



CLOSED CASE SUMMARY

ISSUED DATE: NOVEMBER 10, 2020

FROM: DIRECTOR ANDREW MYERBERG
OFFICE OF POLICE ACCOUNTABILITY

CASE NUMBER: 2020OPA-0305

Allegations of Misconduct & Director’s Findings

Named Employee #1

Allegation(s):		Director’s Findings
# 1	1.020 Chain of Command 7. Command Employees Take Responsibility for Every Aspect of Their Command	Not Sustained (Training Referral)
# 2	5.001 Standards and Duties 10. Employees Strive to be Professional	Not Sustained (Unfounded)
# 3	5.001 Standards and Duties 11. Employees Shall Be Truthful and Complete in All Communication	Not Sustained (Unfounded)

Named Employee #2

Allegation(s):		Director’s Findings
# 1	5.001 Standards and Duties 2. Employees Must Adhere to Laws, City Policy and Department Policy	Not Sustained (Management Action)
# 2	5.001 Standards and Duties 10. Employees Strive to be Professional	Not Sustained (Training Referral)
# 3	5.001 Standards and Duties 11. Employees Shall Be Truthful and Complete in All Communication	Not Sustained (Unfounded)

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:

The Complainant alleged that Named Employee #2 violated City law and that Named Employee #1 was aware of and supported this. The Complainant asserted that this constituted unprofessional behavior on the Named Employees’ part and potential dishonesty.

SUMMARY OF INVESTIGATION:

This case arose out of an Equal Employment Opportunity (EEO) complaint filed by the Complainant against Named Employee #1 (NE#1). That EEO complaint ultimately resulted in an OPA investigation, which, in turn, yielded three additional OPA investigations, including this one. The present case concerns an allegation made during the Complainant’s EEO interview. Specifically, she contended that, at one point, Named Employee #2 (NE#2) – another Detective employed in her then-unit – used a personal drone to take photographs of a residence as part of a case investigating ATM theft. She further contended that NE#1, their Sergeant, directed NE#2 to show a confidential informant (CI) the photographs and, once the residence was identified, to delete the photographs from the drone



and say that he showed the CI images from Google Maps. The Complainant stated that she did not hear this conversation but was informed of it by another Detective in the unit – Witness Employee #1 (WE#1). The Complainant stated that this incident occurred approximately one to two years ago.

As part of its investigation, OPA interviewed WE#1. She recalled the ATM theft case and said that it was assigned to NE#2. She believed that it was investigated several years ago. She said that, along with a Detective assigned to the Major Crimes Task Force, she interviewed a CI who claimed knowledge of the ATM theft. She later relayed what she learned to NE#2. She stated that NE#2 was attempting to write up a search warrant but was having trouble figuring out the specific house that the suspect was affiliated with, as the suspect's parents owned two houses that were situated side by side. She said that, at some point after this, she was at work and heard NE#2 discussing with NE#1 that he flew a drone over the homes and took a video. NE#2 had downloaded the video onto the desktop of his computer. She recalled them "joking" about how they could use the video and how helpful it could be. They talked about how useful drones are and how nice it would be if they could use them. She said to NE#1 and NE#2 that they were not allowed to use the video. WE#1 did not remember if a search warrant was ever written for the suspect, but she recalls that none was ever served. She does not believe that the suspect was ever charged. WE#1 lastly said that the Complainant was present for and heard the conversations between NE#1, NE#2, and herself. She said that NE#1 told NE#2 to take screenshots of the video, show them to the CI to get a confirmation on the home, and then shred them and say that he used Google Maps in the warrant. WE#1 alternatively described them as laughing and joking about doing this and as NE#1 actually telling NE#2 to do this. However, when asked a follow up question concerning this, she articulated her belief that NE#1 was joking. When NE#1 walked away, WE#1 told NE#2 that he could not use the photographs and NE#2 said that he understood and would not do so.

NE#1 told OPA that, as the unit Sergeant, he was responsible for overseeing investigations. NE#1 said that he would answer Detectives' questions and would approve operations plans. NE#1 became aware that NE#2 had taken a video of a suspect's home using a personal drone. NE#1 did not approve the use of the drone or know about it beforehand. NE#1 said that when he learned that the video was taken by the drone, he told NE#2 that it could not be used because of the Surveillance Ordinance, which governs the use of surveillance technology by the City. He told NE#2 that it needed to be deleted. NE#2 told NE#1 that he was not familiar with the Surveillance Ordinance. NE#1 did not recall anything about photographs relating to the drone. NE#1 said that the issue was resolved by his discussion with NE#2. NE#1 did not make any PAS entries, document this counseling, or make an OPA referral.

NE#2 recalled the ATM case and said that he tried to get the CI to identify in which house the suspect lived. He said he met with the CI and showed him Google Maps images, but this was not definitive. He said that he decided to use his personal drone to take a video of the west side of the suspect's home. He said that the purpose of the video was to give South ACT a tactical advantage during the service of the warrant. He said that he discussed the video with NE#1 and he was told that he could not use it. NE#1 explained that the use of drones, whether personal or otherwise, was prohibited by the Surveillance Ordinance. NE#1 told him to delete the video and NE#2 did so. NE#2 said that he did not use the video as part of the search warrant application and, ultimately, no search warrant was completed, or operations plan generated. He said that the suspect was not charged and remains a person of interest in the crime. He said that NE#1 ultimately gave him a verbal reprimand for his use of the drone and the matter was closed.

NE#2 opined that he technically did not violate the Surveillance Ordinance when he used the drone. He cited that the Surveillance Ordinance defined surveillance as "to observe or analyze the movements, behavior, or actions of identifiable individuals in a manner that is reasonably likely to raise concerns about civil liberties, freedom of speech or association, racial equity or social justice." NE#2 reasoned that he was observing the outside of a home, not



searching for or trying to monitor identifiable individuals. He also asserted that the City did not acquire the technology in question – the drone – he did so personally and for personal use.

NE#2 denied that he was dishonest and fabricated information on any police reports as the Complainant suggested. He stated that the Complainant made this up as she did not know what, if anything, he discussed with the CI. NE#2 noted that the Complainant was very “toxic” while she was in the unit and that unit morale had improved since she left. Finally, he noted that either the Complainant was aware of potential misconduct and sat on it for two years without reporting it, or that she was now making up an allegation when opportune to her. He posited that the latter scenario was more likely.

ANALYSIS AND CONCLUSIONS:

Named Employee #1 - Allegation #1

1.020 – Chain of Command 7. Command Employees Take Responsibility for Every Aspect of Their Command

SPD Policy 1.020-POL-7 states that supervisors are responsible for every aspect of their command. This includes ensuring that investigations are performed consistent with policy and law, as well as ensuring that proper action is taken when this is not the case.

The evidence here does not conclusively establish that NE#1 supported NE#2’s use of impermissible technology or the fruits of that technology. While WE#1 recalled a conversation between NE#1 and NE#2 concerning the use of screenshots from the drone, upon further questioning, she indicated her belief that this was not meant seriously by NE#1. She further had no evidence that NE#2 ever used the photographs or video to support a search warrant and, indeed, he expressly told her that he would not do so. The Complainant also did not produce this information. Moreover, the evidence appears definitive that NE#1 did, in fact, direct NE#2 to delete the video and counseled him regarding the taking of the video being inappropriate.

While OPA does not believe that NE#1’s supervision of NE#2 and handling of the drone video violated policy, OPA is concerned with NE#1’s lack of official action surrounding and documentation of his counseling of NE#2. At the very least, NE#2’s actions should have been documented via a PAS entry and, arguably, warranted an OPA referral. However, NE#1 solely provided NE#2 with verbal counseling and did not complete any paperwork regarding this.

OPA does not believe that this was consistent with NE#1’s supervisory requirements and finds that it was contrary to policy. However, OPA notes that this is the first occasion that NE#1 has not complied with this policy. OPA further notes that Sergeants are given discretion to determine when acts constitute serious misconduct and NE#1 may have decided that this was not the case here as violations of the Surveillance Ordinance were not specifically called out in SPD Policy 5.002. For these reasons, OPA believes that retraining and counseling is the appropriate result. OPA warns NE#1, however, that future similar conduct will result in a Sustained finding and the imposition of discipline.

- **Training Referral:** NE#1 should be reminded of when he is permitted to counsel and retrain employees versus when he must make an OPA referral. He should further be retrained concerning how such counseling should be provided and the need to document corrective action, including in a PAS entry where appropriate. This retraining and counseling should be documented, and this documentation should be maintained in an appropriate database.



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

Named Employee #1 - Allegation #2

5.001 Standards and Duties 10. Employees Strive to be Professional

As discussed above, the evidence indicates that, even to the extent that NE#1 told NE#2 to take screenshots of the drone video, he did so in jest. Moreover, as explained in the context of Allegation #1, there is insufficient evidence supporting a finding that NE#1 facilitated or approved the improper use of surveillance technology. As such, OPOA recommends that this allegation be Not Sustained – Unfounded.

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

Named Employee #1 - Allegation #3

5.001 – Standards and Duties 11. Employees Shall Be Truthful and Complete in All Communication

As this allegation is premised on the same conduct discussed in Allegation #2, OPA also recommends that this allegation be Not Sustained – Unfounded.

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

Named Employee #2 - Allegation #1

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

SPD Policy 5.001-POL-2 requires that employees adhere to laws, City policy, and Department policy. This includes the Surveillance Ordinance, which is a validly enacted City law.

Here, OPA finds that NE#2 was in non-compliance with the law when he used a drone to take a video of a suspect's home. While OPA does not dismiss out of hand NE#2's arguments concerning the specific language of the Surveillance Ordinance and its lack of applicability to this case, OPA concludes that the clear intent of law is to prohibit the use of technologies by officers, such as drones, without prior approval.

OPA also does not disregard NE#2's assertion that he was unaware of the Surveillance Ordinance. OPA does not know how many other officers in the Department are also unaware of or, potentially, do not understand this law and all of its requirements and parameters. With the constant development of new technologies, it is more important than ever that officers have a firm grasp on the Surveillance Ordinance to ensure that they do not violate it, even inadvertently. This is crucial to ensure that civil liberties are protected and that the public has trust and confidence in the Department.

To gird against the possibility that NE#2's lack of understanding is indicative of a larger information gap within SPD ranks, OPA believes that large-scale reminders and retraining throughout the Department are warranted. As such, OPA issues the below Management Action Recommendation. OPA evaluates NE#2's individual culpability in the context of Allegation #2, below.

- **Management Action Recommendation:** The Department should send out a reminder for all SPD employees concerning the parameters of the Surveillance Ordinance and what technologies are both approved for use



and banned under its ambit. If not recently done, the Department should also create an e-learning or more in-depth training on the Surveillance Ordinance and make that training a requirement for all SPD employees to complete in 2021.

Recommended Finding: **Not Sustained (Management Action)**

Named Employee #2 - Allegation #2

5.001 Standards and Duties 10. Employees Strive to be Professional

SPD Policy 5.001-POL-10 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-10.)

OPA finds that NE#2’s use of a drone could serve to undermine public trust and confidence in both him and the Department. As such, OPA believes that it was unprofessional.

In reaching this finding, OPA believes NE#2 that he did not know that the use of a personal drone was prohibited by the Surveillance Ordinance. This is buttressed by the fact that, if this were not true, it is inordinately unlikely that NE#2 would have openly discussed the use of a drone in the office amongst co-workers and also would have saved the video to a Department computer. Moreover, he made a colorable case that he did not violate the law when interpreting the Surveillance ordinance at his OPA interview. However, OPA ultimately concludes that the use of a drone – whether taking pictures of a home or a person or whether personally or Department-owned – is not permissible without seeking prior approval. OPA further concludes that NE#2 should have known this – indeed, both NE#1 and WE#1 were aware that the drone was prohibited.

The above being said, OPA believes that retraining, not discipline, is the appropriate result for several reasons. First, NE#1 has not improperly used technology before and, aside from once failing to turn on his In-Car Video system, has not been found to have violated any Department policies during his 12-year career. Second, OPA credits NE#2’s account that he was mistaken in this incident. Third, it seems unjust to issue a Sustained finding against only NE#2 when OPA concludes that the entirety of the Department would benefit from a reminder of and training on the Surveillance Ordinance. Accordingly, OPA recommends that this allegation be Not Sustained – Training Referral.

- **Training Referral:** NE#2 should again be reminded of the provisions of the Surveillance Ordinance and instructed that he is prohibited from using non-approved technologies in his official capacity. He should be informed that any future failure to comply with the Surveillance Ordinance will likely result in a Sustained finding and the imposition of discipline. This retraining and counseling should be documented, and this documentation should be maintained in an appropriate database.

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

Named Employee #2 - Allegation #3

5.001 – Standards and Duties 11. Employees Shall Be Truthful and Complete in All Communication

SPD Policy 5.001-POL-11 requires Department employees to be truthful and complete in all communications.



The Complainant alleged that NE#1 fabricated information in a report. Specifically, she contended that he was dishonest when he characterized how he learned information from the CI.

After reviewing reports generated by NE#1, including those relating to the ATM theft case, OPA finds insufficient evidence to determine that NE#1 was dishonest. Most notably, there was no indication in the reports that the CI was shown pictures from Google Maps and/or that the CI positive identified the suspect's residence. Ultimately, the burden is high to prove dishonesty, and the evidence is simply not enough here.

Accordingly, OPA recommends that this allegation be Not Sustained – Unfounded.

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