



GOVERNMENT OF THE DISTRICT OF COLUMBIA

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PCB POLICY REPORT #21-3 Marijuana Trained Drug Detection Canines

Summary of the Issue:

While the Metropolitan Police Department (MPD) deploys canines for illicit drug detection in Washington, DC, this work must be balanced with the rights of community members who abide by the District's laws on the lawful possession of marijuana. This Report examines the changes to marijuana laws in DC, caselaw on drug detection canines, current MPD orders on marijuana and canines, issues presented in Office of Police Complaints (OPC) Investigations, and lessons from other jurisdictions facing the same issues.¹

Background:

In November 2014, District voters approved the Legalization of Possession of Minimal Amounts of Marijuana for Personal Use Initiative, and it went into effect on February 26, 2015. As a result, it is currently legal for a person who is at least 21 years old to possess two ounces or less of marijuana for recreational purposes.² While DC, has decriminalized possession of up to two ounces of marijuana for persons over the age of 21, federal law continues to prohibit the possession or use of any amount of marijuana and federal law enforcement offices may arrest anyone in D.C. for possession or use in violation of federal law. DC's act falls in line with several states that have also decriminalized recreational marijuana.³

¹ The Police Complaints Board (PCB) is issuing this report pursuant to D.C. Code § 5-1104(d), which authorizes the Board to recommend to the District of Columbia Mayor, Council, MPD Police Chief, and the Director of District of Columbia Housing Authority reforms that have the potential to improve the complaint process or reduce the incidence of police misconduct.

² *The Facts on DC Marijuana Laws*, METROPOLITAN POLICE DEPARTMENT, <https://mpdc.dc.gov/marijuana>, (last visited April 26, 2021) ("As a result, it is legal for a person who is at least 21 years old to: possess two ounces or less of marijuana; transfer one ounce or less of marijuana to another person who is at least 21 years old, so long as there is no payment made or any other type of exchange of goods or services; cultivate within their residence up to six marijuana plants, no more than three of which are mature; possess marijuana-related drug paraphernalia – such as bongs, cigarette rolling papers, and cigar wrappers – that is associated with one ounce or less of marijuana; or use marijuana on private property").

³ *Marijuana Laws by State in 2021: A Legal Weed Map and Short Guide to Regulation*, O.Berk, (Jan. 2021), [https://www.oberk.com/marijuanalawsbystate#:~:text=When%20asking%20%E2%80%9CHow%20many%20states,%2C%20Ve,rmont%2C%20and%20Washington,\(15%20states%20have%20legalized%20recreational%20marijuana,%20and%2048%20of%2050%20states%20allow%20some%20form%20of%20medical%20marijuana\).](https://www.oberk.com/marijuanalawsbystate#:~:text=When%20asking%20%E2%80%9CHow%20many%20states,%2C%20Ve,rmont%2C%20and%20Washington,(15%20states%20have%20legalized%20recreational%20marijuana,%20and%2048%20of%2050%20states%20allow%20some%20form%20of%20medical%20marijuana).)

As a result of these changes in law, MPD Special Order 15-07 established that MPD Officers shall not request or apply for a search warrant if the sole basis for its issuance would be the possession or transfer of marijuana under the legal limit of two ounces.⁴ Under the Special Order, MPD Officers cannot establish reasonable suspicion based on the odor of marijuana on any persons over the age of 21 because it could constitute a legal possession. The legal possession of marijuana under two ounces for DC adults can also include marijuana-infused edible goods.⁵ Similarly, guidance for handling incidents involving medical marijuana falls under Special Order 13-08, where it is the MPD policy not to interfere, disrupt, or impede any citizen who is authorized and registered with the DC Department of Health for the possession and use of medical marijuana.⁶

Under MPD General Order 306.01, MPD utilizes trained law enforcement canines because of their superior senses that makes them a valuable asset to the department, where their specialized capabilities are used for legally acceptable crime detection and prevention.⁷ MPD Officers are assigned to the Canine Patrol Unit (CPU) and are known as Canine Handlers. Canine Handlers must adhere to the rules and procedures of the CPU and they can deploy canines in patrol or field operations in compliance with use of force General Order 901.07.

The CPU has multiple missions in support of the District's patrol division, including drug detection.⁸ The CPU supports all of the districts and specialized units that need their services. The canines are used for two general purposes: (1) patrol, which involves tracking and apprehending suspects; and (2) detection, which involves narcotics, firearms, and explosives. The canines are trained through the academy and after completion, they may start working as part of the CPU. Most of the canines are dual-purposed, meaning they were trained in patrol and detection, or trained to detect in multiple areas. MPD Canine Handlers are required to attend recertification every six weeks and canines not in compliance are immediately de-certified.⁹ Currently, the canines are trained to detect five different drug odors: marijuana, methamphetamines, ecstasy, cocaine, and heroine. While the canines can detect the difference between each odor, they have only one indication to alert their Canine Handler of all five odors.

In *United States v. Place*, the United States Supreme Court stated that a canine sniff "by a well-trained narcotics detection dog...[that] does not expose noncontraband items" is a "much less intrusive search" because it only alerts to the "presence or absence" of illegal narcotics.¹⁰ In *Illinois v. Caballes*, the Court reaffirmed that a dog sniff that only reveals information on illegal substances, "does not violate the Fourth Amendment" because contraband cannot be deemed "legitimate" and "governmental conduct that only reveals the possession of contraband

⁴ *Legalization of Possession of Minimal Amounts of Marijuana for Personal use Initiative of 2014 (Initiative 71)*, Special Order 15-07, (Feb. 26, 2015), https://go.mpdconline.com/GO/SO_15_07.pdf.

⁵ *Id.*

⁶ *Medical Marijuana*, Special Order 13-08, (Aug. 29, 2013), https://go.mpdconline.com/GO/SO_13_08.pdf.

⁷ *Canine Teams*, General Order RAR-306.01, (Feb. 18, 2005), https://go.mpdconline.com/GO/306_01re.pdf.

⁸ *Canine Patrol Unit*, METROPOLITAN POLICE DEPARTMENT, <https://mpdc.dc.gov/page/canine-patrol-unit>, (last visited April 26, 2021).

⁹ *Canine Teams*, General Order RAR-306.01, (Feb. 18, 2005), https://go.mpdconline.com/GO/306_01re.pdf.

¹⁰ *United States v. Place*, 462 U.S. 696, 707 (1983).

‘compromises no legitimate privacy interest.’”¹¹ In *Florida v. Harris*, the Court held that a common-sense standard of probable cause must be utilized in determining the reliability of drug detection dogs.¹² The Court elaborated that an inflexible set of evidentiary requirements should not be described, and the question to ask is “whether all the facts surrounding a dog’s alert, viewed through the lens of common sense, would make a reasonably prudent person think that a search would reveal contraband or evidence of a crime.” The Court stated that a “sniff is up to snuff when it meets that test”.¹³ Thus, these cases established that a person’s reasonable expectation of privacy under the Fourth Amendment is not violated as long as the drug detection dog’s sniff can only reveal information regarding illegal narcotics.

After legalizing recreational marijuana, making it no longer an illegal narcotic, the Colorado Supreme Court took additional steps to address the use of drug detection dogs utilized by their state police departments. In 2019, the court held that “a drug-detection dog that alerts to even the slightest amount of marijuana can no longer be said to detect ‘only’ contraband. Thus, an exploratory sniff...from a dog trained to alert to a substance that may be lawfully possessed violates a person’s reasonable expectation of privacy in lawfully possessing that item.”¹⁴ The legal landscape surrounding this issue continues to change and evolve, with most states that have legalized recreational marijuana still grappling with what steps to take to ensure compliance with established and future caselaw on the matter.

Policy and Legal Concerns

OPC has received complaints concerning unlawful vehicle searches involving the MPD’s Canine Patrol Unit (CPU). In March 2021, OPC interviewed a CPU Canine Handler in response to a complainant’s allegations who believed the Canine Handler conducted an unlawful car search when deploying his canine to sweep a vehicle that was under investigation for narcotics.

The Canine Handler was not present for the initial part of the investigation, but conducted the sweep of the vehicle in accordance with his training and his Sergeant’s directive. The drug detection canine indicated the presence of the odor of narcotics, unable to distinguish which one, and the officers searched the vehicle, the only drug found was marijuana. The Canine Handler was not aware of any canine implications in the Special Order 15-07, acted in accordance with his Sergeant’s commands in order to avoid subordination charges, was unaware of any policy updates regarding sweeps for canines trained to detect marijuana, and thus has continued the same canine process that was in place before the legalization of recreational marijuana.

While this investigation is still an ongoing matter, it highlights the disparity regarding compliance with Special Order 15-07 and the Supreme Court’s holdings on when a drug detection canine’s “sniff is up to snuff”.¹⁵ Complaints surrounding this issue portrays the constant damage to community trust that is enabled when the MPD continues its canine policies

¹¹ *Illinois v. Caballes*, 543 U.S. 405, 408–09 (2005).

¹² *Florida v. Harris*, 568 U.S. 237 (2013).

¹³ *Id.* at 248.

¹⁴ *People v. McKnight*, 446 P.3d 397, 408 (2019).

¹⁵ *Harris*, 568 U.S. at 248.

without providing its Canine Handlers or other MPD Officers any guidance on how to reconcile the legalization of marijuana in a legal landscape where marijuana is no longer considered contraband in DC.

Based on current training and deployment practices of the CPU, MPD drug detection canines cannot distinguish between the legal and illegal possession of marijuana under their current alerts to Canine Handlers. If an MPD Officer cannot establish reasonable suspicion based on the smell of marijuana, MPD canines cannot be deployed as a work around to satisfy reasonable suspicion either – at least not without violating a DC resident’s constitutional right to a reasonable expectation of privacy, that is now extended to the possession of marijuana.

CPU Canine Handlers must be provided new and updated guidance on how to comply with Special Order 15-07 – or it will continue to harm the delicate relationship between MPD and the community they are meant to serve and protect. Required under MPD General Order 306.01, if a Canine Handler believes that the deployment of a canine is unwarranted, the handler must express those concerns to their officials who authorize deployment and record those concerns.¹⁶ MPD must implement and enforce an updated policy regarding marijuana detection canines and provide guidance to their Canine Handlers not only to avoid insubordination claims if a Canine Handler refuses to deploy a canine after being given a direct order, but to also ensure that D.C. residents’ reasonable expectation of privacy is protected when complying with the legal possession of marijuana within DC’s jurisdiction.

Lastly, K-9 units are typically regarded as a specialty unit, and the price for dogs vary depending on the state.¹⁷ Purchasing canines can cost a police department anywhere between \$8000 to \$12000, and training them in patrol work, drug detection, and other duties can cost an additional \$11,000 to \$15,000 per dog depending on the program and miscellaneous costs.¹⁸ These numbers alone do not even include costs related to recertification, equipment, or supplies needed to maintain canines once they are acquired for a police force. With such expensive and continuously rising costs required to maintain an effective canine unit, MPD should prioritize the proper deployments of their drug detection canines. MPD cannot afford to continue financing marijuana trained detection canines on their current practices when it leaves MPD susceptible to additional legal and policy liability that could cost the department more money in potential litigation costs.

Lessons from Other Jurisdictions:

Colorado

In 2019, the Colorado Supreme Court ruled in *People v. McKnight*¹⁹ that a sniff from a canine trained to detect marijuana is a “search” under Colorado’s State Constitution because the

¹⁶ *Canine Teams*, General Order RAR-306.01, (Feb. 18, 2005), https://go.mpdconline.com/GO/306_01re.pdf.

¹⁷ *FAQ*, GLENDALE POLICE DEPARTMENT K-9 UNIT, <https://www.glendaleca.gov/government/departments/police-department/k9-unit/faq#:~:text=How%20much%20do%20the%20dogs,police%20dog%20is%20approximately%20%2422%2C500>, (last visited April 26, 2021); *Frequent Questions*, THE NATIONAL POLICE DOG FOUNDATION, <https://www.nationalpolicedogfoundation.org/faq>, (last visited April 26, 2021).

¹⁸ *Id.*

¹⁹ *McKnight*, 446 Colo. P.3d at 400.

dog's sniff can intrude on a person's reasonable expectation of privacy for the lawful activity, which now includes the possession of marijuana because Colorado legalized the recreational possession of marijuana in 2012. The court held that law enforcement officers must establish probable cause prior to deploying marijuana-trained drug detection canines for an exploratory sniff.²⁰

Through informal conversations with the Denver Police Department, the Denver Police Department no longer uses dogs trained in marijuana detection for probable cause purposes, and have retired or repurposed current department canines. In addition, new canines are no longer trained for marijuana detection, but are still trained on other illicit drugs. While the Denver Police Department may still use their marijuana detection canines on areas governed by federal jurisdiction, these informal policy changes have been implemented based on the recommendations of their district attorneys, and their officers have been informed internally about the changes even though the changes have not been formally documented yet.

Michigan

Through informal conversations with the Lansing Police Department in Michigan, the Lansing Police Department K-9 Unit and the Michigan State Police Department have also both stopped using marijuana-trained drug detection canines to establish probable cause, based on the recommendation of their prosecutor's office after the state legalized recreational marijuana in 2018. Lansing Police Department had six canines, three of which were used for drug detection including marijuana detection. The dogs are no longer used to establish probable cause for a search. However, after being granted a warrant, the canines have been utilized to locate where such drugs may be hidden during a lawful search.

Future canines acquired by the Lansing Police Department will no longer be trained in marijuana and the police department is implementing informal policy changes to follow the growing trend of what they expect more states and federal law changes to adopt moving forward. While the officers in the Lansing Police Department are all aware of these informal changes, the department as a whole is currently undergoing several policy changes at this time, and this may be adopted as a formal written policy changes in the future. Regardless of whether or not the policy remains unchanged on the books, the Lansing Police will have phased out all of their marijuana detection drug canines within the next few years, and all canines that remain marijuana trained will be retired or repurposed for other patrol duties.

California

In 2016, California legalized recreational marijuana and law enforcement agencies across the state have discussed possibilities of retiring their marijuana trained detection canines as agencies grapple with how to become compliant with California's Prop 64, the initiative which California voters approved the legalization of marijuana.²¹ In addition, canine training centers are

²⁰ *Id.*

²¹ Terry Hacienda, *California Police Dog Forced to Retire Because of New Marijuana Laws*, THE FRESH TOAST (Aug. 22, 2017), <https://thefreshtoast.com/cannabis/california-police-dog-forced-to-retire-because-of-new-marijuana-laws/>.

phasing out marijuana as part of their program's training requirements and only using cocaine and other illegal drugs in their drug-sniffing courses for canine certification.²² At Top Dog Police K-9 Training and Consulting, out of the 20 or so agencies the business works with, there is a growing need for drug detection canines who are not trained on marijuana detection in order for agencies to comply with California's marijuana legality changes.²³

Massachusetts

Massachusetts legalized recreational marijuana in 2016 and since then, law enforcement agencies have phased out marijuana detection canines and have brought in new canines without marijuana detection training. Police departments have retired or repurposed marijuana detection canines who were already members of their departments. Massachusetts courts, similarly to Colorado, have determined that marijuana alone cannot establish probable cause for a reasonable search or seizure and marijuana detection canines utilized without a distinction are no longer an accepted practice.²⁴

Recommendations:

To help facilitate better relations and increase trust between MPD officers and community members, the PCB recommends that:

1. MPD should not deploy canines trained in marijuana detection in any way that would infringe upon the rights of the public, such as for sweeps or searches of persons or vehicles.
2. After probable cause has been established, MPD may deploy marijuana trained canines for a sweep, but probable cause must be established prior to and independently from utilizing a canine trained in marijuana detection.
3. MPD should no longer train canines in marijuana detection at the academy, and any certification processes should no longer be dependent on the canine's ability to detect marijuana.
4. Any canines trained in marijuana detection that are currently employed by the MPD Canine Patrol Unit should be retired or repurposed for other departmental purposes and no longer be used as drug detection dogs.

²² Doug Johnson, *Fewer K-9s are Being Trained to Sniff Out Marijuana Due to Legalization*, FOX40 (Nov. 27, 2018, 5:22 PM PST), <https://fox40.com/news/local-news/fewer-k-9s-are-being-trained-to-sniff-out-marijuana-due-to-legalization/>.

²³ *Id.*

²⁴ Neal Simpson, *With Marijuana Legal, Many Police Dogs are Now Overqualified*, WICKEDLOCAL.COM (Dec. 15, 2016, 11:01 AM), <https://www.wickedlocal.com/news/20161215/with-marijuana-legal-many-police-dogs-are-now-overqualified>.

5. If MPD has or acquires any canine that has the ability to distinguish between the legal and illegal possession of marijuana and the possession of other illegal drugs would not be subject to this policy recommendation.
 - a. However, the canine should undergo more frequent recertification processes and it should not be recommended to deploy them for sweeps, acting in an abundance of caution to protect against any risk of infringing on the reasonable expectation of privacy that DC residents have to lawfully possess marijuana.

6. MPD should update General Order 306.01 and General Order 901.07 to reflect the above recommendations to ensure that the rights of community members who are abiding by the District's Special Order 15-07 are protected and are uncompromised by drug detection canine deployment.