavior. It also identifies termination as the aggravated penalty for verbal sexual harassment and sexual harassment involving suggestive touching, and lists "misconduct indicative of a pattern of behavior" as an aggravating factor.[6] We also note that "inappropriate conduct of a sexual nature,

[5] *Addressing Sexual Offenses and Misconduct by Law Enforcement: Executive Guide*, *supra* note 4.

[6] *New York City Police Department Disciplinary System Penalty Guidelines*, *supra* note 3; *see also Denver Police Department Discipline Handbook: Conduct Principles and Disciplinary Guidelines*, May 2, 2019, https://www.denvergov.org/content/dam/denvergov/Portals/720/documents/discipline-handbook/handbook-final.pdf (identifying termination as the presumptive penalty for sexual misconduct); *South Bend Police Department*

civil or criminal" and "[e]ngaging in sexual conduct while on duty" are included in the definition of an officer's "removal for cause" that permits the Division of Criminal Justice Services to remove the officer from the Central State Registry of Police Officers and Peace Officers pursuant to 9 NYCRR §§ 6056.2(h)(1)(d) and 6056.4(f).

2) Update SPD's Practices and Policies Regarding Sexual Misconduct and Internal Investigations

To protect members of the public and fellow officers, law enforcement agencies must take a strict approach to accountability for officers who engage in sexual harassment and sexual misconduct, particularly given research that suggests there is a strong likelihood that someone who engages in such misconduct will do so again if their actions are not properly addressed.[7]

SPD's sexual harassment policy espouses a "zero tolerance" approach to sexual harassment. Commendably, the agency took immediate action to identify Complainant #1 after her anonymous complaint, and the supervisors who learned of the allegations of Officers 1 and 2 promptly reported those allegations to the SPD Chief.

However, to prevent this type of misconduct in the future, SPD should update and improve its practices regarding sexual misconduct and sexual harassment by:

- Enacting a separate policy on sexual misconduct[8] and revising Policy Number 3000 to enact a more comprehensive policy on sexual harassment modelled after the New York State Department of Labor's model sexual harassment prevention policy[9];

- Establishing presumptive penalties for officers found to have engaged in sexual misconduct or sexual harassment to ensure that "zero tolerance" means "zero tolerance"; and

- Implementing trauma-informed protocols for investigations into alleged sexual harassment or misconduct, and training on those protocols for SPD personnel who investigate such complaints. People who have been the victims of sexual harassment or misconduct may be reluctant to report their experiences and cooperate with an investigation for many reasons, including the trauma involved in the incident and the fear that they will

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Discipline Matrix, July 20, 2020, https://southbendin.gov/wp-content/uploads/2020/07/SBPD-Discipline-Matrix-7.6.2020-FINAL.pdf (identifying termination as the presumptive penalty for harassment or discrimination based on sex or gender identity).

[7] *Sexual Harassment & Misconduct*, Int'l Ass'n of Chiefs of Police, Feb. 2022, https://www.theiacp.org/resources/policy-center-resource/sexual-harassment-and-misconduct?check_logged_in=1

[8] *See* Chief Thomas Tremblay (Ret.) et al., *Model Policy Resource: Law Enforcement Sexual Misconduct Prevention and Accountability*, Dec. 2022, https://evawintl.org/wp-content/uploads/2020-02_TB-Model-Policy-Resource-LESM-Prevention-and-Accountability-1.pdf.

[9] *See Sexual Harassment Prevention Model Policy and Training*, OFF. WEBSITE of N.Y. ST., https://www.ny.gov/combating-sexual-harassment-workplace/sexual-harassment-prevention-model-policy-and-training (last visited June 6, 2023).

> not be believed.[10] When the perpetrator is a law enforcement officer, they may be particularly reluctant to trust law enforcement investigators. For those reasons, investigators should understand and acknowledge the difficulty of reporting sexual misconduct and work carefully to win the trust of complainants. In addition, a victim's reluctance to participate in an investigation should not be considered indicative of a false allegation nor reason to forgo further investigation.

There are many resources available to help develop updated policies and protocols, including model policies and guidance issued by the International Association of Chiefs of Police and End Violence Against Women International as well as the United States Department of Justice's Guidance on Improving Law Enforcement Response to Sexual Assault and Domestic Violence by Identifying and Preventing Gender Bias.[11]

We also note that the conduct of the then Ulster County Human Rights Commissioner who participated in the interview of Officer #2 is an example of what not to do when investigating a sexual harassment or misconduct allegation. Officer #2 was asked by the then Commissioner to demonstrate on him what happened when both of Officer Johnson's hands were on her and they were face-to-face. By making such a request, the that the then Commissioner dismissed the severity of the incident by implicitly suggesting that he would not find being touched in this manner problematic and also risked re-traumatizing Officer #2.

3) Alert DA to Criminal Allegations Involving Officers

Finally, in cases involving potentially serious criminal allegations involving officers, as was the case with Complainant #1, we recommend that the agency notify and consult with the local district attorney's office to determine further investigative steps, assess probable cause for an arrest, and potentially involve the victim assistance personnel.[12]

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[10] *Addressing Sexual Offenses and Misconduct by Law Enforcement: Executive Guide*, *supra* note 4; *Improving Law Enforcement Responses to Sexual Assault and Domestic Violence by Identifying and Preventing Gender Bias*, US Dep't of Justice Office of Violence Against Women, May 2022, https://www.justice.gov/media/1224961/dl?inline

[11] *Improving Law Enforcement Responses to Sexual Assault and Domestic Violence by Identifying and Preventing Gender Bias*, *supra* note 10; *Sexual Harassment & Misconduct*, *supra* note 7; Tremblay (Ret.) et al., supra note 8.

[12] *Addressing Sexual Offenses and Misconduct by Law Enforcement: Executive Guide*, *supra* note 4.