



CLOSED CASE SUMMARY

ISSUED DATE: OCTOBER 4, 2019

CASE NUMBER: 2017OPA-0398

Allegations of Misconduct & Director’s Findings

Named Employee #1

Allegation(s):		Director’s Findings
# 1	15.180 – Primary Investigations II. Officer Responsibilities B. Felony Cases 2. Other Felonies	Not Sustained (Inconclusive)

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, while an officer, he was assaulted but that the Department did not investigate that assault based on animus towards him.

ADMINISTRATIVE NOTE:

This complaint was alleged against an unknown employee. As the identity of this employee was not discovered, the 180-day contractual deadline for OPA investigations was tolled. While this deadline remains tolled, OPA has set the end of the 180-day period as the date of this DCM for administrative purposes.

SUMMARY OF INVESTIGATION:

A. Underlying Incident

On June 22, 2014, the Complainant, who was employed as a Seattle Police Officer at that time, responded to a domestic violence incident. He ultimately made the decision to place a female (referred to here as the Subject) under arrest. The Complainant attempted to place the handcuffed Subject into the rear of his patrol vehicle, and she refused to be seated therein. At one point, she kicked outwards, and her foot appeared to strike Complainant in his facial area. The Complainant subsequently punched the Subject in the face, fracturing her orbital bone.

In the aftermath of the incident, another officer completed a General Offense Report that concerned the Subject’s assault towards the Complainant. The officer noted the substance of the report was based on his conversations with the Complainant, who was being treated at a hospital. The officer included the following information in his report:

As she entered the patrol vehicle head first [the Subject] mule kicked [the Complainant] on the left side of his face and jaw. [The Complainant] was stunned and suffered extreme pain to his jaw and down his back... [The Complainant] was examined by SFD Medical Personnel and transported to HMC for further treatment. [The Subject] also suffered an injury as a result of the incident and was transported to HMC via AMR and later booked into KCJ for Investigation of Assault.



Given the nature of the injury suffered by the Subject, the Department's Force Investigation Team (FIT) was notified and responded to the scene. Based on its initial review, FIT referred this incident to OPA that same day due to the belief that the force used by the Complainant was potentially inconsistent with policy. On June 23, 2014, the investigation into the alleged assault of the Complainant by the Subject was assigned for follow-up investigation to a Homicide Detective by the then Homicide Sergeant. However, it was unassigned that same day. No investigation was performed in that case, which was administratively cleared on April 1, 2015. On June 25, 2014, OPA requested that SPD conduct a criminal investigation into the force used by the Complainant and recommended that the investigation be performed by an outside law enforcement agency. The entire case was immediately referred to the Washington State Patrol (WSP) by SPD.

B. Criminal and Administrative Investigations

WSP's investigation focused on the force used by the Complainant and the possible criminality of those actions. The WSP investigation concluded that, based on reviews of the ICV (including enhanced video) it was unclear whether the Subject's foot ever made physical contact with the Complainant's head or body. The WSP investigation further noted that the Subject denied that she intentionally kicked the Complainant. The WSP investigation found that a review of the Complainant's medical records "did not reveal any obvious injury." The WSP investigation noted, however, that the Complainant complained of injury to his face and jaw and that photographs were taken by his chain of command of the parts of his body that he said were injured. Ultimately, the WSP investigation concluded, relying heavily on an expert report, that the force used by the Complainant was not reasonable or necessary.

After WSP concluded its investigation, the case was provided to the King County Prosecuting Attorney's Office (KCPAO) for review. The KCPAO declined to file charges against the Complainant and returned the case to SPD. Shortly thereafter, the U.S. States Attorney's Office for the Western District of Washington (USAO) initiated a civil rights investigation into this matter. Ultimately, the USAO, like the KCPAO, declined to file charges indicating that they could not meet the requisite evidentiary standard to prove the allegations.

After these criminal investigations were completed and no charges were brought, OPA conducted its investigation. OPA determined that the Complainant violated Department policies concerning force and de-escalation. The then Chief of Police agreed with OPA's recommended findings and made the decision to terminate the Complainant's employment at SPD.

C. Complainant's OPA and EEO Complaints

After his termination, the Complainant filed several Equal Employment Opportunity (EEO) and OPA complaints against individuals including the then Homicide Captain. Included in the allegations made by the Complainant against the Homicide Captain was that he caused WSP to not investigate the assault against the Complainant by the Subject.

The Homicide Captain was interviewed in the EEO case and confirmed that he directed that the Homicide Unit stop investigating the assault because the case was going to be referred to WSP. The Homicide Captain stated that his understanding was that WSP "was going to investigate the entire incident," including the assault against the Complainant. He stated that he had no conversations with WSP about whether or not they would do so and that his role was to act as the neutral liaison.



The WSP Sergeant assigned to the case told the EEO investigator that he was not instructed or asked to investigate the assault against the Complainant and, instead, WSP's focus was on whether the Complainant engaged in criminal activity. He stated that the Homicide Captain made no mention of the assault to him except when referencing the crime for which the Subject had initially been booked. The WSP Sergeant asserted his belief that the investigation into the assault against the Complainant was being put on hold by SPD pending the resolution of WSP's review. Based on the information gathered during the EEO investigation, an outside investigator determined that there was insufficient evidence to establish malfeasance on the part the named employees. With regard to the allegation that the Homicide Captain caused the assault to not be investigated, the outside investigator provided the following conclusion:

[The Homicide Captain's] halting of his unit's investigation into [the Subject] does not appear inappropriate or retaliatory under the circumstances. He says he understood the entire matter had been transferred to WSP, and there appears to be no reason to disbelieve him. He was not the decision-maker for SPD regarding the referral to WSP or the scope of its investigation. Having recommended that his unit not handle the criminal investigation of [the Complainant], the same underlying factors weighed against his unit investigating [the Subject's] alleged assault of [the Complainant], as the two investigations were inextricably linked. Moreover, given that WSP was investigating the facts of the [Subject] incident, which would have applied equally to possible charges against [the Complainant] or [the Subject], it would have made sense for WSP to consider both aspects of the incident. WSP interviewed [the Subject], who said she had not kicked [the Complainant] intentionally. By the time the case came back to SPD in December 2014, the King County Prosecutor's Office had reviewed WSP's investigation and, had the Office considered the evidence sufficient to bring charges against [the Subject], could have brought such charges. Within days of the case's return to SPD, DOJ announced its decision to investigate possible civil rights charges against [the Complainant], and a few months later [the Subject] sued the City and [the Complainant]. Apparently due to [the Complainant's] attorney's demand, SPD was not able to resume its investigation of the [Subject] incident until DOJ declined to bring charges in November 2015. Reinitiating an investigation into charges against Ms. Durden at that point would have made little sense, and it appears that no one considered it.

Notably, in a footnote in the EEO investigation findings document, the outside investigator wrote: "[The Complainant] also complained, generally, that SPD never referred charges against [the Subject] for assault of [the Complainant] to the King County Prosecutor's Office. He did not identify any individual(s) as having made an intentional decision not to refer charges." Given this, the outside investigator did not reach a final determination on this issue.

The Complainant's initial claim that the assault against him was not investigation was also reviewed by OPA and processed as a Supervisor Action. It appears that this Supervisor Action was informational only and no counseling or retraining was requested by OPA or performed by the chain of command.

The Complainant subsequently initiated a second OPA complaint – the present case – against an unknown SPD employee who he alleged caused the investigation into the assault perpetrated against him to be closed and for no charges to be filed against the Subject due to animus towards the Complainant. OPA commenced this investigation



to find out whether an unknown SPD employee did cause the investigation to not be investigation and, if so, to determine the identity of this individual.

D. OPA's Investigation

As part of its investigation, OPA interviewed the Homicide Detective who was initially assigned to investigate the case. The Homicide Detective stated that the case was assigned to him and then unassigned the same day. The Homicide Detective said that the then Homicide Sergeant did not tell him why the case was being unassigned. The Homicide Detective stated that he later learned that the case was flagged to be investigated by a supervisor. The Homicide Detective did not know whether the Homicide Sergeant actually investigated the case. The Homicide Detective confirmed that he did not conduct any interviews or perform any investigative tasks. The Homicide Detective did not recall ever having another assault on an officer case being assigned and unassigned to him in such a manner.

The Homicide Sergeant, who has since retired from the Department, recalled assigning and then unassigning the case. He stated that he was ordered to do so by the then Homicide Captain. The Homicide Sergeant said that the Homicide Captain told him that no further investigation would be completed. The Homicide Sergeant opined that it was unusual for a captain to become involved in case assignments and that assaults against officers were ordinarily assigned for a follow-up investigation.

A Sergeant formerly assigned to OPA (referred to here as the "OPA Sergeant"), who conducted the administrative investigation into the force used by the Complainant on the Subject, was also interviewed. In his investigative file, the OPA Sergeant confirmed that, based on an analysis of the video and the Subject's own statements, he believed the evidence indicated that the Subject did, in fact, kick the Complainant. The OPA Sergeant documented that the assault for which the Subject was arrested was not investigated or charged. He believed that he relied on Department records for this information and did not interview any personnel from the Homicide Unit. The OPA Sergeant did not recall ever asking or being told why the assault was not criminally investigated.

OPA interviewed the current Homicide Lieutenant who had been assigned to the Homicide Unit for approximately eight to nine months when the assault was assigned. The Homicide Lieutenant recalled being informed by the Homicide Captain that the case was being unassigned because it was going to be investigated by an outside law enforcement agency. He stated that the Homicide Captain told him that this decision was made in a command staff meeting (a meeting of the Chief of Police, Deputy and Assignment Chiefs, and legal and operational staff).

The Homicide Captain confirmed that cases were assigned in the Homicide Unit by the Homicide Sergeant. The Homicide Captain stated that, after that point, the general process was that a follow-up investigation was completed, and the case was referred for a charging decision. Cases were forwarded to the prosecutor directly by the Homicide Sergeants and were not reviewing prior to that point by the Homicide Lieutenant or Homicide Captain. The Homicide Captain told OPA that, with regard to this incident, the assault case was unassigned from the Homicide Detective because the entire case (both the assault and use of force investigations) was being referred to WSP for investigation. The Homicide Captain told OPA that was ordered by SPD command staff and that he was not part of the decision-making process. The Homicide Captain stated that his role was to facilitate the referral and then to act as a liaison to ensure that SPD resources and personnel were made available, if necessary, to WSP.

OPA additionally interviewed a current Captain who was the Assistant Chief of the Criminal Investigations Bureau (referred to here as the "Assistant Chief") from August 2014 to March 2015. The Assistant Chief had no recollection



of why the case was not investigated by the Homicide Unit and did not recall any conversations that she had concerning this case while a command staff member.

OPA further interviewed the current Chief of Police via written questions. The Chief indicated that she was the Assistant Chief of the Criminal Investigations Bureau until August 2014. She did not recall the specifics of any conversation concerning the Homicide Unit's investigation into the assault and she did not recall directing the Homicide Captain to stop the assault investigation. However, she stated that a decision was made to send the entire case to WSP for an outside investigation. She indicated that the results of the WSP investigation were reviewed by the KCPAO. The Chief stated that she did not "recall any affirmative decision to decline to investigate any part of the incident," but she affirmed that SPD's "focus was on the significant use of force by a police officer against a handcuffed suspect." The Chief asserted that: "neither the identity of the employee involved [nor] 'political' considerations played a role." The Chief said that it was possible that she contacted the KCPAO to determine the timing of their review, but she denied that she ever made recommendations on filing decisions.

Lastly, OPA analyzed assault on officer cases that occurred from 2014 to 2016. In 2014, OPA found 12 cases, including the alleged assault of the Complainant. Of those, 10 were assigned for follow-up investigations and were referred for charging decisions. One of the two non-investigated cases was the alleged assault of the Complainant and the other was concerning a suspect who was in crisis. In 2015, there were 14 cases, and all were assigned for follow-up investigation and were referred for a charging decision. In 2016, there were 10 cases. 9 were either investigated and referred or were referred directly to the City Attorney's Office as misdemeanors. The one case that was not investigated or referred in 2016 involved an officer who did not suffer an actual injury.

ANALYSIS AND CONCLUSIONS:

Named Employee #1 - Allegations #1

15.180 – Primary Investigations II. Officer Responsibilities B. Felony Cases 2. Other Felonies

SPD Policy 15.180(II)(B)(2) concerns the investigation of felonies. OPA notes that the decision by the Department to decline to pursue an investigation of an assault would not constitute, by itself, a violation of policy. There is no private right of for a person, even a police officer, to compel a criminal investigation into an assault against himself. However, if, as the Complainant alleged here, an unknown employee of SPD caused the investigation into an assault perpetrated against the Complainant to be closed and for no charges to be filed due to specific animus towards the Complainant, it would violate policy.

Ultimately, OPA was unable to determine through its investigation who, if anyone, may have directed that the alleged assault of the Complainant be not investigated or charged. As discussed in the EEO investigation, there is insufficient evidence to support a finding that the Homicide Captain did so. Similarly, OPA was not able to uncover evidence that any other member of SPD's past or present command staff engaged in such conduct.

It is clear from OPA's investigation that, once the nature of the underlying incident was fully understood by the Department, the focus was more on the force used by the Complainant and the potential assault that he inflicted on the Subject than on the alleged assault he experienced. This was confirmed by the Chief's written responses to OPA. Moreover, WSP clearly understood this to be the focus of their investigation and, at least in the perspective of the WSP Sergeant assigned to the case, WSP was not investigating the assault against the Complainant at all. However, there is no evidence establishing that this was due to specific direction he received from anyone at SPD. It very well may have been the case that this was simply a miscommunication or an incorrect assumption on the part of the WSP



Sergeant. It also could have been due to the fact that the email from SPD to WSP transmitting the case referenced the criminal referral from OPA, which was clearly focused on the Complainant's conduct, not that of the Subject (which was the only conduct within the jurisdiction of OPA). Notably, the Homicide Captain indicated that it was his understanding that the entire case, including the alleged assault of the Complainant, would be transmitted to and investigated by WSP. There is no clear evidence in the record contradicting this.

Lastly, based on OPA's investigation, the lack of a follow-up investigation into the alleged assault against the Complainant was uncommon, but not unprecedented. Again, it appears that it was the intent of the Department to conduct a follow-up investigation into this matter but that the expectation was that this would be completed by WSP not SPD. Moreover, even if the evidence of how other cases were handled raises legitimate questions, it does not, without other supporting information, establish malfeasance here.

For the above reasons, OPA's investigation yielded insufficient evidence to establish whether or not an unknown SPD employee acted inappropriately in this case and with animus towards the Complainant. As such, I recommend that this allegation be Not Sustained – Inconclusive.

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