



CLOSED CASE SUMMARY

ISSUED DATE: FEBRUARY 13, 2020

CASE NUMBER: 2017OPA-1326

Allegations of Misconduct & Director’s Findings

Named Employee #1

Allegation(s):		Director’s Findings
# 1	5.001 - Standards and Duties 14. Employees Obey any Lawful Order Issued by a Superior Officer	Not Sustained (Inconclusive)
# 2	5.001 - Standards and Duties 2. Employees Must Adhere to Laws, City Policy and Department Policy	Not Sustained (Training Referral)
# 3	5.001 - Standards and Duties 9. Employees Shall Strive to be Professional at all Times	Sustained
# 4	5.001 - Standards and Duties 10. Employees Shall Be Truthful and Complete In All Communication	Not Sustained (Inconclusive)

Imposed Discipline

Termination – Note: The discipline decision involves the Named Employee’s actions in this case and 2018OPA-0874.

This Closed Case Summary (CCS) represents the opinion of the OPA Director regarding the misconduct alleged and therefore sections are written in the first person.

EXECUTIVE SUMMARY:

It was alleged that the Named Employee engaged in unprofessional behavior towards the Complainant and failed to comply with the Complainant’s lawful orders. It was further alleged that the Named Employee was dishonest concerning the facts of this incident. Lastly, it was alleged that the Named Employee failed to complete an Activity Prescription Form upon his return to duty after suffering a work-related injury.

ADMINISTRATIVE NOTE:

OPA initially recommended that Allegation #3, which concerned the Named Employee’s honesty – or the lack thereof, be Sustained. At the disciplinary meeting in this matter, the Named Employees chain of command and others expressed their belief that, while there were certainly significant questions concerning the Named Employee’s honesty, the evidence was insufficient to conclusively establish this. It was argued that whether or not the Named Employee was yelling or raised his voice, which was the basis for the dishonesty finding, was subjective and did not meet the elevated evidentiary standard needed to prove this allegation.

After the meeting, and based on the discussion that took place, OPA decided to change its recommended finding for this allegation from Sustained to Not Sustained – Inconclusive. This should not be taken to mean that OPA does not believe that the Named Employee was honest in this instance. OPA expressly does not reach such a conclusion. It simply means that OPA was convinced that it could not meet the evidentiary burden required.



STATEMENT OF FACTS:

On December 24, 2017, Named Employee #1 (NE#1) suffered a work-related injury. NE#1 was on furlough on December 25 and December 26. He returned to active duty on December 27. The Complainant, who was NE#1's sergeant, told OPA that, the following day, he determined that NE#1 had failed to complete an Activity Prescription Form (APF). This form is required when an officer returns to work after a reported on-duty injury. A Lieutenant, who was aware of this issue, told the Complainant to call NE#1 in the field and to tell him to return to the precinct to address this matter. The Complainant did so and NE#1 returned to the precinct and came to the Complainant's office.

This is where the accounts of the incident significantly diverge. The Complainant alleged that he asked NE#1 whether NE#1 had gotten a signed APF from his doctor. NE#1 said that he had not. The Complainant stated that he then told NE#1 that he would have to obtain the signed form from his doctor before he could continue working. The Complainant recounted that, at that point, NE#1 "aggressively" stood up and "yelled 'fuck, whatever,' and stormed out of the office." The Complainant described feeling shocked and stated that he told NE#1 to return to the office because he was not finished talking to him. NE#1 ignored him and continued to walk down the hallway. The Complainant again told NE#1 to return, but NE#1 said to the Complainant that he was taking a file back to the clerk's office and continued to walk away. The Complainant waited for NE#1 to return to his office, which NE#1 eventually did. When NE#1 was inside of his office, the Complainant closed the door and told NE#1 to stop yelling at him. The Complainant also said to NE#1 that storming from the office and not returning when directed to do so constituted insubordination. The Complainant reported that NE#1's demeanor became "worse." He recounted that NE#1 said that he did not care what the Complainant had to do and said to the Complainant that he was not his "fucking dog," he was not the Complainant's "fucking idiot off the block," and alleged that the Complainant had created a hostile work environment and was a bully.

The Complainant opened his office door to see if the Lieutenant was there and when he did not see one he called the Lieutenant. NE#1 continued to yell at the Complainant and act unprofessionally. He then again left the Complainant's office. The Complainant told him not to do so because the Lieutenant was coming, but NE#1 left anyway. NE#1 continued to walk away and stated that he was going to use the restroom and get some water. NE#1 then began calling for another officer to witness his interaction with the Complainant. NE#1 and the witness officer came to the Complainant's door and NE#1 asked if the Complainant was denying him access to the restroom and water. The Complainant stated that he was not and told NE#1 to access the restroom and water if needed. He also informed the witness officer that he could return to his post. When NE#1 returned, the Complainant directed him to enter the office but NE#1 refused. The Lieutenant then arrived and they all entered the office to discuss this matter. As a result of that interaction, the Complainant requested that NE#1 be placed on administrative leave and filed the instant OPA complaint.

NE#1 filed a dueling OPA complaint on the date of the incident. In that complaint, he recounted the interaction between himself and the Complainant differently. NE#1 stated that he saw a chiropractor regarding a work-related injury. The chiropractor told him that the injury had sufficiently healed to permit him to fully return to active duty. After seeing the chiropractor, NE#1 went to work. He saw the Complainant who asked him about his injury and whether he needed L&I reimbursement. NE#1 told him that he paid for the visit out of pocket and did not need reimbursement. The following day, however, NE#1 stated that he was out in the field doing a mail run when he received a call from the Complainant directing him to return to the precinct. NE#1 stated that there was "urgency" in the Complainant's tone of voice and that he "fear[ed] the worst." The Complainant again raised the issue of having the chiropractor sign off on the L&I paperwork. NE#1 reminded the Complainant that they had discussed this the



previous day; however, the Complainant told NE#1 that he was relieved for duty until he got the required paperwork signed. He started to do as he was told and began to walk towards the front desk to give the mail to the desk officer. At that point, the Complainant yelled at NE#1 to come back to his office. NE#1 continued to drop the mail off and, when the Complainant yelled at him again, he returned to the office.

NE#1 stated that, when he entered the office, the Complainant “rushed towards” a few inches of where NE#1 was standing and pointed a finger in NE#1’s face. NE#1 described that he was afraid for his physical safety and stated that he believed that “an assault was imminent.” He alleged that the Complainant continuously yelled at him. NE#1 told the Complainant “to be aware of his posture” and that he was “not a dog or a street punk.” NE#1 stated that he continued to back away from the Complainant and that the Complainant eventually opened his door to call for the Lieutenant. Once the door was opened, and given that he claimed to be afraid for his well-being, NE#1 left the office to go to the restroom and get water before the Lieutenant arrived. NE#1 alleged that the Complainant told him that he could not do so. It was not until NE#1 called a witness officer to observe the interaction that the Complainant agreed to allow him to get water and use the restroom. When NE#1 returned, the Complainant was standing in the doorway of his office, still behaving aggressively. The Complainant told NE#1 to enter his office, but NE#1 stated that he did not feel safe and declined to do so until the Lieutenant arrived. NE#1 stated that he explained what had happened to the Lieutenant, but that the Complainant lied to the Lieutenant and stated that NE#1 had been yelling and disobeying orders. NE#1 contended that the Lieutenant took no action.

As part of its investigation, OPA interviewed both the Complainant and NE#1. OPA further interviewed the Lieutenant and the witness officer. The Lieutenant recalled receiving a call from the Complainant, during which the Complainant stated that he was dealing with ongoing insubordination. The Lieutenant stated that he could hear NE#1 yelling in the background. When the Lieutenant arrived, NE#1 and the Complainant were standing outside of the office. The Lieutenant recounted that NE#1 was telling the Complainant that he did not trust him. NE#1 appeared to be angry, while the Complainant appeared calm. At this point, NE#1 was talking loudly but was not yelling. The Lieutenant told OPA that he was not present for the alleged insubordination and did not hear NE#1 use any curse words in his presence. The Lieutenant believed that NE#1’s conduct towards the Complainant constituted a lack of professionalism and was disrespectful.

The witness officer indicated that he became involved in this incident when NE#1 yelled down the hallway in his direction stating that he needed a witness. He walked over to the Complainant’s office and observed an interaction between NE#1 and the Complainant during which NE#1 repeatedly asked if the Complainant was denying him access to the restroom and to water. The witness officer recalled that the Complainant stated NE#1’s first name several times in an apparent attempt to calm him down. The Complainant then told NE#1 that he could use the restroom and get water and let the witness officer know that he could return to his desk. When he walked away, the witness officer heard NE#1 yelling. He told OPA that he also heard NE#1 yelling before that time. He did not hear NE#1 swear at the Complainant. He stated that he did not see any threatening behavior from the Complainant, but that he observed NE#1 point at the Complainant when NE#1 “was yelling in the doorway.” When asked if NE#1’s conduct appeared to be professional, the witness officer stated: “Given a similar circumstance I would not have raised my voice in that manner to a supervisor.” The witness officer stated that the Complainant appeared calm throughout the incident. The witness officer memorialized what he observed in notes, which are included in OPA’s case file.

The Complainant and NE#1 largely hewed to their accounts of the incident at their OPA interviews. NE#1 denied being unprofessional in this instance. He told OPA that he did not swear or yell at the Complainant. Indeed, he stated that the only time he raised his voice at all was when he told the Complainant that he was dropping off the mail prior to



returning to the Complainant's office. He denied that he engaged in insubordination and explained that he did not comply with several of NE#1's orders because he was afraid for his safety.

ANALYSIS AND CONCLUSIONS:

Named Employee #1 - Allegations #1

5.001 - Standards and Duties 14. Employees Obey any Lawful Order Issued by a Superior Officer

It was alleged that NE#1 failed to comply with multiple orders issued by the Complainant. It is undisputed by NE#1 that he failed to comply with the Complainant's orders; however, NE#1 contended that he did not do so because he felt intimidated by the Complainant and was afraid for his physical safety. He further stated that he wanted to remove himself from the Complainant's office until a witness officer and the Lieutenant were present.

The Complainant denied threatening NE#1 or acting aggressively. He stated that, instead, NE#1 was aggressive, yelled at him, and used curse words towards him.

The witness officer did not observe much of the interaction between NE#1 and the Complainant. The portion that he did see involved an agitated NE#1 and a calm Complainant. While he recounted hearing NE#1 yelling, he did not observe an order given by the Complainant that NE#1 refused to comply with. Similarly, the Lieutenant also did not observe NE#1 refuse to comply with one of the Complainant's order, even though he believed that NE#1 was clearly unprofessional.

SPD Policy 5.001-POL-14 requires that Department employees obey any lawful order issued by a superior officer. Failure to do so constitutes insubordination. (SPD Policy 5.001-POL-14.)

While, given the totality of the circumstances, I believe that the Complainant's account of the incident is more credible than NE#1's, I cannot conclusively determine that NE#1 failed to obey lawful orders. This is due to the dispute of fact on this issue between the parties and the lack of an independent witness who observed this violation. This should not be construed to suggest that I believe insubordination did not occur – I simply cannot meet the evidentiary burden required to prove this allegation. For these reasons, I recommend that this allegation be Not Sustained – Inconclusive.

Recommended Finding: **Not Sustained (Inconclusive)**

Named Employee #1 - Allegation #2

5.001 - Standards and Duties 2. Employees Must Adhere to Laws, City Policy and Department Policy

SPD Policy 5.001-POL-2 requires SPD employees to adhere to laws, City policy, and Department policy.

This allegation was classified due to NE#1's alleged failure to obtain and provide to his supervisor a signed APF upon his return to duty.

NE#1 suffered a work-related injury on December 24. He stated that he did not miss any shifts due to that injury, but that he did complete L&I paperwork. He then began his weekend and, due to other responsibilities, did not seek



medical treatment for his injury. He did see a chiropractor who discussed the injury with him. NE#1 returned to work on December 27 for his next shift. These dates were consistent with his time sheets.

NE#1 stated that he discussed his injury and return to work with the Complainant on December 27. At that time, the Complainant did not raise the issue of the APF and told him that he was “good.” It was not until the following day that the Complainant told him that he was relieved for duty until he provided a signed APF. NE#1 ultimately provided the completed and signed form to his supervisors.

Any time a Department employee suffers a work-related injury, the employee is required to complete an APF prior to returning to work. (See SPD Policy 4.050-PRO-1.) NE#1 initially did not provide a signed APF upon his return to duty. He further did not do so until directed to complete the form by the Complainant. While, under NE#1’s iteration of the incident, he was provided conflicting information by the Complainant, NE#1 is ultimately responsible for complying with the requirements of this policy. That being said, and while NE#1 committed a technical violation of policy, I do not feel that this conduct warrants a Sustained finding. Instead, I issue NE#1 a Training Referral.

- **Training Referral:** NE#1 should be retrained as to the elements of SPD Policy 4.050 and, specifically, the requirement set forth in SPD Policy 4.050-PRO-1 that he provide a signed APF whenever returning to duty after a work-related injury. NE#1 should be counseled by his chain of command to more closely adhere to this policy moving forward. This retraining and associated counseling should be documented and this documentation should be maintained in an appropriate database.

Recommended Finding: **Not Sustained (Training Referral)**

Named Employee #1 - Allegation #3

5.001 - Standards and Duties 9. Employees Shall Strive to be Professional at all Times

SPD Policy 5.001-POL-9 requires that SPD employees “strive to be professional at all times.” The policy further instructs that “employees may not engage in behavior that undermines public trust in the Department, the officer, or other officers.” (SPD Policy 5.001-POL-9.) The policy further states that: “Any time employees represent the Department or identify themselves as police officers or Department employees, they will not use profanity directed as an insult or any language that is derogatory, contemptuous, or disrespectful toward any person.” (Id.) The policy further instructs that: “Employees will avoid unnecessary escalation of events even if those events do not end in reportable uses of force.” (Id.)

NE#1 and the Complainant largely dispute who was aggressive and threatening in this instance. NE#1 points at the Complainant as being physically and verbally aggressive. NE#1 denied yelling at or using curse words towards the Complainant. The Complainant, however, asserted that NE#1 yelled at him, behaved disrespectfully towards him, and repeatedly refused to comply with lawful orders. The Complainant contended that he remained calm and at no point physically or verbally threatened NE#1.

While neither the Lieutenant or the witness officer observed the entirety of the interaction between NE#1 and the Complainant, both confirmed that NE#1, not the Complainant, was yelling. Both also described NE#1 as angry or agitated, but described the Complainant as calm. Moreover, the Lieutenant explicitly stated that NE#1’s conduct that he did observe was unprofessional and disrespectful towards the Complainant. The witness officer was less conclusive, but suggested that he also believed that NE#1 was unprofessional when he yelled at a supervisor officer.



Based on my review of the record and applying a preponderance of the evidence standard, I find that NE#1 was, in fact, unprofessional in this instance. Significant to this finding is my determination that NE#1 yelled at the Complainant while the Complainant remained calm. This is supported by the accounts of two independent witnesses. Even if the Lieutenant's testimony could be discounted given his role as command staff and his arguable alignment with the Complainant, no such relationship exists between the witness officer and NE#1. Notably, the witness officer was not within the Complainant's chain of command and there is no evidence that he had or has any loyalty or bias towards either the Complainant or NE#1.

Ultimately, yelling at a supervisor during a work shift while in the middle of the precinct constitutes unprofessional behavior. As such, I recommend that this allegation be Sustained.

Recommended Finding: **Sustained**

Named Employee #1 - Allegations #4

5.001 - Standards and Duties 10. Employees Shall Be Truthful and Complete In All Communication

SPD Policy 5.001-POL-10 requires employees to be truthful and complete in all communications.

If the Complainant's account is accurate, then NE#1 was clearly dishonest in his written submissions to OPA and the Assistant Chief of Patrol. However, many of the material facts in these submissions cannot be definitively established one way or the other. For example, while NE#1 claimed that he was prevented by the Complainant from using the restroom and getting water, this fact is in dispute. Similarly, NE#1's contention that the Complainant was "advancing towards [him] in a physically threatening manner" also cannot be conclusively proved as there were no independent witnesses to this alleged conduct. I note, however, that this appears very unlikely given that every witness to this incident, except for NE#1, described the Complainant as calm and NE#1 as the agitated and aggressive party. Lastly, there is no evidence supporting, or for that matter disproving, NE#1's claim of retaliation and "racially based treatment" (NE#1 is White and the Complainant is Black). Certainly, the Complainant denied engaging in this behavior and, based on my review of this case and other related cases, this claim appears meritless; however, I cannot say that it did not occur.

In the initial version of this Director's Certification Memo, OPA recommended that this allegation be Sustained. OPA believed, at that time, that the evidence indicated that NE#1 did engage in material dishonesty in one regard – specifically, NE#1's contention to OPA that he did not yell or raise his voice at the Complainant.

At his OPA interview, NE#1 was asked the following questions:

OPA: Okay. The Complainant...further alleges that you raised your voice at him and refused to lower it and speak in a respectful or professional manner. Did that occur?

NE#1: No.

OPA: Did you ever raise your voice?

NE#1: No, we were talking about this level we're talking now.



NE#1 asserted to OPA that the only time he ever raised his voice during his entire interaction with the Complainant was: "...when I was in the hall and he was yelling, [he] said, where are you going? I said, 'I'm taking the mail envelope back to [the witness officer].'"

However, two witnesses, in addition to the Complainant, said that NE#1 did in fact yell and raise his voice at the Complainant. The Lieutenant stated that he heard NE#1 yelling when he was called by the Complainant ("...when [the Complainant] called me on the phone, I could hear [NE#1] in the background yelling, in a raised voice at [the Complainant])."

The witness officer also stated that he heard NE#1 yelling both before and after his involvement as a witness at the Complainant's office. The witness officer specifically described the following:

OPA: Ok could you make a determination as to who was yelling?

Witness Officer: It still sounded like Todd.

OPA: Ok. All right. So that goes to one of my next questions. Did you hear either [NE#1]...or [the Complainant] use profanity or derogatory language directed at one another.?

Witness Officer: No.

OPA: Ok and was there yelling that occurred?

Witness Officer: Yes.

OPA: And whose voice was raised or yelling?

Witness Officer: [NE#1]

Notably, the testimony of this disinterested witness, who was actually cited by NE#1 as being supportive of his account, is consistent with the contemporaneous notes that the witness officer took after the incident.

Whether or not NE#1 was yelling is a material fact in this case. Not only does it suggest that the allegation of insubordination has merit, but it also establishes that that NE#1 was unprofessional. Moreover, it is directly contrary to NE#1's depiction of his conduct in the OPA complaint that he filed and in his email to the Assistant Chief of Patrol. I further find that he had motive to deliberately falsify this issue in order to both provide a defense to the allegations here and to buttress his claims against the Complainant.

That being said, and as discussed at the discipline meeting in this matter, whether or not NE#1 was yelling or raised his voice is a subjective question. NE#1 might have believed that he was not doing so, even though everyone around him perceived the contrary. Given this fact, OPA is unable to meet the elevated standard of proof required to prove dishonesty.



As discussed above, this does not mean that OPA believes that NE#1 was not dishonest. Indeed, in OPA's opinion, the evidence suggests the opposite. It simply reflects that OPA does not feel that it can satisfy its evidentiary burden. For these reasons, I recommend that this allegation be Not Sustained – Inconclusive.

Recommended Finding: **Not Sustained (Inconclusive)**